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RESERVATIONS: (202) 741–6008

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Presidential Documents

Title 3—

The President

Proclamation 8435 of October 7, 2009

Leif Erikson Day, 2009

By the President of the United States of America

A Proclamation

On this day in 1825, the ship *Restauration* landed in New York City after sailing for 3 months from Stavanger, Norway. The 52 passengers aboard represented the first organized emigration of Norwegians to America. These brave individuals set to the seas, following in the grand footsteps of the famous Scandinavian explorer Leif Erikson. Over a millennium ago, Leif Erikson—son of Iceland and grandson of Norway—arrived in North America and founded the settlement Vinland, located in modern-day Canada. Today, we celebrate his historic voyage and remember those who journeyed to America from far-away lands.

Our Nation's founding history is marked by millions of individuals who faced great hardship and difficulty as they pursued a brighter future abroad. As explorers, they did not know what they would find, but they were determined not to turn back, in order to learn what lay beyond the setting sun. This same spirit lived within Leif Erikson, and it has inspired countless others who venture from their homes in search of opportunity, uncertain of the possibilities and challenges that await them.

Today, our Nation continues to welcome those descendents of Leif Erikson to our shores. Nordic Americans have contributed immeasurably to the success of America. Their cultural accomplishments have enriched the diversity of our country. And their pioneering spirit continues to embody our Nation's unbounded enthusiasm for discovery and learning.

To honor Leif Erikson and celebrate our Nordic-American heritage, the Congress, by joint resolution (Public Law 88–566) approved on September 2, 1964, has authorized the President to proclaim October 9 of each year as ''Leif Erikson Day.''

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, do hereby proclaim October 9, 2009, as Leif Erikson Day, and I call upon all Americans to observe this day with appropriate ceremonies, activities, and programs to honor our country's rich Nordic-American heritage.

IN WITNESS WHEREOF, I have hereunto set my hand this seventh day of October, in the year of our Lord two thousand nine, and of the Independence of the United States of America the two hundred and thirty-fourth.

[FR Doc. E9–24953
Filed 10–14–09; 8:45 am]
Billing code 3195–W9–P

Presidential Documents

Presidential Determination No. 2010–01 of October 8, 2009

Waiver of and Certification of Statutory Provisions Regarding the Palestine Liberation Organization Office

Memorandum for the Secretary of State

Pursuant to the authority and conditions contained in section 7034(b) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2009 (Division H, Public Law 111–8), as carried forward by the Continuing Appropriations Resolution, 2010 (Division B, Public Law 111–68), I hereby determine and certify that it is important to the national security interest of the United States to waive the provisions of section 1003 of the Anti-Terrorism Act of 1987, Public Law 100–204.

This waiver shall be effective for a period of 6 months. You are hereby authorized and directed to transmit this determination to the Congress and to publish it in the *Federal Register.*

THE WHITE HOUSE,
Washington, October 8, 2009

[FR Doc. E9–24955
Filed 10–14–09; 8:45 am]
Billing code 4710–10–P

Rules and Regulations

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

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DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

10 CFR Part 452

RIN 1904–AB73

Production Incentives for Cellulosic Biofuels; Reverse Auction Procedures and Standards

AGENCY: Office of Energy Efficiency and Renewable Energy, U.S. Department of Energy.

ACTION: Final rule.

SUMMARY: The Department of Energy (DOE) today publishes a final rule establishing the procedures and standards for reverse auctions of production incentives for cellulosic biofuels pursuant to section 942 of the Energy Policy Act of 2005 (EPAct 2005).

DATES: This final rule is effective November 16, 2009.

FOR FURTHER INFORMATION CONTACT: Lawrence J. Russo, Jr., Office of Biomass Program, U.S. Department of Energy, Mailstop EE–2E, Room 5H021, 1000 Independence Avenue, SW., Washington, DC 20585; (202) 586–5618 or *larry.russo@ee.doe.gov;* or Mr. Edward Myers, Office of the General Counsel, U.S. Department of Energy, Mailstop GC–72, Room 6B–256, 1000 Independence Avenue, SW., Washington, DC 20585; (202) 586–3397 or *edward.myers@hq.doe.gov.*

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I. Background and Overview

Section 942 of the Energy Policy Act of 2005, Pub. L. 109–58 (August 8, 2005), requires the Secretary of Energy (Secretary), in consultation with the Secretary of Agriculture, the Secretary of Defense, and the Administrator of the Environmental Protection Agency, to establish an incentive program for the production of cellulosic biofuels and to implement that program by means of a ''reverse auction.'' Section 942(a) states that the purposes of the program are to: ''(1) Accelerate deployment and commercialization of biofuels; (2) deliver the first one billion gallons of annual cellulosic biofuel production by 2015; (3) ensure biofuels produced after 2015 are cost competitive with gasoline and diesel; and (4) ensure that small feedstock producers and rural small businesses are full participants in the development of the cellulosic biofuels industry.'' In order to achieve these purposes, the Secretary is to award production incentives on a per gallon basis to eligible entities by means of a reverse auction. Under section 942, the auction is conducted annually until the earlier of the first year that annual production of cellulosic biofuels in the United States reaches one billion gallons or 10 years after enactment of EPAct 2005.

In order to implement section 942, DOE is promulgating this final rule establishing procedures for the reverse auction and standards for making production incentive awards. The eligibility standards include both pre-auction requirements which must be met prior to an entity's participation in a reverse auction under section 942 and several post-auction standards which must be met as a condition of receiving an award. The post-auction standards are especially necessary if the nation is to achieve the long-term goals of section 942, including delivery of the first one billion gallons of annual cellulosic biofuel production by the statutory deadline, and establishment of a biofuels industry that is cost competitive with gasoline and diesel. The post-auction standards are thus intended to ensure that successful bidders make real and meaningful progress toward the production of cellulosic biofuels in commercially significant quantities. DOE believes that as successive auctions yield more and more production of cellulosic biofuels, the nation will move closer to achieving section 942's long-term national goal of a commercially viable production capability after 2015. In addition, by setting forth clear pre-auction and post-auction standards, DOE believes that only the most serious entities will seek to participate in each reverse auction.

II. Discussion of Comments and Modifications of Proposed Rule

A. Comments of Dupont Danisco Cellulosic Ethanol, LLC

On December 23, 2008, DOE published a Notice of Proposed Rulemaking (NOPR) in the **Federal Register**, 73 FR 78663, proposing the issuance of this rule and inviting public comment on the proposal. In response, DOE received only one set of comments—from Dupont Danisco Cellulosic Ethanol, LLC (Dupont Danisco).

Dupont Danisco offered the following recommendations:

○ Eligibility Criteria. Tighten the eligibility criteria for bidders, including the addition of requirement that a bidder must have previously demonstrated its refining technology in a pilot plant; that DOE employ a review panel to qualify bidders; and that putative bidders must submit *pro forma* financial statements.

○ Bidding Process. Adopt an anonymous iterative, open bidding process and clarify whether bids are to cover one year or multiple years and/or total volume production for a specific site or multiple sites for a single entity. The comments recommend that the rule should permit incentive awards that are site specific and for multiple years and that a bidder also should be able to bid in subsequent years for uncovered production volumes at the same site.

○ Bidder Defaults. Where the bidder defaults due to a failure to fulfill annual production obligations, (a) only the

shortfall should be considered to be in default and only the dollar value of the shortfall should be added to the amount of incentives eligible in the next auction round; or, in the alternative, (b) defaulted monies should be allocated to the next lowest [1] non-winning bidder in the auction in which the defaulting bidder won its award.

○ Force Majeure. DOE should provide a reasonable time extension for performance by the successful bidder where there has been a delay due to a force majeure event.

○ Transfer of Awards. Awards should be site specific but transferable to entities producing at that site.

DOE agrees with the commenter that, as a condition of eligibility for participation in reverse auctions under the rule, bidders should have to demonstrate that the technologies which they employ have been first demonstrated as effective processes for biofuels refining, and the final rule incorporates this recommendation in the definition of ''eligible cellulosic biofuels production facility'' in section 452.2. Likewise, DOE agrees that bidders must submit audited or *pro forma* financial statements as a condition of eligibility, as reflected in section 452.4(a)(2). These two modifications of the NOPR should help to ensure that only capable and financially fit entities participate in the reverse auctions. On the other hand, the rule does not adopt the commenter's recommendation for the establishment of a review panel. The review of bidders' qualifications is a governmental function. While DOE may employ a panel to assist it in this review, in the manner suggested by the commenter, DOE is not convinced of the need for it in this situation.

DOE appreciates the commenter's recommendation for the adoption of an anonymous, iterative bidding process. However, it is not clear at this time that an iterative bidding process would improve the bidding process or the quality of the bids received. It warrants noting that DOE had specifically solicited public comment on the question of potential benefits from use of such an open iterative bidding process but, other than the single recommendation described above, received none. Accordingly, DOE will carefully monitor the procedures adopted in this final rule. Over time, DOE may reconsider whether an open iterative bidding scheme would be helpful.

[1] The commenter uses the term ''next highest bid'' but, given the context of a reverse auction, we understand him to mean ''next lowest bid.''

With respect to whether a bid is site specific and/or entity specific, or whether a bid is to cover only a single year or multiple years, DOE intends that each bid should identify a projected level of production on a per gallon, site, entity, and year specific basis for a six year production period. Bids thus must contain projections of anticipated production volumes for each of the six years covered by the bid. The final rule provides clarification of these matters in section 452.5(b). Additionally, DOE intends that a bidder should be able to bid for additional incentives for uncovered production volumes in subsequent years at the same site where an award has already been made. Also see, section 452.5(b).

DOE has revised section 452.6 to address the question of force majeure events. Section 452.6(b) contains language that would allow a reasonable extension of time to be granted at DOE's discretion to winning bidders to fulfill their obligations under their production agreements with DOE.

Absent a force majeure event, however, the final rule provides, in section 452.6(c) that a winning bidder must produce at least 50 percent of its annual obligation under the production agreement in order to avoid a default and the revocation of its award. Assuming that at least 50 percent of its annual obligation is produced in any calendar year covered by the production agreement, any shortfall will be added to the production obligation for the following year.

The final rule, however, adopts the commenter's alternate recommendation as regards defaults, i.e., if there is still a shortfall at the end of the last calendar year covered by the production agreement, the shortfall will be allocated to the next best (lowest) bidder in the auction round won by the bidder that is party to the production agreement. If, however, the next best bidder fails to enter into a production agreement with DOE within 30 days after being notified of its award, the shortfall will be allocated instead to the next reverse auction. See, section 452.5(d).

As proposed in the NOPR, DOE also agrees with the commenter that awards should be site specific but transferable to eligible entities that succeed to ownership of the site. Section 452.5(g) has been revised to clarify this intent.

B. Energy Independence and Security Act of 2007

Title II of the Energy Independence and Security Act of 2007, Pub. L. 110–140 (December 19, 2007) (EISA), directs the Administrator of the Environmental Protection Agency (EPA) to revise that agency's regulations implementing section 211(o)(1) of the Clean Air Act, 42 U.S.C. 7545(o), to ensure, *inter alia,* that transportation fuel sold or introduced into commerce in the United States on an annual average basis, contains at least a specified minimum volume of renewable fuel, advanced biofuel, cellulosic biofuel, or biomass-based diesel. Pursuant to EISA section 202, the minimum volume requirement for cellulosic biofuel, as defined in EISA, is 1 billion gallons by the year 2013. The term ''cellulosic biofuel'' is defined in section 201 of EISA as ''renewable fuel derived from any cellulose, hemicellulose, or lignin that is derived from renewable biomass and that has lifecycle greenhouse gas emissions, as determined by the Administrator, that are at least 60 percent less than the baseline lifecycle greenhouse gas emissions.''

To date, the Administrator of the EPA has not issued the regulations required under section 202 of EISA. Nonetheless, DOE is mindful that the EPA regulations, once promulgated, could affect reverse auctions established by this final rule. In particular, if the renewable fuel standard for ''cellulosic biofuel'' under EISA is achieved, the last reverse auction required under section 942 of EPAct 2005 may occur in 2013, rather than 2015, the target provided under EPAct for refining 1 billion gallons of cellulosic biofuels on an annual basis. However, this presupposes that the ''cellulosic biofuel'' used to meet the renewable fuel standard under EISA also qualifies as ''cellulosic biofuels'' for purposes of this final rule.

That may not be the case, however. The definition of ''cellulosic biofuel'' in section 201 of EISA is different from the definition used in EPAct and this final rule. The final rule defines ''*cellulosic biofuel''* as ''any liquid fuel produced from cellulosic feedstocks'' and ''*cellulosic feedstock* means any lignocellulosic feedstock as defined by EPAct, section 932(a)(2).'' Thus the final rule attempts to be consistent with the definition used elsewhere in EPAct. In the absence of final regulations implementing the renewable fuel standard of EISA, the definitions established in the later-enacted legislation cannot be imported to this final rule without the possibility that the EPA regulations may further refine the statutory definitions.

Nevertheless, DOE retains discretion to later modify the definition used in this final rule in order to make it consistent with the regulations implementing EISA, if sound public

policy considerations support such a modification within the parameters established by EPAct. After EPA promulgates its regulations implementing section 202 of EISA, DOE will review this final rule to determine whether it is feasible and appropriate to reconcile the terms and definitions of both rules.

C. Heating Value

In an effort to treat all potential biofuels equally, section 452.5 of this final rule modifies the proposed rule by requiring bidders to set forth their calculation of the fuel selected for their bids on a gasoline equivalent volumetric basis using the lower heating Btu value (LHV) of the fuel compared to the LHV of gasoline. Awards similarly shall be issued on a gasoline equivalent volumetric basis. The gasoline equivalent volumes are to be calculated by multiplying the gallons of biofuels times the LHV of the fuel divided by 116,090 Btu per gallon (the LHV of gasoline). An example, in the case of ethanol, would be 1 gallon of ethanol times 76,330 Btu per gallon (the LHV of ethanol) divided by 116,090 (the LHV of gasoline). Consequently, 1 gallon of ethanol would be 0.6575 gasoline equivalent gallons. A table with most common fuels heating values can be found at: *http://cta.ornl.gov/bedb/appendix_a/Lower Higher_Heating_Values_for_Various_Fuels.xls.*

D. Commercial Suitability

This final rule modifies section 452.4(a)(2) of the proposed rule by clarifying that bidders must demonstrate in their pre-auction eligibility submissions that, in addition to other requirements set forth in section 452.4, they will produce a cellulosic biofuel which either currently is suitable for widespread general use as a transportation fuel or, alternatively, that the cellulosic biofuel will be suitable for such use in a timeframe and in sufficient volumes to significantly contribute to the goal of 1 billion gallons of refined cellulosic biofuel by the statutory deadline. Those pre-auction eligibility submissions proposing fuels that are not currently widely accepted and available as a transportation fuel also must describe a clear path to achieving the status of an acceptable liquid transportation cellulosic biofuel. This description may include, but is not limited to the following:

- Obtaining vehicle manufacturer(s) approval;
- Obtaining EPA fuel registration(s);
- Establishing standards for use, production, storage, transportation, and retail dispensing; and,
- Establishing a distribution/dispensing infrastructure.

Additionally, the pre-auction eligibility submissions must estimate the costs and discuss the activities required for eventually commercializing the proposed cellulosic biofuel.

III. Regulatory Review

A. Executive Order 12866

Today's rule has been determined to be a significant regulatory action under Executive Order 12866, ''Regulatory Planning and Review,'' 58 FR 51735 (October 4, 1993). Accordingly, this action was subject to review under that Executive Order by the Office of Information and Regulatory Affairs of the Office of Management and Budget (OMB).

Section 942 of EPAct 2005 provides that awards under the program shall be limited to not more than $100 million in any one year. 42 U.S.C. 16251(d)(4). The possibility of awards at the $100 million level makes this rulemaking economically significant under the Executive Order. However, the level of funding provided by Congress for this program, thus far, suggests it is unlikely DOE will award $100 million in any one year. In fiscal year 2008, Congress appropriated $5.0 million to initiate the program. The President has requested no funding for this program in his Fiscal Year 2010 budget.

The incentives awarded for the production of cellulosic biofuels under this program constitute transfer payments. In this case, the payments are from the Government to private entities, and they do not affect total resources available to society. These transfers do not involve costs and benefits, and thus no assessment of costs and benefits is required by Executive Order 12866. *See* OMB Circular A–4, at 38 and 46. DOE expects the first auction will be held in late 2009 or 2010 and the last auction no later than 2015. As discussed in section II. B. of this notice, the Renewable Fuel Standard administered by EPA was amended by EISA to call for the production of 1 billion gallons of cellulosic biofuel by the year 2013. If that goal is met, then the last auction would occur in 2013.

The EPAct 2005 program for conducting reverse auctions to provide incentives for production of cellulosic biofuels is one of several actions Congress has taken to encourage the production of cellulosic biofuels. As discussed, Congress has amended the Renewable Fuel Standard to set specific targets for the production of cellulosic biofuel, including 1 billion gallons by 2013. Congress also in EPAct 2005 and EISA authorized funding for research and development of advanced biofuels and cellulosic biofuel. Current research and development efforts, in combination with various methodologies that could be funded using the procedures established in this regulation, have the potential to realize alternatives that DOE believes can achieve the production goals set in section 942 of EPAct 2005 and EISA.

B. National Environmental Policy Act

DOE has determined that this rule is covered under the Categorical Exclusion found in the DOE's National Environmental Policy Act (NEPA) regulations at paragraph A6 of Appendix A to Subpart D, 10 CFR part 1021, which applies to rulemakings that are strictly procedural. DOE notes that the procedures proposed in this rule do not afford DOE discretion to determine whether or how a facility will be constructed or operated. DOE's prescribed role under section 942, that is, awarding production incentives to the lowest bidder in a reverse auction, is strictly procedural. Accordingly, neither an environmental assessment nor an environmental impact statement is required for the rule or for an award that DOE gives or proposes to give to a successful bidder. If DOE subsequently proposes to take any additional actions with respect to successful bidders, separate from the award of funds under section 942 of EPAct 2005, DOE will separately evaluate the need for NEPA review of those new proposed actions.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process (68 FR 7990). DOE has made its procedures and policies available on the Office of General Counsel's Web site: *http://www.gc.doe.gov.*

DOE has reviewed today's rule under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. The rule will only affect biofuels

producers if they choose to participate in the reverse auction. Moreover, the rule will provide an economic benefit without imposing any regulatory requirements on producers of cellulosic biofuels. On the basis of the foregoing, DOE certifies that this rule will not have a significant economic impact on a substantial number of small entities. Accordingly, DOE has not prepared a regulatory flexibility analysis for this rulemaking. This certification and supporting statement of factual basis will be provided to the Chief Counsel for Advocacy of the Small Business Administration pursuant to 5 U.S.C. 605(b).

D. Paperwork Reduction Act

Section 452.4(a) provides that entities that intend to participate in a reverse auction must file a pre-auction eligibility submission. The pre-auction eligibility submission must contain certain information, including an implementation plan, as described above. This information will be used by DOE to determine if an entity that files a pre-auction eligibility submission will be accepted to participate in the reverse auction.

In addition, section 452.4(c) provides that a bidder must submit a progress report. The progress report must contain the additional information described above. DOE will use this information to evaluate the bidder's progress in the production of cellulosic biofuels. DOE has submitted this collection of information to the Office of Management and Budget for approval pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) and the procedures implementing that Act, 5 CFR 1320.1 *et seq*.

DOE estimates that the annual reporting and recordkeeping burden for this collection of information will be 30 hours per year (10 bidders × 3 hours) at a total annual cost of $2250 (10 bidders × $225 per auction). 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. 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.

E. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) generally requires Federal agencies to examine closely the impacts of regulatory actions on State, local, and tribal governments. Subsection 101(5) of title I of that law defines a Federal intergovernmental mandate to include any regulation that would impose upon State, local, or tribal governments an enforceable duty, except a condition of Federal assistance or a duty arising from participating in a voluntary federal program. Title II of that law requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and tribal governments, in the aggregate, or to the private sector, other than to the extent such actions merely incorporate requirements specifically set forth in a statute. Section 202 of that title requires a Federal agency to perform a detailed assessment of the anticipated costs and benefits of any rule that includes a Federal mandate which may result in costs to State, local, or tribal governments, or to the private sector, of $100 million or more in any one year (adjusted annually for inflation). 2 U.S.C. 1532(a) and (b). Section 204 of that title requires each agency that proposes a rule containing a significant Federal intergovernmental mandate to develop an effective process for obtaining meaningful and timely input from elected officers of State, local, and tribal governments. 2 U.S.C. 1534.

This rule will not impose a Federal mandate on State, local, or tribal governments or on the private sector. Accordingly, no assessment or analysis is required under the Unfunded Mandates Reform Act of 1995.

F. Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well being. The rule will not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

G. Executive Order 13132

Executive Order 13132, ''Federalism,'' 64 FR 43255 (August 4, 1999) imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions. DOE has examined this rule and has determined that it would not preempt State law and would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. No further action is required by Executive Order 13132.

H. Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, ''Civil Justice Reform,'' 61 FR 4729 (February 7, 1996), imposes on Executive agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. With regard to the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, the rule meets the relevant standards of Executive Order 12988.

I. Treasury and General Government Appropriations Act, 2001

The Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB.

OMB's guidelines were published at 67 FR 8452 (February 22, 2002), and DOE's guidelines were published at 67 FR 62446 (October 7, 2002). DOE has reviewed today's rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

J. Executive Order 13211

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001) requires Federal agencies to prepare and submit to OMB, a Statement of Energy Effects for any proposed significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use. Today's regulatory action would not have a significant adverse effect on the supply, distribution, or use of energy and is therefore not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

K. Consultation

Pursuant to section 942(c)(1) of EPAct 2005, DOE has consulted with the Secretary of Agriculture, the Secretary of Defense, and the Administrator of the Environmental Protection Agency prior to issuing today's rule.

L. Congressional Notification.

As required by 5 U.S.C. 801, DOE will report to Congress promulgation of this rule prior to its effective date. The report will state that it has been determined that the rule is not a ''major rule'' as defined by 5 U.S.C. 804(2). DOE will submit the supporting analysis to the Comptroller General in the U.S. Government Accountability Office and make it available to each House of Congress.

IV. Approval of the Office of the Secretary

The issuance of this rule has been approved by the Office of the Secretary.

List of Subjects in 10 CFR Part 452

Fuel, Grant programs, Recordkeeping and reporting requirements, Renewable energy.

Issued in Washington, DC, on September 11, 2009.

Cathy Zoi,

Assistant Secretary, Energy Efficiency and Renewable Energy.

■ For the reasons stated in the preamble, DOE is amending chapter II of title 10 of the Code of Federal Regulations by adding a new part 452 as set forth below:

PART 452—PRODUCTION INCENTIVES FOR CELLULOSIC BIOFUELS

Sec.
452.1 Purpose and scope.
452.2 Definitions.
452.3 Solicitations.
452.4 Eligibility requirements.
452.5 Bidding procedures.
452.6 Incentive award terms and limitations.

Authority: 42 U.S.C. 7101 *et seq.;* 42 U.S.C. 16251.

§ 452.1 Purpose and scope.

(a) This part sets forth the standards, policies, and procedures that the Department of Energy uses for receiving, evaluating, and awarding bids in reverse auctions of production incentive payments for cellulosic biofuels under section 942 of the Energy Policy Act of 2005 (42 U.S.C. 16251).

(b) Part 1024 of chapter X of title 10 of the Code of Federal Regulations shall not apply to actions taken under this part.

§ 452.2 Definitions.

As used in this part:

Cellulosic biofuel means any liquid fuel produced from cellulosic feedstocks.

Cellulosic feedstock means any lignocellulosic feedstock as defined by EPAct, section 932(a)(2).

Commercially significant quantity means 10 million gallons or more of cellulosic biofuels produced in one year.

DOE means the U.S. Department of Energy.

Eligible biofuels producer means a business association, including but not limited to a sole proprietorship, partnership, joint venture, corporation, or other business entity that owns and operates, or plans to own and operate, an eligible cellulosic biofuels production facility and that meets all other eligibility requirements that are conditions on the receipt of production incentives under this part.

Eligible cellulosic biofuels production facility means a facility—

(1) Located in the United States (including U.S. territories and possessions);

(2) Which meets all applicable Federal and State permitting requirements;

(3) Employs a demonstrated refining technology; and

(4) Meets any relevant financial criteria established by the Secretary.

EPAct 2005 means the Energy Policy Act of 2005, Public Law 109–58 (August 8, 2005).

Open window means the period during each reverse auction, as specified in an associated solicitation, during which DOE accepts bids for production incentives under this part.

Secretary means the Secretary of Energy.

§ 452.3 Solicitations.

The reverse auction process commences with the issuance of a solicitation by DOE. DOE will publish a solicitation in the **Federal Register** and shall post the solicitation on its website at www.eere.energy.gov no later than 60 days before the bidding in a reverse auction under this part commences. The solicitation shall:

(a) Invite interested persons and businesses to submit pre-qualification statements;

(b) Set forth the terms on which bids will be accepted;

(c) Specify the open window for bidding; and

(d) Specify the date by which successful bidders will be required to file pre-auction eligibility submissions.

§ 452.4 Eligibility requirements.

(a) *Pre-auction eligibility submissions.* (1) Entities that intend to participate in a reverse auction, within the time period stated in the relevant solicitation, must file a pre-auction eligibility submission that provides all information requested in the applicable solicitation to which it is responding, including an implementation plan.

(2) Each pre-auction eligibility submission's implementation plan must, at a minimum:

(i) Demonstrate that the filing party owns and operates or plans to own and operate an eligible cellulosic biofuels production facility;

(ii) Identify the site or proposed site for the filing party's eligible cellulosic biofuels production facility;

(iii) Demonstrate that the cellulosic biofuel to be produced for purposes of receiving an award either currently is suitable for widespread general use as a transportation fuel or will be suitable for such use in a timeframe and in sufficient volumes to significantly contribute to the goal of 1 billion gallons of refined cellulosic biofuel by August 2015.

(iv) Provide audited or *pro forma* financial statements for the latest 12 month period; and

(v) Identify one or more proposed sources of financing for the construction or expansion of the filing party's eligible cellulosic biofuels production facility.

(b) *Notification of pre-auction eligibility status.* DOE shall notify each entity that files a pre-auction eligibility submission of its acceptance or rejection no later than 15 days before the reverse auction for which the submission was made. A DOE decision constitutes final agency action and is conclusive.

(c) *Progress reports.* Within one year after the reverse auction in which a bidder successfully competed, the bidder must submit a progress report that includes all additional information required by the solicitation in which the bidder submitted a successful bid and which demonstrates that the bidder has:

(1) Acquired the site where its proposed eligible cellulosic biofuels production facility is or will be located;

(2) Obtained secure financing commitments for the plant or expansion thereof, as necessary to produce cellulosic biofuels; and

(3) Entered into a written engineering, procurement, and construction (EPC) contract for design and construction of the eligible cellulosic biofuels production facility; such EPC contract must provide for completion of construction of the eligible cellulosic biofuels production facility such that operations at the plant or plant expansion will commence within three years of the reverse auction in which the bidder successfully competed.

(d) *Production agreement.* Within 90 days after submission of its progress report under paragraph (c) of this section, the successful bidder must enter into an agreement with DOE which requires the bidder to begin production of commercially significant quantities of cellulosic biofuels, at the eligible cellulosic biofuels production facility that was the subject of the relevant bid, not later than three years from the date of the acceptance of the successful bid.

(e) *Confirmation of continuing eligibility.* After receiving the progress report described in the paragraph (e) of the section and upon confirmation by DOE that the successful bidder has entered into a production agreement with DOE, as described in paragraph (d) of this section, DOE will confirm to the bidder that it continues to meet the eligibility requirements of this part.

(f) *Contractual condition on eligibility.* (1) As a condition of the receipt of an award under this part, a successful bidder in a reverse auction under this part must demonstrate that it has fulfilled the terms of its production agreement entered into with DOE pursuant to paragraph (d) of this section.

(2) As a condition of continuing to receive production incentive payments under this part, a bidder that has entered into a production agreement with DOE must annually submit to DOE, by a commercially reasonable date specified by DOE, verification of the bidder's production volumes for the prior calendar year. Within 90 days of the submission of such verification, DOE shall notify the successful bidder whether the bidder has fulfilled the terms of the production agreement and shall make payment of any production incentive awards then outstanding for the one year period covered by the verified data submission.

§ 452.5 Bidding procedures.

DOE shall conduct an electronic reverse auction through a limited duration single bid per producer auction process open only to pre-auction eligible cellulosic biofuels producers. The following procedures shall be used:

(a) DOE shall accept only electronic bids received from pre-auction eligible cellulosic biofuels producers during the open window established in the solicitation. The open window shall consist of a single continuous period of at least four hours for each auction.

(b) Bids shall identify an estimated annual production amount from an eligible cellulosic biofuels production facility on a per gallon, site, entity, and year specific basis for a consecutive six year production period. A bid also may be submitted for additional incentives for uncovered production volumes at a site where an award was made in an earlier auction round.

(c) All bids must set forth the methodology used to derive the estimates of annual production volumes covered by the bid and the bid shall be calculated on a gasoline equivalent volumetric basis using the lower heating Btu value of the fuel compared to the lower heating Btu value of gasoline.

(d) All bids will be confidential until 45 days after the close of the window for submission of bids for the reverse auction.

(e) Bid evaluation and incentive awards selection procedures include the following:

(1) After DOE evaluates the bids received during the open window, it shall, within 45 days following the close of the open window for submission of bids for the reverse auction, announce on DOE's website and by direct mail the names of the successful bidders and the terms of their bids.

(2) DOE shall issue awards for the bid production amounts beginning with the bidder that submitted the bid for the lowest level of production incentive on a per gallon basis.

(3) In the event of a tie among the lowest bids, preference will be given to the lowest tied bidder based on DOE's evaluation of the extent to which the tied bids meet the following criteria:

(i) Demonstrates outstanding potential for local and regional economic development;

(ii) Includes agricultural producers or cooperatives of agricultural producers as equity partners in the ventures; and

(iii) Has a strategic agreement in place to fairly reward feedstock suppliers.

(4) In the event more than one lowest tied bid equally meets the standards in paragraph (c)(3) of this section, the award will be distributed equally on a per capita basis among those lowest tied bidders meeting the standards.

§ 452.6 Incentive award terms and limitations.

(a) *Amount of incentive.* Subject to the availability of appropriated funds and the limitations in paragraph (c) of this section, an eligible cellulosic biofuels producer selected to receive an award shall receive the amount of the production incentive on the per gallon basis requested in the auction solicitation for each gallon produced and sold by the entity during the first six years of operation of its eligible cellulosic biofuels production facility.

(b) *Failure to commence production.* Except in the circumstance of a force majeure event, as solely determined by DOE, failure by an eligible cellulosic biofuels producer that made a successful bid to commence production of cellulosic biofuels, at the eligible cellulosic biofuels production facility that was the subject of the successful bid, by the end of the third year after the close of submission of the open window of bids for the reverse auction in which it submitted a successful bid, shall result in immediate revocation of DOE's award to that producer.

(c) *Failure of the successful bidder to meet annual production obligations.* Except in the circumstance of a force majeure event, as solely determined by DOE, a successful bidder's failure to produce at least 50 percent of the volumes specified in its production agreement by December 31 of any year covered by the bid shall result in immediate revocation of DOE's award; if the successful bidder produces 50 percent or more of the volumes set forth in the production agreement on an

annual basis by December 31 of any year covered by the agreement, any production shortfall will be carried forward and added to the successful bidder's production obligations for next year covered by the agreement.

(d) *Shortfalls remaining at the end of the production period.* If, for any reason, by December 31 of the last year of the production agreement, the bidder has failed to produce the total production volumes for all years covered by the agreement, any such remaining shortfall shall be awarded to the bidder with the next lowest bid in the auction round for which the award was made. If, however, the next best bidder is unable to enter into a production agreement with DOE within 30 days after being notified of its award, the shortfall shall be allocated instead to the next reverse auction.

(e) *Incentive award limitations.* The following limits shall apply to awards of cellulosic biofuels production incentives under this part:

(1) During the first four years after the commencement of the program, the incentive shall be limited to $1.00 per gallon. For purposes of this limitation, the program shall be deemed to have commenced on the date that the first solicitation for a reverse auction is issued;

(2) A per gallon cap over the remaining lifetime of the program of $.95 per gallon provided that—

(i) This cap shall be lowered by $.05 each year commencing the first year after annual cellulosic biofuels production in the United States exceeds 1 billion gallons;

(ii) Not more than 25 percent of the funds committed within each reverse auction shall be awarded to any single project;

(iii) Not more than $100 million in production incentives shall be awarded in any one calendar year; and

(iv) Not more than $1 billion in production incentives shall be awarded over the lifetime of the program.

(f) *Participation in subsequent auctions.* A successful bidder in a reverse auction under this part may participate in subsequent reverse auctions if the incentives sought will assist the addition of plant production capacity for the eligible cellulosic biofuels production facility associated with its previously successful bid.

(g) *Transferability of awards.* A production incentive award under this part may be transferred to a successor entity at the same production facility for which the award was made, provided that the successor entity meets all eligibility requirements of this part, including execution of an agreement with DOE to commence production of cellulosic biofuels in commercially significant quantities not later than three years of the date that bidding closes on the reverse auction in which the predecessor entity submitted a successful bid.

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FEDERAL RESERVE SYSTEM

12 CFR Part 204

[Regulation D; Docket No. R–1373]

Reserve Requirements of Depository Institutions

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule.

SUMMARY: The Board is amending Regulation D, Reserve Requirements of Depository Institutions, to reflect the annual indexing of the reserve requirement exemption amount and the low reserve tranche for 2010. The Regulation D amendments set the amount of total reservable liabilities of each depository institution that is subject to a zero percent reserve requirement in 2010 at $10.7 million, up from $10.3 million in 2009. This amount is known as the reserve requirement exemption amount. The Regulation D amendments also set the amount of net transaction accounts at each depository institution that is subject to a three percent reserve requirement in 2010 at $55.2 million, up from $44.4 million in 2009. This amount is known as the low reserve tranche. The adjustments to both of these amounts are derived using statutory formulas specified in the Federal Reserve Act. The Board is also announcing changes in two other amounts, the nonexempt deposit cutoff level and the reduced reporting limit, that are used to determine the frequency at which depository institutions must submit deposit reports.

DATES: *Effective Date:* November 16, 2009.

Compliance Dates: For depository institutions that report deposit data weekly, the new low reserve tranche and reserve requirement exemption amount will apply to the fourteen-day reserve computation period that begins Tuesday, December 1, 2009, and the corresponding fourteen-day reserve maintenance period that begins Thursday, December 31, 2009. For depository institutions that report deposit data quarterly, the new low reserve tranche and reserve requirement exemption amount will apply to the seven-day reserve computation period that begins Tuesday, December 15, 2009, and the corresponding seven-day reserve maintenance period that begins Thursday, January 14, 2010. For all depository institutions, these new values of the nonexempt deposit cutoff level, the reserve requirement exemption amount, and the reduced reporting limit will be used to determine the frequency at which a depository institution submits deposit reports effective in either June or September 2010.

FOR FURTHER INFORMATION CONTACT: Sophia Allison, Senior Counsel (202/452–3565), Legal Division, or Mary-Frances Styczynski, Financial Analyst (202/452–3303), Division of Monetary Affairs; for users of Telecommunications Device for the Deaf (TDD) only, contact (202/263–4869); Board of Governors of the Federal Reserve System, 20th and C Streets, NW., Washington, DC 20551.

SUPPLEMENTARY INFORMATION: Section 19(b)(2) of the Federal Reserve Act (12 U.S.C. 461(b)(2)) requires each depository institution to maintain reserves against its transaction accounts and nonpersonal time deposits, as prescribed by Board regulations, for the purpose of implementing monetary policy. Section 11(a)(2) of the Federal Reserve Act (12 U.S.C. 248(a)(2)) authorizes the Board to require reports of liabilities and assets from depository institutions to enable the Board to conduct monetary policy. The Board's actions with respect to each of these provisions are discussed in turn below.

1. Reserve Requirements

Pursuant to section 19(b) of the Federal Reserve Act (Act), transaction account balances maintained at each depository institution are subject to reserve requirement ratios of zero, three, or ten percent. Section 19(b)(11)(A) of the Act (12 U.S.C. 461(b)(11)(A)) provides that a zero percent reserve requirement shall apply at each depository institution to total reservable liabilities that do not exceed a certain amount, known as the reserve requirement exemption amount. Section 19(b)(11)(B) provides that, before December 31 of each year, the Board shall issue a regulation adjusting the reserve requirement exemption amount for the next calendar year if total reservable liabilities held at all depository institutions increase from one year to the next. No adjustment is made to the reserve requirement exemption amount if total reservable

liabilities held at all depository institutions should decrease during the applicable time period. The Act requires the percentage increase in the reserve requirement exemption amount to be 80 percent of the increase in total reservable liabilities of all depository institutions over the one-year period that ends on the June 30 prior to the adjustment.

Total reservable liabilities of all depository institutions increased 5.0 percent (from $4,770 billion to $5,011 billion) between June 30, 2008, and June 30, 2009. Accordingly, the Board is amending Regulation D to increase the reserve requirement exemption amount by $0.4 million, from $10.3 million for 2009 to $10.7 million for 2010.[1]

Pursuant to Section 19(b)(2) of the Act (12 U.S.C. 461(b)(2)), transaction account balances maintained at each depository institution over the reserve requirement exemption amount and up to a certain amount, known as the low reserve tranche, are subject to a three percent reserve requirement. Transaction account balances over the low reserve tranche are subject to a ten percent reserve requirement. Section 19(b)(2) also provides that, before December 31 of each year, the Board shall issue a regulation adjusting the low reserve tranche for the next calendar year. The Act requires the adjustment in the low reserve tranche to be 80 percent of the percentage increase or decrease in total transaction accounts of all depository institutions over the one-year period that ends on the June 30 prior to the adjustment.

Net transaction accounts of all depository institutions increased 31.0 percent (from $665 billion to $868 billion) between June 30, 2008 and June 30, 2009. Accordingly, the Board is amending Regulation D to increase the low reserve tranche for net transaction accounts by $10.8 million, from $44.4 million for 2009 to $55.2 million for 2010.

For depository institutions that file deposit reports weekly, the new low reserve tranche and reserve requirement exemption amount will be effective for the fourteen-day reserve computation period beginning Tuesday, December 1, 2009, and for the corresponding fourteen-day reserve maintenance period beginning Thursday, December 31, 2009. For depository institutions that report quarterly, the new low reserve tranche and reserve requirement exemption amount will be effective for the seven-day reserve computation period beginning Tuesday, December 15, 2009, and for the corresponding seven-day reserve maintenance period beginning Thursday, January 14, 2010.

2. Deposit Reports

Section 11(b)(2) of the Federal Reserve Act authorizes the Board to require depository institutions to file reports of their liabilities and assets as the Board may determine to be necessary or desirable to enable it to discharge its responsibility to monitor and control the monetary and credit aggregates. The Board screens depository institutions each year and assigns them to one of four deposit reporting panels (weekly reporters, quarterly reporters, annual reporters, or nonreporters). The panel assignment for annual reporters is effective in June of the screening year; the panel assignment for weekly and quarterly reporters is effective in September of the screening year.

In order to ease reporting burden, the Board permits smaller depository institutions to submit deposit reports less frequently than larger depository institutions. The Board permits depository institutions with net transaction accounts above the reserve requirement exemption amount but total transaction accounts, savings deposits, and small time deposits below a specified level (the ''nonexempt deposit cutoff'') to report deposit data quarterly. Depository institutions with net transaction accounts above the reserve requirement exemption amount but with total transaction accounts, savings deposits, and small time deposits above the nonexempt deposit cutoff are required to report deposit data weekly. The Board requires certain large depository institutions to report weekly regardless of the level of their net transaction accounts if the depository institution's total transaction accounts, savings deposits, and small time deposits exceeds a specified level (the ''reduced reporting limit''). The nonexempt deposit cutoff level and the reduced reporting limit are adjusted annually, by an amount equal to 80 percent of the increase, if any, in total transaction accounts, savings deposits, and small time deposits of all depository institutions over the one-year period that ends on the June 30 prior to the adjustment.

From June 30, 2008 to June 30, 2009, total transaction accounts, savings deposits, and small time deposits at all depository institutions increased 10 percent (from $6,461 billion to $7,126 billion). Accordingly, the Board is increasing the nonexempt deposit cutoff level to $243.1 million for 2010. The Board is also increasing the reduced reporting limit to $1.362 billion for 2010.[2]

Beginning in 2010, the boundaries of the four deposit reporting panels will be defined as follows. Those depository institutions with net transaction accounts over $10.7 million (the reserve requirement exemption amount) or with total transaction accounts, savings deposits, and small time deposits greater than or equal to $1.362 billion (the reduced reporting limit) are subject to detailed reporting, and must file a Report of Transaction Accounts, Other Deposits and Vault Cash (FR 2900 report) either weekly or quarterly. Of this group, those with total transaction accounts, savings deposits, and small time deposits greater than or equal to $243.1 million (the nonexempt deposit cutoff level) are required to file the FR 2900 report each week, while those with total transaction accounts, savings deposits, and small time deposits less than $243.1 million are required to file the FR 2900 report each quarter. Those depository institutions with net transaction accounts less than or equal to $10.7 million (the reserve requirement exemption amount) and with total transaction accounts, savings deposits, and small time deposits less than $1.362 billion (the reduced reporting limit) are eligible for reduced reporting, and must either file a deposit report annually or not at all. Of this group, those with total deposits greater than $10.7 million (but with total transaction accounts, savings deposits, and small time deposits less than $1.362 billion) are required to file the Annual Report of Deposits and Reservable Liabilities (FR 2910a) report annually, while those with total deposits less than or equal to $10.7 million are not required to file a deposit report. A depository institution that adjusts reported values on its FR 2910a report in order to qualify for reduced reporting will be shifted to an FR 2900 reporting panel.

Notice and Regulatory Flexibility Act. The provisions of 5 U.S.C. 553(b) relating to notice of proposed rulemaking have not been followed in connection with the adoption of these amendments. The amendments involve expected, ministerial adjustments prescribed by statute and by the Board's policy concerning reporting practices. The adjustments in the reserve requirement exemption amount, the low

[1] Consistent with Board practice, the low reserve tranche and reserve requirement exemption amounts have been rounded to the nearest $0.1 million.

[2] Consistent with Board practice, the nonexempt deposit cutoff level has been rounded to the nearest $0.1 million, and the reduced reporting limit has been rounded to the nearest $1 million.

reserve tranche, the nonexempt deposit cutoff level, and the reduced reporting limit serve to reduce regulatory burdens on depository institutions. Accordingly, the Board finds good cause for determining, and so determines, that notice in accordance with 5 U.S.C. 553(b) is unnecessary. Consequently, the provisions of the Regulatory Flexibility Act, 5 U.S.C. 601, do not apply to these amendments.

List of Subjects in 12 CFR Part 204

Banks, banking, Reporting and recordkeeping requirements.

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

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

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

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

■ 2. Section 204.4(f) is revised to read as follows:

§ 204.4 Computation of required reserves.

* * * * *

(f) For all depository institutions, Edge and Agreement corporations, and United States branches and agencies of foreign banks, required reserves are computed by applying the reserve requirement ratios below to net transaction accounts, nonpersonal time deposits, and Eurocurrency liabilities of the institution during the computation period.

Reservable liability	Reserve requirement ratio
NET TRANSACTION ACCOUNTS:	
$0 to reserve requirement exemption amount ($10.7 million)	0 percent of amount.
Over reserve requirement exemption amount ($10.7 million) and up to low reserve tranche ($55.2 million).	3 percent of amount.
Over low reserve tranche ($55.2 million)	$1,335,000 plus 10 percent of amount over $55.2 million.
Nonpersonal time deposits	0 percent.
Eurocurrency liabilities	0 percent.

By order of the Board of Governors of the Federal Reserve System, October 9, 2009.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. E9–24767 Filed 10–14–09; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

12 CFR Part 229

[Regulation CC; Docket No. R–1372]

Availability of Funds and Collection of Checks

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule; technical amendment.

SUMMARY: The Board of Governors (Board) is amending the routing number guide to next-day availability checks and local checks in Regulation CC to delete the reference to the head office of the Federal Reserve Bank of Dallas and to reassign the Federal Reserve routing symbols currently listed under that office to the head office of the Federal Reserve Bank of Cleveland. The Board is also amending the routing number guide to delete the reference to the Los Angeles branch office of the Federal Reserve Bank of San Francisco and to reassign the routing symbols currently listed under that office to the head office of the Federal Reserve Bank of Cleveland. These amendments reflect the restructuring of check-processing operations within the Federal Reserve System. The Board is also providing advance notice about anticipated future amendments in connection with the Reserve Banks' restructuring such that by early next year there will only be a single check-processing region for purposes of Regulation CC. Accordingly, at that time there will no longer be any checks that would be considered nonlocal.

DATES: The amendments to appendix A to part 229 in amendatory instruction 2 are effective October 17, 2009.

The amendments to appendix A to part 229 in amendatory instruction 3 are effective November 14, 2009.

FOR FURTHER INFORMATION CONTACT: Jeffrey S. H. Yeganeh, Financial Services Manager (202/728–5801), or Joseph P. Baressi, Financial Services Project Leader (202/452–3959), Division of Reserve Bank Operations and Payment Systems; or Dena L. Milligan, Attorney (202/452–3900), Legal Division. For users of Telecommunications Devices for the Deaf (TDD) only, contact 202/263–4869.

SUPPLEMENTARY INFORMATION:

Background

Regulation CC establishes the maximum period a depositary bank may wait between receiving a deposit and making the deposited funds available for withdrawal.[1] A depositary bank generally must provide faster availability for funds deposited by a ''local check'' than by a ''nonlocal check.'' A check is considered local if it is payable by or at or through a bank located in the same Federal Reserve check-processing region as the depositary bank.

Appendix A to Regulation CC contains a routing number guide that assists banks in identifying local and nonlocal banks and thereby determining the maximum permissible hold periods for most deposited checks. The appendix includes a list of each Federal Reserve check-processing office and the first four digits of the routing number, known as the Federal Reserve routing symbol, of each bank that is served by that office for check-processing purposes. Banks whose Federal Reserve routing symbols are grouped under the same office are in the same check-processing region and thus are local to one another.

Final Amendments to Appendix A

On October 17, 2009, the Reserve Banks will transfer the check-processing operations of the head office of the Federal Reserve Bank of Dallas to the head office of the Federal Reserve Bank of Cleveland. On November 14, 2009, the Reserve Banks will transfer the check-processing operations of the Los Angeles branch office of the Federal Reserve Bank of San Francisco to the head office of the Federal Reserve Bank of Cleveland. As a result of these changes, some checks that are drawn on and deposited at banks located in the Dallas, Los Angeles, and Cleveland check-processing regions and that currently are nonlocal checks will

[1] For purposes of Regulation CC, the term ''bank'' refers to any depository institution, including commercial banks, savings institutions, and credit unions.

become local checks subject to faster availability schedules. To assist banks in identifying local and nonlocal checks and making funds availability decisions, the Board is amending the lists of routing symbols in appendix A associated with the Federal Reserve Banks of Dallas, San Francisco, and Cleveland to reflect the transfer of check-processing operations from the Dallas head office and the Los Angeles branch office to the head office of the Federal Reserve Bank of Cleveland. To coincide with the effective date of the underlying check-processing changes, the amendments to appendix A are effective October 17 and November 14, 2009, respectively. The Board is providing notice of the amendments at this time to give affected banks ample time to make any needed processing changes. Early notice also will enable affected banks to amend their availability schedules and related disclosures if necessary and provide their customers with notice of these changes.[2]

Information About Anticipated Future Changes to Regulation CC

The Federal Reserve Banks initially announced in November 2008 that decreases in check volume necessitated transition to a single paper-check-processing site in order to comply with the cost recovery provisions of the Monetary Control Act.[3] On July 31, 2009, the Reserve Banks reaffirmed that decreasing check-processing volume was likely to necessitate the transition to a single check-processing center by the first quarter of 2010.[4] The Reserve Banks are taking these steps in response to the continued nationwide decline in check usage, as well as the rapidly increasing use of electronic check-clearing methods, and to meet the cost recovery requirements of the Monetary Control Act of 1980. For the information and planning needs of banks, the Board is today providing notice that, assuming check volumes continue to evolve in line with the Reserve Banks' expectations, the Reserve Banks intend to change their check-processing infrastructure such that by early next year there will be only a single check-processing region for purposes of Regulation CC. Accordingly, at that time there will no longer be any checks that would be considered nonlocal.

Administrative Procedure Act

The public comment requirements of section 553(b) of the Administrative Procedure Act do not apply to these amendments to Appendix A of Regulation CC because the amendments involve matters of agency organization. The Monetary Control Act requires cost recovery for Federal Reserve Bank priced services over the long term, which from time to time necessitates changes in the internal organization of Reserve Bank services in order to meet the statutory mandate. The rapid decline in paper check volumes, generally, and the decline in paper checks sent to the Reserve Banks for collection have significantly reduced the need for Federal Reserve check-processing locations and the ability of Reserve Banks to recover the costs of maintaining those locations. In order to achieve the Monetary Control Act requirement of long-run full cost recovery, the Reserve Banks have adjusted their check service infrastructure to reduce the number of check-processing regions. In light of the fact that the Reserve Banks are receiving a high percentage of checks electronically, the consolidation of check processing centers and the accompanying amendments to Appendix A of Regulation CC are required by law. As a result of the consolidation of Federal Reserve check-processing offices, amendments to Appendix A are necessary because the statutory and regulatory terms ''local'' and ''nonlocal'' are defined in terms of ''check-processing regions''—the geographic areas served by a Federal Reserve check-processing office.

In addition, the Board finds, in accordance with APA section 553(d), good cause for making the amendments to Appendix A relating to the transfer of check-processing operations from Dallas to Cleveland effective without 30 days advance publication. On August 14, 2009, the Federal Reserve Banks, by letter, informed depository institutions within Dallas's check-processing region of the October 17 transfer of check-processing operations from Dallas to Cleveland. That letter was then published on the Federal Reserve Financial Services' Web site. Accordingly, the affected depository institutions are aware of and making preparations for the transfer of paper check-processing operations from Dallas to Cleveland.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506; 5 CFR 1320 Appendix A.1), the Board has reviewed the final rule under authority delegated to the Board by the Office of Management and Budget. The technical amendments to Appendix A of Regulation CC will delete the references to the head office of the Federal Reserve Bank of Dallas and the Los Angeles branch office of the Federal Reserve Bank of San Francisco and reassign the routing symbols listed under those offices to the head office of the Federal Reserve Bank of Cleveland. The depository institutions that are located in the affected check-processing regions and that include the routing numbers in their disclosure statements would be required to notify customers of the resulting change in availability under § 229.18(e). However, the Board believes that all procedures for notifying customers of any change in funds availability are in place, and therefore, the Board anticipates that no additional burden will be imposed as a result of this rulemaking.

List of Subjects in 12 CFR Part 229

Banks, Banking, Reporting and recordkeeping requirements.

Authority and Issuance

■ For the reasons set forth in the preamble, the Board is amending 12 CFR part 229 to read as follows:

PART 229—AVAILABILITY OF FUNDS AND COLLECTION OF CHECKS (REGULATION CC)

■ 1. The authority citation for part 229 continues to read as follows:

Authority: 12 U.S.C. 4001–4010, 12 U.S.C. 5001–5018.

■ 2. Effective October 17, 2009, the Fourth and Eleventh District routing symbol lists in appendix A are amended by removing the headings and listings for the Eleventh Federal Reserve District and revising the listings for the Fourth Federal Reserve District to read as follows:

APPENDIX A To Part 229—Routing Number Guide To Next-Day Availability Checks and Local Checks

* * * * *

Fourth Federal Reserve District

[Federal Reserve Bank of Cleveland]

Head Office

0220–2220
0223–2223
0410–2410
0412–2412

[2] Section 229.18(e) of Regulation CC requires that banks notify account holders who are consumers within 30 days after implementing a change that improves the availability of funds.

[3] See *http://www.frbservices.org/files/communications/pdf/check/110608_restructure_announcement.pdf.*

[4] See *http://www.frbservices.org/files/communications/pdf/check/073109_check_restructure_acceleration.pdf.*

0420–2420
0421–2421
0422–2422
0423–2423
0430–2430
0432–2432
0433–2433
0434–2434
0440–2440
0441–2441
0442–2442
0515–2515
0519–2519
0710–2710
0711–2711
0712–2712
0719–2719
0720–2720
0724–2724
0730–2730
0739–2739
0740–2740
0749–2749
0750–2750
0759–2759
0813–2813
0830–2830
0839–2839
0863–2863
0910–2910
0911–2911
0912–2912
0913–2913
0914–2914
0915–2915
0918–2918
0919–2919
0920–2920
0921–2921
0929–2929
0960–2960
1010–3010
1011–3011
1012–3012
1019–3019
1020–3020
1021–3021
1022–3022
1023–3023
1030–3030
1031–3031
1039–3039
1040–3040
1041–3041
1049–3049
1070–3070
1110–3110
1111–3111
1113–3113
1119–3119
1120–3120
1122–3122
1123–3123
1130–3130
1131–3131
1140–3140
1149–3149
1163–3163

* * * * *

■ 3. Effective November 14, 2009, the Fourth and Twelfth District routing symbol lists in appendix A are amended by removing the headings and listings for the Twelfth Federal Reserve District and revising the listings for the Fourth Federal Reserve District to read as follows:

APPENDIX A TO PART 229—ROUTING NUMBER GUIDE TO NEXT-DAY AVAILABILITY CHECKS AND LOCAL CHECKS

* * * * *

Fourth Federal Reserve District

[Federal Reserve Bank of Cleveland]

Head Office

0220–2220
0223–2223
0410–2410
0412–2412
0420–2420
0421–2421
0422–2422
0423–2423
0430–2430
0432–2432
0433–2433
0434–2434
0440–2440
0441–2441
0442–2442
0515–2515
0519–2519
0710–2710
0711–2711
0712–2712
0719–2719
0720–2720
0724–2724
0730–2730
0739–2739
0740–2740
0749–2749
0750–2750
0759–2759
0813–2813
0830–2830
0839–2839
0863–2863
0910–2910
0911–2911
0912–2912
0913–2913
0914–2914
0915–2915
0918–2918
0919–2919
0920–2920
0921–2921
0929–2929
0960–2960
1010–3010
1011–3011
1012–3012
1019–3019
1020–3020
1021–3021
1022–3022
1023–3023
1030–3030
1031–3031
1039–3039
1040–3040
1041–3041
1049–3049
1070–3070
1110–3110
1111–3111
1113–3113
1119–3119
1120–3120
1122–3122
1123–3123
1130–3130
1131–3131
1140–3140
1149–3149
1163–3163
1210–3210
1211–3211
1212–3212
1213–3213
1220–3220
1221–3221
1222–3222
1223–3223
1224–3224
1230–3230
1231–3231
1232–3232
1233–3233
1240–3240
1241–3241
1242–3242
1243–3243
1250–3250
1251–3251
1252–3252

* * * * *

By order of the Board of Governors of the Federal Reserve System, acting through the Secretary of the Board under delegated authority, October 8, 2009.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. E9–24634 Filed 10–14–09; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2009–0909; Directorate Identifier 2009–NM–172–AD; Amendment 39–16045; AD 2007–23–05 R1]

RIN 2120–AA64

Airworthiness Directives; Saab AB, Saab Aerosystems Model SAAB 2000 Airplanes

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

ACTION: Final rule; request for comments.

SUMMARY: We are adopting a new airworthiness directive (AD) for the products listed above that would revise an existing AD. This AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

Subsequent to accidents involving Fuel Tank System explosions in flight * * * and on ground, * * * Special Federal Aviation Regulation 88 (SFAR88) * * * required a safety review of the aircraft Fuel Tank System * * *.

* * * * *

Fuel Airworthiness Limitations are items arising from a systems safety analysis that have been shown to have failure mode(s) associated with an 'unsafe condition' * * *. These are identified in Failure Conditions for which an unacceptable probability of ignition risk could exist if specific tasks and/or practices are not performed in accordance with the manufacturers' requirements.

This AD requires actions that are intended to address the unsafe condition described in the MCAI.

DATES: This AD becomes effective October 30, 2009.

On December 11, 2007 (72 FR 62564, November 6, 2007), the Director of the Federal Register approved the incorporation by reference of certain publications listed in the AD.

We must receive comments on this AD by November 30, 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 W12–40, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this AD, contact Saab Aircraft AB, SAAB Aerosystems, SE 581 88, Linköping, Sweden; telephone +46 13 18 5591; fax +46 13 18 4874; e-mail *saab2000.techsupport@saabgroup.com;* Internet *http://www.saabgroup.com.*

Examining the AD Docket

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

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

SUPPLEMENTARY INFORMATION:

Discussion

On October 27, 2007, we issued AD 2007–23–05, Amendment 39–15251 (72 FR 62564, November 6, 2007). That AD applied to all Saab Model SAAB 2000 airplanes. That AD required revising the Airworthiness Limitations Section (ALS) of the Instructions for Continued Airworthiness.

Critical design configuration control limitations (CDCCLs) are limitation requirements to preserve a critical ignition source prevention feature of the fuel tank system design that is necessary to prevent the occurrence of an unsafe condition. The purpose of a CDCCL is to provide instruction to retain the critical ignition source prevention feature during configuration change that may be caused by alterations, repairs, or maintenance actions. A CDCCL is not a periodic inspection.

Since we issued that AD, we have determined that it is necessary to clarify the AD's intended effect on spare and on-airplane fuel tank system components, regarding the use of maintenance manuals and instructions for continued airworthiness.

Section 91.403(c) of the Federal Aviation Regulations (14 CFR 91.403(c)) specifies the following:

No person may operate an aircraft for which a manufacturer's maintenance manual or instructions for continued airworthiness has been issued that contains an airworthiness limitation section unless the mandatory * * * procedures * * * have been complied with.

Some operators have questioned whether existing components affected by the new CDCCLs must be reworked. We did not intend for the AD to retroactively require rework of components that had been maintained using acceptable methods before the effective date of the AD. Owners and operators of the affected airplanes therefore are not required to rework affected components identified as airworthy or installed on the affected airplanes before the required revisions of the ALS. But once the CDCCLs are incorporated into the ALS, future maintenance actions on components must be done in accordance with those CDCCLs.

FAA's Determination

This product has been approved by the aviation authority of another country, and is approved for operation in the United States.

Differences Between the AD and the MCAI or Service Information

We have reviewed the MCAI and related service information and, in general, agree with their substance. But we might have found it necessary to use different words from those in the MCAI to ensure the AD is clear for U.S. operators and is enforceable. In making these changes, we do not intend to differ substantively from the information provided in the MCAI and related service information.

We might also have required different actions in this AD from those in the MCAI in order to follow FAA policies. Any such differences are highlighted in a note within the AD.

FAA's Justification and Determination of the Effective Date

This revision merely clarifies the intended effect on spare and on-airplane fuel tank system components, and makes no substantive change to the AD's requirements. For this reason, it is found that notice and opportunity for prior public comment for this action are unnecessary, and 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 precede it by notice and opportunity for public comment. We invite you to send any written relevant data, views, or arguments about this AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2009–0909; Directorate Identifier 2009–NM–172–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

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

For the reasons discussed above, I certify this AD:

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

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

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

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

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 removing amendment 39–15251 (72 FR 62564, November 6, 2007) and adding the following new AD:

2007–23–05 R1 Saab AB, Saab Aerosystems: Amendment 39–16045. Docket No. FAA–2009–0909; Directorate Identifier 2009–NM–172–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective October 30, 2009.

Affected ADs

(b) This AD revises AD 2007–23–05.

Applicability

(c) This AD applies to all Saab AB, Saab Aerosystems Model SAAB 2000 airplanes, certificated in any category, all serial numbers.

Note 1: This AD requires revisions to certain operator maintenance documents to include new inspections. Compliance with these inspections is required by 14 CFR 91.403(c). For airplanes that have been previously modified, altered, or repaired in the areas addressed by these inspections, the operator may not be able to accomplish the inspections described in the revisions. In this situation, to comply with 14 CFR 91.403(c), the operator must request approval for an alternative method of compliance according to paragraph (g) of this AD. The request should include a description of changes to the required inspections that will ensure the continued operational safety of the airplane.

Subject

(d) Air Transport Association (ATA) of America Code 28: Fuel.

Reason

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

Subsequent to accidents involving Fuel Tank System explosions in flight * * * and on ground, the FAA published Special Federal Aviation Regulation 88 (SFAR 88) in June 2001. SFAR 88 required a safety review of the aircraft Fuel Tank System to determine that the design meets the requirements of FAR (Federal Aviation Regulation) § 25.901 and § 25.981(a) and (b).

A similar regulation has been recommended by the JAA (Joint Aviation Authorities) to the European National Aviation Authorities in JAA letter 04/00/02/07/03–L024 of 3 February 2003. The review was requested to be mandated by NAA's (National Aviation Authorities) using JAR (Joint Aviation Regulation) § 25.901(c), § 25.1309.

In August 2005 EASA (European Aviation Safety Agency) published a policy statement on the process for developing instructions for maintenance and inspection of Fuel Tank System ignition source prevention (EASA D 2005/CPRO, *www.easa.eu.int/home/cert_policy_statements_en.html*) that also included the EASA expectations with regard to compliance times of the corrective actions on the unsafe and the not unsafe part of the harmonised design review results. On a global scale the TC (type certificate) holders committed themselves to the EASA published compliance dates (see EASA policy statement). The EASA policy statement has been revised in March 2006: the date of 31–12–2005 for the unsafe related actions has now been set at 01–07–2006.

Fuel Airworthiness Limitations are items arising from a systems safety analysis that have been shown to have failure mode(s) associated with an 'unsafe condition' as defined in FAA's memo 2003–112–15 'SFAR 88—Mandatory Action Decision Criteria'. These are identified in Failure Conditions for which an unacceptable probability of ignition risk could exist if specific tasks and/or practices are not performed in accordance with the manufacturers' requirements.

This EASA Airworthiness Directive mandates the Fuel System Airworthiness Limitations (comprising maintenance/inspection tasks and Critical Design Configuration Control Limitations (CDCCL)) for the type of aircraft, that resulted from the design reviews and the JAA recommendation and EASA policy statement mentioned above.

The corrective action is revising the Airworthiness Limitations Section (ALS) of the Instructions for Continued Airworthiness to incorporate new limitations for fuel tank systems.

Restatement of AD 2007–23–05, With No Changes

Actions and Compliance

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

(1) Within 3 months after December 11, 2007 (the effective date of AD 2007–23–05), revise the ALS of the Instructions for Continued Airworthiness to incorporate the maintenance and inspection instructions in Part 1 of Saab Fuel Airworthiness Limitations 2000 LKS 009032, dated February 14, 2006. For all tasks identified in Part 1 of Saab Fuel Airworthiness Limitations 2000 LKS 009032, dated February 14, 2006, the initial compliance times start from December 11, 2007, and the repetitive inspections must be accomplished thereafter at the interval specified in Part 1 of Saab Fuel Airworthiness Limitations 2000 LKS 009032, dated February 14, 2006.

(2) Within 12 months after December 11, 2007, revise the ALS of the Instructions for Continued Airworthiness to incorporate the CDCCLs as defined in Part 2 of Saab Fuel Airworthiness Limitations 2000 LKS 009032, dated February 14, 2006.

(3) Except as provided by paragraph (g) of this AD: After accomplishing the actions specified in paragraphs (f)(1) and (f)(2) of this AD, no alternative inspection, inspection intervals, or CDCCLs may be used.

(4) Where Saab Fuel Airworthiness Limitations 2000 LKS 009032, dated February 14, 2006, allows for exceptional short-term extensions, an exception is acceptable to the FAA if it is approved by the appropriate principal inspector in the FAA Flight Standards Certificate Holding District Office.

New Information:

Explanation of CDCCL Requirements

Note 2: Notwithstanding any other maintenance or operational requirements, components that have been identified as airworthy or installed on the affected airplanes before the revision of the airworthiness limitations section (ALS), as required by paragraph (f) of this AD, do not need to be reworked in accordance with the

CDCCLs. However, once the airworthiness limitations section has been revised, future maintenance actions on these components must be done in accordance with the CDCCLs.

FAA AD Differences

Note 3: This AD differs from the MCAI and/or service information as follows: No differences.

Other FAA AD Provisions

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

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Shahram Daneshmandi, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1112; fax (425) 227–1149. Before using any approved AMOC on any airplane to which the AMOC applies, notify your 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.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(3) *Reporting Requirements:* For any reporting requirement in this AD, under the provisions of the Paperwork Reduction Act, the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120–0056.

Related Information

(h) Refer to MCAI European Aviation Safety Agency Airworthiness Directive 2006–0199, dated July 11, 2006; and Saab Fuel Airworthiness Limitations 2000 LKS 009032, dated February 14, 2006; for related information.

Material Incorporated by Reference

(i) You must use Saab Fuel Airworthiness Limitations 2000 LKS 009032, dated February 14, 2006, to do the actions required by this AD, unless the AD specifies otherwise.

(1) The Director of the Federal Register previously approved the incorporation by reference of this service information on December 11, 2007 (72 FR 62564, November 6, 2007).

(2) For service information identified in this AD, contact Saab Aircraft AB, SAAB Aerosystems, SE 581 88, Linköping, Sweden; telephone +46 13 18 5591; fax +46 13 18 4874; e-mail *saab2000.techsupport@saabgroup.com;* Internet *http://www.saabgroup.com.*

(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 September 18, 2009.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E9–24542 Filed 10–14–09; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Parts 730, 734, 738, 740, 742, 744, 772 and 774

[Docket No. 080211163–9110–02]

RIN 0694–AE18

Encryption Simplification Rule: Final

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Final rule.

SUMMARY: The Bureau of Industry and Security (BIS) published the interim final rule entitled ''Encryption Simplification'' on October 3, 2008 (73 FR 57495). This rule finalizes that rule, corrects errors published in the October 3, 2008 interim final rule, and resolves inconsistencies in that rule identified by the public.

DATES: *Effective Dates:* This rule is effective October 15, 2009.

ADDRESSES: Written comments on this final rule may be sent by e-mail to *publiccomments@bis.doc.gov.* Include ''Encryption rule'' in the subject line of the message. Comments may also be submitted by mail or hand delivery to Sharron Cook, Office of Exporter Services, Regulatory Policy Division, Bureau of Industry and Security, Department of Commerce, 14th St. & Pennsylvania Avenue, NW., Room 2705, Washington, DC 20230, ATTN: Encryption rule; or by fax to (202) 482–3355.

FOR FURTHER INFORMATION CONTACT: For questions of a general nature contact Sharron Cook, Office of Exporter Services, Regulatory Policy Division at (202) 482–2440 or e-mail: *scook@bis.doc.gov.*

For questions of a technical nature contact: The Information Technology Division, Office of National Security and Technology Transfer Controls at 202–482–0707 or e-mail: C. Randall Pratt at *cpratt@bis.doc.gov.*

SUPPLEMENTARY INFORMATION:

Background

BIS published the interim final rule entitled ''Encryption Simplification'' on October 3, 2008 (73 FR 57495). This rule removed section 744.9 of the EAR, which set forth requirements for authorization from BIS for U.S. persons to provide technical assistance (including training) to foreign persons with the intent to aid a foreign person in the development or manufacture outside the United States of encryption commodities or software that, if of U.S.-origin, would be ''EI'' controlled under ECCNs 5A002 or 5D002. Section 744.9 was added to the EAR in 1996 when jurisdiction over dual-use encryption items was transferred from the Department of State to the Department of Commerce. However, other parts of the EAR that referred to section 744.9 were inadvertently not removed. Therefore, this rule removes these references in § 730.5(d), § 734.5(c), § 736.2(b)(7)(ii), and § 744.1(a)(1). In addition, other corrections are made to harmonize with revisions made in the ''Encryption Simplification'' rule published on October 3, 2008. Some of the revisions in this rule are the results of requests for clarification from the public on the October 3 encryption simplification rule.

Part 730

The last sentence in paragraph (d) of section 730.5 is removed, because it makes reference to technical assistance in section 744.9, which was removed by the October 3 encryption simplification rule.

Part 734

Section 734.4 is amended to revise paragraphs (b)(1) and (b)(2) in order to harmonize with the October 3 encryption simplification rule and corrections thereto. Paragraph (b)(1)(iv) is added to conform with the clarifications in this correction by making it clear that section 740.17(b)(4) is a separate authorization. Paragraph (b)(2) is revised to simply state that all items classified under ECCNs 5A992, 5D992, or 5E992 are eligible for consideration under the *de minimis* rules. Paragraph (c) of section 734.5 is removed because it refers to technical assistance in section 744.9, which was

removed by the October 3 encryption simplification rule.

Part 736

Paragraph (b)(7)(ii) of section 736.2 is removed and reserved, because it refers to technical assistance in section 744.9, which was removed by the October 3 encryption simplification rule.

Part 738

Paragraph (a)(2)(ii)(B) of section 738.4 is amended by removing a reference to the mass market review requirements in section 742.15(b) for 5A992 and 5D992, and replacing it with an instruction that the export may be executed under the No License Required (NLR) principle unless the License Requirement section refers the reader to another section of the EAR. *E.g.,* in ECCN 5A002 the License Requirement section not only refers the reader to the Commerce Country Chart in Supplement No. 1 of part 738, but it also refers the reader to section 742.15 of the EAR to determine license requirements.

Part 740

Section 740.17(b)(1)–(3): paragraph (b) is changed for clarity, transparency, and simplification of language authorizing export after review. Authorization language to Supplement 3 countries under the subparagraphs of (b)(1) was complex and confusing to exporters. Under the reorganization of License Exception ENC, there is no need to exclude exports to countries listed in Supplement 3 from authorization under paragraphs (b)(2) and (b)(3). Such exclusions are removed here. Once a review has been submitted, Paragraph (b)(1)(i) is intended to authorize immediate export to the Supplement 3 countries of all encryption items (except ''cryptanalytic items'' to ''government end-users''). After the review is complete, all items except technology and Open Cryptographic Interfaces (OCIs) are authorized by paragraphs (b)(2), (b)(3), or (b)(4). As the language has been revised, four sets of authorization language will cover almost all items authorized for export and reexport. The four authorizations will be:

(a) and (b)(1)(i) technology and OCI;
(a) and (b)(2) ENC restricted commodities and software;
(a) and (b)(3) ENC unrestricted commodities and software; and
(b)(4) ENC commodities and software as described.

Prior to the implementation of this final rule, paragraph (b)(4) authorized immediate export under (b)(2) or (b)(3) for source code and key length limited items. However, with the authorization under (b)(4), it was no longer clear that (b)(2) items were not authorized for immediate export to ''government end-users'' outside the Supplement 3 countries. The added language implemented by this rule makes clear that this continues to be true. Products that would not be authorized for permanent export to certain ''government end-users'' should not be authorized for temporary export to those end-users.

This rule revises section 740.17(b)(1)(i) of the EAR to remove the phrase ''(excluding source code),'' because BIS has received a number of inquires from the public who are confused by this phrase appearing in this paragraph. This paragraph describes exports and reexports to government end-users and non-government end-users located in a country listed in Supplement No. 3 of section 740.17 of the EAR that are eligible for License Exception ENC once a review request is registered with BIS, including commodities and software that are pending review (under section 742.15(b)) for mass market treatment (ECCNs 5A992.c and 5D992.c). Encryption source code is not eligible for such mass market treatment. This is what the phrase ''(excluding source code)'' refers to. Although this phrase only refers to software that is pending review for mass market treatment (under section 742.15(b)), and thus does not pertain to any other License Exception ENC-eligible encryption source code (e.g., as described in section 740.17(b)(2)(ii)), it has nonetheless proven confusing and so is being removed.

This rule revises section 740.17(b)(4) to fix an incorrect citation and clarify concerning what is authorized by each subsection of paragraph (b)(4). Paragraph (b)(4) should contain specific authorization language like all other License Exception ENC paragraphs. The addition of the introductory sentence accomplishes this. The second sentence makes it clear that paragraph (b)(4)(ii) does not authorize subsequent export from the United States of the foreign developed products.

This rule adds text to sections 740.17(b)(4)(ii) and 742.15(b)(2) to provide clarification to the regulated community that foreign products developed with or incorporating U.S.-origin encryption source code authorized for export under License Exception TSU (section 740.13(e)) that are subject to the EAR are also excluded from review requirements and that after a mass market review request is submitted, there is no waiting period for export to certain end-users as authorized by sections 740.17(a) and 740.17(b)(1)(i), or for certain encryption items as authorized by section 740.17(b)(1)(ii).

This rule also makes slight editorial corrections to sections 740.9(c)(3), 740.13(d)(2), 740.17(b)(2)(ii) and 740.17(e)(1)(i)(C).

Part 742

The second sentence in paragraph (b)(1) of section 742.15 is revised and the fourth sentence removed to conform to the new mandatory SNAP–R procedures (published August 21, 2008, effective October 20, 2008, 73 FR 49323) for submission of review requests.

Supplement No. 6 to part 742 ''Guidelines for Submitting Review Requests for Encryption Items'' is amended by removing the fourth and fifth sentences of the introductory paragraph to harmonize with the new mandatory SNAP–R procedures (published August 21, 2008, effective October 20, 2008, 73 FR 49323) for submission of review requests. This rule adds text to introductory paragraph (a), which was inadvertently omitted in the October 3 rule, explaining that appropriate technical information must accompany the review request. This language was in the introductory paragraph to Supplement 6 prior to the October 3 publication. The intent was to move it to paragraph (a) where it would be more visible. Instead it was inadvertently removed. Also, paragraph (c)(6) is corrected to refer to ECC (elliptic curve cryptography), as opposed to ECCN (Export Control Classification Number).

Part 744

The fifth sentence in paragraph (a)(1) of section 744.1 of the EAR is removed, because it refers to section 744.9, which was removed by the October 3 encryption simplification rule.

Part 772

Exporters have been confused by the Nota Bene to the ''personal area network'' (PAN) definition. This rule deletes some of the text in that note for clarity. In one of the deleted sentences, the words ''enterprise'' and ''long range'' in the absence of a specific 30 meter range limitation could be read to include intermediate-range devices. What is authorized by section 740.17(b)(4)(iii) are certain ''PAN'' items with nominal operating ranges not exceeding 30 meters. This rule deletes other text where the language could also be misunderstood to describe items clearly not eligible for section 740.17(b)(4)(iii) treatment. ''PAN'' items are not necessarily eligible for section

740.17(b)(4)(iii). Eliminating the confusing examples should help the public understand why a ''data capable wireless telephone'', for example, is not eligible for section 740.17(b)(4)(iii) self-classification.

In addition, this rule revises the Nota Bene for the term ''ancillary cryptography'' by making editorial clarifications, as well as adding a footnote to clarify that for the purpose of this definition, the term 'transportation systems' does not include any Automatic Identification System (AIS)/Vessel Traffic Service (VTS). Secure AIS/VTS and their maritime applications are not considered ''ancillary cryptography''.

Supplement No. 1 to Part 774—Commerce Control List

ECCN 5B002 is amended by adding License Exception ENC to the License Exception section to clarify that this ECCN may be considered for License Exception ENC eligibility.

ECCN 5E002 is amended by adding License Exception ENC to the License Exception section to clarify that this ECCN may be considered for License Exception ENC eligibility.

ECCN 5E992 is amended by inserting ''according to the General Technology Note'' into the heading to more clearly define the scope of this ECCN.

Although the Export Administration Act expired on August 20, 2001, the President, through Executive Order 13222 of August 17, 2001, 3 CFR, 2001 Comp., p. 783 (2002), as extended by the Notice of August 13, 2009 (74 Fed. Reg. 41,325 (August 14, 2009)), has continued the Export Administration Regulations in effect under the International Emergency Economic Powers Act.

Rulemaking Requirements

1. This final correction rule has been determined to be significant for purposes of Executive Order 12866.

2. Notwithstanding any other provision of law, no person is required to respond to, nor shall any person 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 two collections of information subject to the PRA. One of the collections has been approved by OMB under control number 0694 0088, ''Multi Purpose Application,'' and carries a burden hour estimate of 58 minutes for a manual or electronic submission. The other collection has been approved by OMB under control number 0694–0104, ''Commercial Encryption Items Under the Jurisdiction of the Department of Commerce,'' and carries a burden hour estimate of 7 hours for a manual or electronic submission. Send comments regarding these burden estimates or any other aspect of these collections of information, including suggestions for reducing the burden, to Jasmeet Seehra, OMB Desk Officer, by e-mail at *jseehra@omb.eop.gov* or by fax to (202) 395–7285; and to the Office of Administration, Bureau of Industry and Security, Department of Commerce, 14th and Pennsylvania Avenue, NW., Room 6622, Washington, DC 20230.

3. This rule does not contain policies with Federalism implications as that term is defined under 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 and foreign affairs function of the United States (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 final rule. Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule under the Administrative Procedure Act or by any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are not applicable. Therefore, this correction regulation is issued in final form. Although there is no formal comment period, public comments on this regulation are welcome on a continuing basis. Comments should be submitted to Sharron Cook, Office of Exporter Services, Bureau of Industry and Security, Department of Commerce, 14th and Pennsylvania Ave., NW., Room 2705, Washington, DC 20230.

List of Subjects

15 CFR Part 730

Administrative practice and procedure, Advisory committees, Exports, Reporting and recordkeeping requirements, Strategic and critical materials.

15 CFR Part 734

Administrative practice and procedure, Exports, Inventions and patents, Research Science and technology.

15 CFR Parts 738 and 772

Exports.

15 CFR Part 740

Administrative practice and procedure, Exports, Reporting and recordkeeping requirements.

15 CFR Part 742

Exports, Terrorism.

15 CFR Part 744

Exports, Reporting and recordkeeping requirements, Terrorism.

15 CFR Part 774

Exports, Reporting and recordkeeping requirements.

■ Accordingly, parts 730, 734, 738, 740, 742, 744, 772, and 774 of the Export Administration Regulations (15 CFR parts 730–774) are amended as follows:

PART 730—[AMENDED]

■ 1. The authority citation for part 730 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. 2151 note; 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. 11912, 41 FR 15825, 3 CFR, 1976 Comp., p. 114; E.O. 12002, 42 FR 35623, 3 CFR, 1977 Comp., p. 133; E.O. 12058, 43 FR 20947, 3 CFR, 1978 Comp., p. 179; E.O. 12214, 45 FR 29783, 3 CFR, 1980 Comp., p. 256; E.O. 12851, 58 FR 33181, 3 CFR, 1993 Comp., p. 608; E.O. 12854, 58 FR 36587, 3 CFR, 1993 Comp., p. 179; E.O. 12918, 59 FR 28205, 3 CFR, 1994 Comp., p. 899; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 12947, 60 FR 5079, 3 CFR, 1995 Comp., p. 356; E.O. 12981, 60 FR 62981, 3 CFR, 1995 Comp., p. 419; E.O. 13020, 61 FR 54079, 3 CFR, 1996 Comp., p. 219; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13099, 63 FR 45167, 3 CFR, 1998 Comp., p. 208; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; E.O. 13224, 66 FR 49079, 3 CFR, 2001 Comp., p. 786; E.O. 13338, 69 FR 26751, May 13, 2004; Notice of August 13, 2009, 74 FR 41,325 (August 14, 2009); November 10, 2008, 73 FR 67097 (November 12, 2008).

§ 730.5 [Amended]

■ 2. Section 730.5 is amended by removing the last sentence in paragraph (d).

PART 734—[AMENDED]

■ 3. The authority citation for part 734 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 13020, 61 FR 54079, 3 CFR, 1996 Comp., p. 219; 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 August 13, 2009, 74 FR 41,325 (August 14, 2009); November 10, 2008, 73 FR 67097 (November 12, 2008).

■ 4. Section 734.4 is amended by:
■ a. Revising paragraphs (b)(1)(ii), and (b)(1)(iii);
■ b. Adding a new paragraph (b)(1)(iv); and
■ c. Revising paragraph (b)(2) and the note to paragraph (b) to read as follows:

§ 734.4 De Minimis U.S. Content.

* * * * *

(b) * * *

(1) * * *

(ii) Authorized for License Exception ENC by BIS after a review pursuant to § 740.17(b)(3) of the EAR;

(iii) Authorized for License Exception ENC by BIS after a review pursuant to § 740.17(b)(2), and the foreign made product will not be sent to any destination in Country Group E:1 in Supplement No. 1 to part 740 of the EAR; or

(iv) Authorized for License Exception ENC pursuant to § 740.17(b)(4).

(2) U.S. origin encryption items classified under ECCNs 5A992, 5D992, or 5E992.

Note to paragraph (b): See supplement No. 2 to this part for *de minimis* calculation procedures and reporting requirements.

* * * * *

§ 734.5 [Amended]

■ 5. Section 734.5 is amended by removing paragraph (c).

PART 738—[AMENDED]

■ 6. The authority citation for part 738 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 August 13, 2009, 74 FR 41,325 (August 14, 2009).

■ 7. Section 738.4 is amended by revising paragraph (a)(2)(ii)(B) to read as follows:

§ 738.4 Determining whether a license is required.

(a) * * *

(2) * * *

(ii) * * *

(B) If *no,* a license is not required based on the particular Reason for Control and destination. Provided that General Prohibitions Four through Ten do not apply to your proposed transaction and the License Requirement section does not refer you to any other part of the EAR to determine license requirements. For example, any applicable review requirements described in § 742.15(b) of the EAR must be met for certain mass market encryption items to effect your shipment using the symbol ''NLR.'' Proceed to parts 758 and 762 of the EAR for information on export clearance procedures and recordkeeping requirements. Note that although you may stop after determining a license is required based on the first Reason for Control, it is best to work through each applicable Reason for Control. A full analysis of every possible licensing requirement based on each applicable Reason for Control is *required* to determine the most advantageous License Exception available for your particular transaction and, if a license is required, ascertain the scope of review conducted by BIS on your license application.

* * * * *

PART 740—[AMENDED]

■ 8. The authority citation for part 740 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; 22 U.S.C. 7201 *et seq.*; 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 August 13, 2009, 74 Fed. Reg. 41325 (August 14, 2009).

§ 740.9 [Amended]

■ 9. Section 740.9 is amended by revising the citation ''742.15(b)(2)'' to read ''742.15(b)'' in paragraph (c)(3).

■ 10. Section 740.13 is amended by revising the last two sentences of paragraph (d)(2) to read as follows:

§ 740.13 Technology and Software—Unrestricted (TSU).

* * * * *

(d) * * *

(2) *Exclusions.* * * * (Once such mass market encryption software has been reviewed by BIS and released from ''EI'' and ''NS'' controls pursuant to § 742.15(b) of the EAR, it is controlled under ECCN 5D992.c and is thus outside the scope of License Exception TSU.) See § 742.15(b) of the EAR for exports and reexports of mass market encryption products controlled under ECCN 5D992.c.

* * * * *

■ 11. Section 740.17 is amended by:
■ a. Removing the phrase ''(excluding source code)'' from paragraph (b)(1)(i);
■ b. Revising paragraph (b)(1)(ii);
■ c. Revising the introductory paragraph to (b)(2);
■ d. Removing the phrase ''encryption source code that is not otherwise eligible'' and adding the phrase ''encryption source code is not otherwise eligible'' in its place in paragraph (b)(2)(ii);
■ e. Removing the phrase ''Supplement No. 3 to this part or'' in paragraph (b)(3);
■ f. Adding a new first sentence to paragraph (b)(4) introductory text;
■ g. Revising paragraph (b)(4)(ii); and
■ h. Adding a comma after ''open cryptographic interface'', and removing the phrase ''exported to a foreign developer'' and adding the phrase ''to a foreign developer'' in its place in paragraph (e)(1)(i)(C).

The revisions and additions read as follows:

§ 740.17 Encryption Commodities, Software and Technology (ENC).

* * * * *

(b) * * *

(1) * * *

(ii) *Export and reexport to countries not listed in Supplement No. 3 of this part.* License Exception ENC authorizes the export and reexport of the following commodities and software (except certain exports and reexports to ''government end-users'' as further described in paragraph (b)(2) of this section, or any ''open cryptographic interface'' item):

* * * * *

(2) *Review required with 30 day wait (non-''government end-users'' only).* Thirty (30) days after your review request is registered with BIS in accordance with paragraph (d) of this section and subject to the reporting requirements in paragraph (e) of this section, License Exception ENC authorizes the export or reexport of the following commodities and software to ''government end-users'' located or headquartered in a country listed in Supplement 3 to this part, and also to non-''government end-users'' located in a country not listed in Country Group E:1 of Supplement No. 1 to part 740 of the EAR:

* * * * *

(4) *Items excluded from review requirements.* License Exception ENC authorizes the export and reexport of the commodities and software described in this paragraph (b)(4) without review (for encryption reasons) by BIS, except that paragraph (b)(4)(ii) of this section does not authorize exports from the United States of foreign products developed with or incorporating U.S.-origin encryption source code, components, or toolkits.

* * * * *

(ii) *Foreign products developed with or incorporating U.S.-origin encryption*

source code, components, or toolkits. Foreign products developed with or incorporating U.S.-origin encryption source code, components or toolkits that are subject to the EAR, provided that the U.S.-origin encryption items have previously been reviewed and authorized by BIS (or else authorized for export under License Exception TSU upon meeting the notification requirements of section 740.13(e) of the EAR, without need for further review) and the cryptographic functionality has not been changed. Such products include foreign-developed products that are designed to operate with U.S. products through a cryptographic interface.

* * * * *

PART 742—[AMENDED]

■ 12. The authority citation for part 742 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; 22 U.S.C. 3201 *et seq.*; 42 U.S.C. 2139a; 22 U.S.C. 7201 *et seq.*; 22 U.S.C. 7210; Sec 1503, Pub. L. 108–11, 117 Stat. 559; E.O. 12058, 43 FR 20947, 3 CFR, 1978 Comp., p. 179; E.O. 12851, 58 FR 33181, 3 CFR, 1993 Comp., p. 608; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Presidential Determination 2003–23 of May 7, 2003, 68 FR 26459, May 16, 2003; Notice of August 13, 2009, 74 Fed. Reg. 41,325 (August 14, 2009); November 10, 2008, 73 FR 67097 (November 12, 2008).

■ 13. Section 742.15 is amended by:
■ a. Revising the second sentence and removing the fourth sentence in paragraph (b)(1); and
■ b. Adding a Note in parentheses after the first sentence in paragraph (b)(2).

The revision and addition read as follows:

§ 742.15 Encryption items.

* * * * *

(b) * * *

(1) *Procedures for requesting review.* * * * Review requests must be submitted to BIS in accordance with §§ 748.1 and 748.3 of the EAR. See paragraph (r) of Supplement No. 2 to part 748 of the EAR for special instructions about this submission. Submissions to the ENC Encryption Request Coordinator should be directed to the mailing address indicated in § 740.17(e)(1)(ii) of the EAR. BIS will notify you if there are any questions concerning your request for review (e.g., because of missing or incompatible support documentation). * * *

(2) *Action by BIS.* * * * (Note that once a mass market review request is submitted, there is no waiting period for export or reexport under License Exception ENC to certain end users as authorized by §§ 740.17(a) and (b)(1)(i), or for certain items as authorized by § 740.17(b)(1)(ii), while the mass market request is pending review with BIS.) * * *

* * * * *

■ 14. Supplement No. 6 to part 742 is amended by:
■ a. Revising the introductory text;
■ b. Adding paragraph (a) introductory text; and
■ c. Revising the acronym ''ECCN'' to read ''ECC'' in paragraph (c)(6).

The revision and addition read as follows:

Supplement No. 6 to Part 742—Guidelines for Submitting Review Requests for Encryption Items

Review requests for encryption items must include all of the documentation described in this supplement and be submitted to BIS in accordance with §§ 748.1 and 748.3 of the EAR. To ensure that your review request is properly routed, insert the phrase ''Mass market encryption'', ''License Exception ENC'' or ''Other Encryption'' (whichever is applicable) in Block 9 (Special Purpose) of the application form and place an ''X'' in the box marked ''Classification Request'' in Block 5 (Type of Application)—Block 5 does not provide a separate item to check for the submission of encryption review requests. Failure to properly complete these items may delay consideration of your review request.

In addition, you must send a copy of your review request and all support documents to: Attn: ENC Encryption Request Coordinator, 9800 Savage Road, Suite 6940, Fort Meade, MD 20755–6000.

If you intend to rely on the 30 day registration provisions of the regulations, express mail certification of these documents is needed.

(a) For all review requests of encryption items, you must provide brochures or other documentation or specifications related to the technology, commodity or software, relevant product descriptions, architecture specifications, and as necessary for the technical review, source code. In addition, you must provide the following information in a cover letter accompanying your review request:

* * * * *

PART 744—[AMENDED]

■ 15. The authority citation for part 744 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; 22 U.S.C. 3201 *et seq.*; 42 U.S.C. 2139a; 22 U.S.C. 7201 *et seq.*; 22 U.S.C. 7210; E.O. 12058, 43 FR 20947, 3 CFR, 1978 Comp., p. 179; E.O. 12851, 58 FR 33181, 3 CFR, 1993 Comp., p. 608; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 12947, 60 FR 5079, 3 CFR, 1995 Comp., p. 356; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13099, 63 FR 45167, 3 CFR, 1998 Comp., p. 208; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; E.O. 13224, 66 FR 49079, 3 CFR, 2001 Comp., p. 786; Notice of August 13, 2009, 74 FR 41,325 (August 14, 2009); November 10, 2008, 73 FR 67097 (November 12, 2008).

§ 744.1 [Amended]

■ 16. Section 744.1 is amended by removing the fifth sentence in paragraph (a)(1).

PART 772—[AMENDED]

■ 17. The authority citation for part 772 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 13, 2009, 74 FR 41,325 (August 14, 2009).

■ 18. In section 772.1 the definition for ''ancillary cryptography'' is amended by revising the Nota Bene (N.B.) and the definition for ''personal area network'' is amended by revising the Nota Bene to read as follows:

§ 772.1 Definitions of terms as used in the Export Administration Regulations (EAR).

* * * * *

''Ancillary cryptography''. * * *

N.B. Examples of commodities and software that perform ''ancillary cryptography'' are items specially designed and limited to: Piracy and theft prevention for software, music, etc.; games and gaming; household utilities and appliances; printing, reproduction, imaging and video recording or playback (but not videoconferencing); business process modeling and automation (*e.g.,* supply chain management, inventory, scheduling and delivery); industrial, manufacturing or mechanical systems (including robotics, other factory or heavy equipment, and facilities systems controllers, such as fire alarms and HVAC); automotive, aviation and other transportation systems.[1] Commodities and software included in this description are not limited to wireless communication and are not limited by range or key length.

* * * * *

''Personal area network''. * * *

N.B. ''Personal area network'' items include but are not limited to items designed to comply with the Institute of Electrical and Electronic Engineers (IEEE) 802.15.1 standard, class 2 (10 meters) and class 3 (1 meter), but not class 1 (100 meters) items. IEEE 802.15.1 class 2 and class 3 devices include hands-free headsets, wireless mice, keyboards and printers, bar code scanners and game console wireless controllers, as well as devices or software for transfer of files between devices using Object Exchange (OBEX).

* * * * *

[1] For the purpose of this definition, the term ''transportation systems'' does not include any Automatic Identification System (AIS)/Vessel Traffic Service (VTS). Secure AIS/VTS and their maritime applications are not considered ''ancillary cryptography''.

PART 774—[AMENDED]

■ 19. 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 August 13, 2009, 74 FR 41,325 (August 14, 2009).

■ 20. In Supplement No. 1 to part 774 (the Commerce Control List), Category 5 Telecommunications and ''Information Security'', Part 2 Information Security, Export Control Classification Number (ECCN) 5B002 is amended by revising the License Exception section to read as follows:

5B002 Information Security—test, inspection and ''production'' equipment.

* * * * *

License Exceptions

LVS: N/A
GBS: N/A
CIV: N/A
ENC: Yes for certain EI controlled equipment, see § 740.17 of the EAR for eligibility.

* * * * *

■ 21. In Supplement No. 1 to part 774 (the Commerce Control List), Category 5 Telecommunications and ''Information Security'', Part 2 Information Security, Export Control Classification Number (ECCN) 5E002 is amended by revising the License Exception section to read as follows:

5E002 ''Technology'' according to the General Technology Note for the ''development'', ''production'' or ''use'' of equipment controlled by 5A002 or 5B002 or ''software'' controlled by 5D002.

* * * * *

License Exceptions

CIV: N/A
TSR: N/A
ENC: Yes for certain EI controlled technology, see § 740.17 of the EAR for eligibility.

* * * * *

■ 22. In Supplement No. 1 to part 774 (the Commerce Control List), Category 5 Telecommunications and ''Information Security'', Part 2 Information Security, Export Control Classification Number (ECCN) 5E992 is amended by revising the Heading to read as follows:

5E992 ''Information Security'' ''technology'' according to the General Technology Note, not controlled by 5E002.

* * * * *

Dated: October 7, 2009.

Matthew S. Borman,

Acting Assistant Secretary for the Bureau of Industry and Security.

[FR Doc. E9–24697 Filed 10–14–09; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 558

[Docket No. FDA–2009–N–0665]

New Animal Drugs for Use in Animal Feeds; Monensin; Tylosin

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect approval of a supplemental new animal drug application (NADA) filed by Elanco Animal Health, A Division of Eli Lilly & Co. The supplemental NADA revises limitations for liquid Type B medicated cattle feeds containing tylosin phosphate.

DATES: This rule is effective October 15, 2009.

FOR FURTHER INFORMATION CONTACT: Cindy L. Burnsteel, Center for Veterinary Medicine (HFV–130), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 240–276–8341, e-mail: *cindy.burnsteel@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION: Elanco Animal Health, A Division of Eli Lilly & Co., Lilly Corporate Center, Indianapolis, IN 46285, filed a supplement to NADA 12–491 for use of TYLAN (tylosin phosphate) Type A medicated article. For liquid Type B medicated cattle feeds containing tylosin phosphate, the supplement removes the presolubilization instructions previously required for manufacture and reduces the expiry from 8 weeks to 31 days. The supplemental NADA is approved as of September 8, 2009, and the regulations in 21 CFR 558.625 are amended to reflect the approval. In addition, the limitations for two-way combination drug medicated liquid feeds containing tylosin and monensin in 21 CFR 558.355 are amended to reflect the revised limitations for tylosin liquid feeds.

Approval of this supplemental NADA did not require review of additional safety or effectiveness data or information. Therefore, a freedom of information summary is not required.

The agency has determined under 21 CFR 25.33 that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

This rule does not meet the definition of ''rule'' in 5 U.S.C. 804(3)(A) because it is a rule of ''particular applicability.'' Therefore, it is not subject to the congressional review requirements in 5 U.S.C. 801–808.

List of Subjects in 21 CFR Part 558

Animal drugs, Animal feeds.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under the authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR part 558 is amended as follows:

PART 558—NEW ANIMAL DRUGS FOR USE IN ANIMAL FEEDS

■ 1. The authority citation for 21 CFR part 558 continues to read as follows:

Authority: 21 U.S.C. 360b, 371.

■ 2. In § 558.355, revise paragraph (f)(3)(ii)(*b*) to read as follows:

§ 558.355 Monensin.

* * * * *

(f) * * *

(3) * * *

(ii) * * *

(*b*) *Limitations*. Feed only to cattle being fed in confinement for slaughter. Feed continuously as sole ration at the rate of 50 to 480 milligrams of monensin and 60 to 90 milligrams of tylosin per head per day. Combination drug liquid Type B medicated feeds may be used to manufacture dry Type C medicated feeds as in § 558.625(c) of this chapter.

* * * * *

§ 558.625 [Amended]

■ 3. In § 558.625, remove and reserve paragraph (c)(2)(i); and in paragraph (c)(3), remove ''8 weeks'' and in its place add ''31 days''.

Dated: September 25, 2009.

Steven D. Vaughn,

Director, Office of New Animal Drug Evaluation, Center for Veterinary Medicine.

[FR Doc. E9–24716 Filed 10–14–09; 8:45 am]

BILLING CODE 4160–01–S

PENSION BENEFIT GUARANTY CORPORATION

29 CFR Part 4022

Benefits Payable in Terminated Single-Employer Plans; Interest Assumptions for Valuing and Paying Benefits

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Final rule.

SUMMARY: Pension Benefit Guaranty Corporation's regulation on Benefits Payable in Terminated Single-Employer Plans prescribes interest assumptions for valuing and paying certain benefits under terminating single-employer plans. This final rule amends the benefit payments regulation to adopt interest assumptions for plans with valuation dates in November 2009. Interest assumptions are also published on PBGC's Web site (*http://www.pbgc.gov*).

DATES: Effective November 1, 2009.

FOR FURTHER INFORMATION CONTACT: Catherine B. Klion, Manager, Regulatory and Policy Division, Legislative and Regulatory Department, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005, 202–326–4024. (TTY/TDD users may call the Federal relay service toll-free at 1–800–877–8339 and ask to be connected to 202–326–4024.)

SUPPLEMENTARY INFORMATION: PBGC's regulations prescribe actuarial assumptions—including interest assumptions—for valuing and paying plan benefits of terminating single-employer plans covered by title IV of the Employee Retirement Income Security Act of 1974. The interest assumptions are intended to reflect current conditions in the financial and annuity markets.

These interest assumptions are found in two PBGC regulations: the regulation on Benefits Payable in Terminated Single-Employer Plans (29 CFR part 4022) and the regulation on Allocation of Assets in Single-Employer Plans (29 CFR part 4044). Assumptions under the asset allocation regulation are updated quarterly; assumptions under the benefit payments regulation are updated monthly. This final rule updates only the assumptions under the benefit payments regulation.

Two sets of interest assumptions are prescribed under the benefit payments regulation: (1) A set for PBGC to use to determine whether a benefit is payable as a lump sum and to determine lump-sum amounts to be paid by PBGC (found in Appendix B to Part 4022), and (2) a set for private-sector pension practitioners to refer to if they wish to use lump-sum interest rates determined using PBGC's historical methodology (found in Appendix C to Part 4022).

This amendment (1) adds to Appendix B to Part 4022 the interest assumptions for PBGC to use for its own lump-sum payments in plans with valuation dates during November 2009, and (2) adds to Appendix C to Part 4022 the interest assumptions for private-sector pension practitioners to refer to if they wish to use lump-sum interest rates determined using PBGC's historical methodology for valuation dates during November 2009.

The interest assumptions that PBGC will use for its own lump-sum payments (set forth in Appendix B to part 4022) will be 2.25 percent for the period during which a benefit is in pay status and 4.00 percent during any years preceding the benefit's placement in pay status. In comparison with the interest assumptions in effect for October 2009, these interest assumptions represent a decrease of 0.25 percent in the immediate annuity rate and are otherwise unchanged. For private-sector payments, the interest assumptions (set forth in Appendix C to part 4022) will be the same as those used by PBGC for determining and paying lump sums (set forth in Appendix B to part 4022).

PBGC has determined that notice and public comment on this amendment are impracticable and contrary to the public interest. This finding is based on the need to determine and issue new interest assumptions promptly so that the assumptions can reflect current market conditions as accurately as possible.

Because of the need to provide immediate guidance for the valuation and payment of benefits in plans with valuation dates during November 2009, PBGC finds that good cause exists for making the assumptions set forth in this amendment effective less than 30 days after publication.

PBGC has determined that this action is not a ''significant regulatory action'' under the criteria set forth in Executive Order 12866.

Because no general notice of proposed rulemaking is required for this amendment, the Regulatory Flexibility Act of 1980 does not apply. See 5 U.S.C. 601(2).

List of Subjects in 29 CFR Part 4022

Employee benefit plans, Pension insurance, Pensions, Reporting and recordkeeping requirements.

■ In consideration of the foregoing, 29 CFR part 4022 is amended as follows:

PART 4022—BENEFITS PAYABLE IN TERMINATED SINGLE–EMPLOYER PLANS

■ 1. The authority citation for part 4022 continues to read as follows:

Authority: 29 U.S.C. 1302, 1322, 1322b, 1341(c)(3)(D), and 1344.

■ 2. In appendix B to part 4022, Rate Set 193, as set forth below, is added to the table.

APPENDIX B TO PART 4022—LUMP SUM INTEREST RATES FOR PBGC PAYMENTS

* * * * *

Rate set	For plans with a valuation date		Immediate annuity rate (percent)	Deferred annuities (percent)				
	On or after	Before		i_1	i_2	i_3	n_1	n_2
*	*		*	*	*	*	*	
193	11–1–09	12–1–09	2.25	4.00	4.00	4.00	7	8

■ 3. In appendix C to part 4022, Rate Set 193, as set forth below, is added to the table.

APPENDIX C TO PART 4022—LUMP SUM INTEREST RATES FOR PRIVATE-SECTOR PAYMENTS

* * * * *

Rate set	For plans with a valuation date		Immediate annuity rate (percent)	Deferred annuities (percent)				
	On or after	Before		i_1	i_2	i_3	n_1	n_2
*	*		*	*	*	*	*	
193	11–1–09	12–1–09	2.25	4.00	4.00	4.00	7	8

Issued in Washington, DC, on this 6th day of October 2009.

Vincent K. Snowbarger,

Acting Director, Pension Benefit Guaranty Corporation.

[FR Doc. E9–24732 Filed 10–14–09; 8:45 am]

BILLING CODE 7709–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2009–0348]

RIN 1625–AA09

Drawbridge Operation Regulation; East River, New York City, NY

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard has temporarily changed the drawbridge operating regulations governing the operation of the Roosevelt Island Bridge, mile 6.4, across the East River at New York City, New York. This temporary final rule allows the Roosevelt Island Bridge to remain in the closed position for eleven months to facilitate a major rehabilitation of the bridge.

DATES: This rule is effective October 15, 2009 through August 31, 2010.

ADDRESSES: Comments and related materials received from the public, as well as documents mentioned in this preamble as being available in the docket, are part of docket USCG–2009–0348 and are available online by going to *http://www.regulations.gov,* inserting USCG–2009–0348 in the ''Keyword'' box, and then clicking ''Search.'' This material is also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary rule, call or e-mail Mr. Joe Arca, Project Officer, First Coast Guard District Bridge Branch, 212–668–7165, *joe.m.arca@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

On August 13, 2009, we published a notice of proposed rulemaking (NPRM) entitled Drawbridge Operation Regulation; East River, New York City, NY, in the **Federal Register** (74 FR 40802). We received no comments on the proposed rule. No public meeting was requested, and none was held.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective in less than 30 days after publication in the **Federal Register**. A delay or cancellation of this ongoing bridge rehabilitation project is not in the public interest and would further disrupt the flow of vehicular and maritime traffic. The rehabilitation project is necessary to ensure the continued safe and reliable operation of the bridge.

Background and Purpose

The Roosevelt Island Bridge has a vertical clearance of 40 feet at mean high water, and 47 feet at mean low water in the closed position. The existing drawbridge operating regulations listed at 33 CFR 117.781, require the bridge to open on signal if at least a two hour advance notice is given.

The bridge owner, New York City Department of Transportation, has requested a temporary rule to facilitate electrical and mechanical rehabilitation at the Roosevelt Island Bridge.

Under this temporary final rule the Roosevelt Island Bridge will remain in the closed position from October 1, 2009 through August 31, 2010. Vessel traffic may transit the East River utilizing the alternate route around the other side of the island.

Discussion of Comments and Changes

The Coast Guard received no comment letters in response to the notice of proposed rulemaking. As a result, no changes have been made to this temporary final rule.

Regulatory Analyses

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

Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. This conclusion is based upon the fact that vessel traffic will still be able to transit the East River using the alternate route around the island.

Small Entities

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

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This conclusion is based upon the fact that vessel traffic will still be able to transit the East River using the alternate route round the island.

Assistance for Small Entities

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

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

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

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

Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that this action is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under figure 2–1, paragraph (32)(e), of the Instruction.

Under figure 2–1, paragraph (32)(e), of the Instruction, an environmental analysis checklist and a categorical exclusion determination are not required for this rule.

List of Subjects in 33 CFR Part 117

Bridges.

■ For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

■ 1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 33 CFR 1.05–1; Department of Homeland Security Delegation No. 0170.1.

■ 2. From, October 15, 2009 through August 31, 2010, § 117.781 is amended by suspending paragraph (c) and adding a temporary paragraph (d) to read as follows:

§ 117.781 East River.

* * * * *

(d) The draw of the Roosevelt Island Bridge at mile 6.4, at New York City, need not open for the passage of vessel traffic from October 1, 2009 through August 31, 2010.

Dated: September 28, 2009.

Joseph L. Nimmich,

Rear Admiral, U.S. Coast Guard Commander, First Coast Guard District.

[FR Doc. E9–24744 Filed 10–14–09; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2009–0814]

RIN 1625–AA09

Drawbridge Operation Regulation; Atlantic Intracoastal Waterway (AIWW), Elizabeth River, Southern Branch, VA

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard is removing the existing drawbridge operation regulation for the Jordan (S337) Bridge, at AIWW mile 2.8, across the Elizabeth River (Southern Branch) in Chesapeake, VA, because the vertical-lift span has been removed.

DATES: This rule is effective October 15, 2009.

ADDRESSES: Documents indicated in this preamble as being available in the docket, are part of docket USCG–2009–0814 and are available by going to *http://www.regulations.gov,* inserting USCG–2009–0814 in the ''Keyword'' box, and then clicking ''Search.'' This material is also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590,

between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or e-mail Waverly W. Gregory, Jr., Bridge Administrator, Fifth Coast Guard District; telephone (757) 398–6222, e-mail *Waverly.W.Gregory@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

The Coast Guard is issuing this final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because prior removal of the bridge renders a notice and comment period unnecessary.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective in less than 30 days after publication in the **Federal Register**. This rule removes the regulation used for the operation of a movable bridge. Since the modification has already taken place, the removal of the regulation will not adversely affect mariners.

Background and Purpose

The Jordan (S337) Bridge vertical-lift span at AIWW mile 2.8, across the Elizabeth River (Southern Branch) in Chesapeake, VA, was removed on May 6, 2009, thereby eliminating the need for 33 CFR 117.997(b).

Since the vertical-lift span of the bridge has been removed, a special operating regulation for a movable bridge is unnecessary. This final rule removes the regulation regarding the Jordan (S337) Bridge.

Discussion of Rule

This change removes the regulation governing the operation of a movable bridge that has been removed.

This action necessitates redesignating the remaining regulations listed in 33 CFR 117.997 as (b), (c), (d), (e), (f), (g), (h), and (i) for the drawbridges at Norfolk and Western Railroad, Gilmerton (US13/460), Norfolk Southern #7 Railroad, I–64, Dominion Boulevard (US 17), S168, Albemarle & Chesapeake Railroad, and Centerville Turnpike (SR170) along the AIWW, South Branch of the Elizabeth River to the Albemarle and Chesapeake Canal.

Regulatory Analyses

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

Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. This rule is not ''significant'' under the regulatory policies and procedures of the Department of Homeland Security (DHS). We expect the economic impact of this rule to be so minimal that a full Regulatory Evaluation under the regulatory policies and procedures of DHS unnecessary. This rule merely removes an operating regulation for a movable bridge that has been removed. Therefore, the operating regulation is unnecessary and its removal will have a *de minimis* economic impact.

Small Entities

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

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. Since the bridge is no longer a movable bridge, the regulation controlling the opening and closing of the bridge in no longer necessary. Hence, this action will have no economic impact on small entities.

Assistance for Small Entities

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

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Energy Effects

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

Technical Standards

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

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

Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.1D which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that this action is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment. Therefore this rule is categorically excluded, under figure 2–1, paragraph (32)(e), of the Instruction.

Under figure 2–1, paragraph (32)(e), of the Instruction, an environmental analysis checklist and a categorical exclusion determination are not required for this rule.

List of Subjects in 33 CFR Part 117

Bridges.

■ For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

■ 1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 33 CFR 1.05–1; Department of Homeland Security Delegation No. 0170.1.

§ 117.997 [Amended]

■ 2. In § 117.997, remove paragraph (b) and redesignate paragraphs (c) through (j) as paragraphs (b) through (i).

Dated: September 29, 2009.

Patrick B. Trapp,

Captain, U.S. Coast Guard, Acting Commander, Fifth Coast Guard District.

[FR Doc. E9–24830 Filed 10–14–09; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2009–0896]

Drawbridge Operation Regulation; Three Mile Slough, Rio Vista, CA

AGENCY: Coast Guard, DHS.

ACTION: Notice of temporary deviation from regulations.

SUMMARY: The Commander, Eleventh Coast Guard District, has issued a temporary deviation from the regulation governing the operation of the California Route 160 Drawbridge across Three Mile Slough, mile 0.1, near Rio Vista, CA. The deviation is necessary to allow Caltrans to conduct drawbridge maintenance. This deviation allows the bridge to remain in the closed-to-navigation position during the maintenance period.

DATES: This deviation is effective from 8 a.m. on October 15, 2009 through 4 p.m. on November 4, 2009.

ADDRESSES: Documents mentioned in this preamble as being available in the docket are part of docket USCG–2009–0896 and are available online by going to *www.regulations.gov*, inserting USCG–2009–0896 in the ''Keyword'' box and then clicking ''Search.'' This material is also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays

FOR FURTHER INFORMATION: If you have questions on this rule, call or e-mail David H. Sulouff, Chief, Bridge Section, Eleventh Coast Guard District; 510–437–3516, *David.H.Sulouff@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, 202–366–9826.

SUPPLEMENTARY INFORMATION: Caltrans requested a temporary change to the operation of the California Route 160 Drawbridge, mile 0.1, Three Mile Slough, near Rio Vista, CA. The drawbridge navigation span provides a vertical clearance of 12 feet above Mean High Water in the closed-to-navigation position. The drawbridge opens on signal as required by 33 CFR 117.5. Navigation on the waterway is commercial and recreational.

The drawbridge will be secured in the closed-to-navigation position from 8 a.m. through 4 p.m. Monday through Friday, from October 15, 2009 through November 4, 2009, to allow Caltrans to replace the industrial staircase leading to the control house. At all other times during this period the drawbridge will open on signal as required by 33 CFR 117.5. This temporary deviation has been coordinated with commercial and recreational waterway users. There is no anticipated levee maintenance during this deviation period. No objections to the proposed temporary deviation were raised.

Vessels that can transit the drawbridge, while in the closed-to-navigation position, may continue to do so at any time.

In the event of an emergency the drawbridge can be opened with 4 hours advance notice.

In accordance with 33 CFR 117.35(e), the drawbridge must return to its regular operating schedule immediately at the end of the designated time period. This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: October 01, 2009.

S.P. Metruck,

Captain, U.S. Coast Guard, Acting Commander, Eleventh Coast Guard District.

[FR Doc. E9–24831 Filed 10–14–09; 8:45 am]

BILLING CODE 4910–15–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2009–0120; FRL–8968–1]

Approval and Promulgation of Air Quality Implementation Plans; Indiana; Carbon Monoxide Maintenance Plan Updates; Limited Maintenance Plan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: The Indiana Department of Environmental Management (IDEM) submitted Carbon Monoxide (CO) ''Limited Maintenance Plan'' updates for Lake and Marion Counties on January 12, 2009. These Limited Maintenance Plans demonstrate continued attainment of the CO National Ambient Air Quality Standard (NAAQS) for Lake and Marion counties for an additional ten years. EPA is, therefore, approving it into Indiana's State Implementation Plan (SIP).

DATES: This direct final rule will be effective December 14, 2009, unless EPA receives adverse comments by November 16, 2009. If adverse comments are received, EPA will publish a timely withdrawal of the direct final rule in the **Federal Register** informing the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R05–OAR–2009–0120, by one of the following methods:

1. *www.regulations.gov:* Follow the on-line instructions for submitting comments.
2. *E-mail: mooney.john@epa.gov.*
3. *Fax:* (312) 692–2551.
4. *Mail:* John M. Mooney, Chief, Criteria Pollutant Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604.
5. *Hand Delivery:* John M. Mooney, Chief, Criteria Pollutant Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604. Such deliveries are only accepted during the Regional Office normal hours of operation, and special arrangements should be made for deliveries of boxed information. The Regional Office official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

Instructions: Direct your comments to Docket ID No. EPA–R05–OAR–2009–0120. 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 docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. We recommend that you telephone Charles Hatten, Environmental Engineer, at (312) 886–6031 before visiting the Region 5 office.

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

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

I. Why did the State make this submittal to EPA?
II. What is a Limited Maintenance Plan?
III. What is EPA's analysis of the submittal?
IV. What action is EPA taking?
V. Statutory and Executive Order Reviews

I. Why did the State make this submittal to EPA?

On December 21, 1999, the State of Indiana submitted redesignation requests and limited CO maintenance plans for the Lake County (East Chicago) and Marion County (Indianapolis) CO nonattainment areas. EPA subsequently approved the redesignation request and limited maintenance plans for CO attainment in Lake and Marion Counties on January 19, 2000 (65 FR 2883).

Section 175A of the Clean Air Act (CAA) sets forth the elements of a maintenance plan for areas seeking redesignation from nonattainment to attainment. The plan must demonstrate continued attainment of the applicable NAAQS for at least ten years after EPA approves a redesignation to attainment. Eight years after the redesignation, the State must submit a revised maintenance plan which demonstrates attainment for the ten years following the initial ten year period.

As part of the original redesignation request and limited CO maintenance plan, IDEM committed to review, and revise its limited maintenance plan eight years after the areas were redesignated to attainment of the CO standard, as required by section 175A(b) of the CAA. On January 12, 2009, Indiana satisfied its commitment by submitting a revision to its SIP to update the limited CO maintenance plans for both the Lake County and Marion County CO attainment areas. The update to the limited CO maintenance plan for Lake County and Marion County supplements, and does not replace, the original approved maintenance plans. The commitments in the approved maintenance plans continue to apply for a second 10 year period.

A. Has public notice been provided?

Indiana published a public notice on November 19, 2008, for the limited maintenance plan update for the Lake and Marion Counties CO attainment areas. No public comments were received during the 30-day comment period ending on December 19, 2008.

B. Geographic Boundaries

The CO maintenance areas are much smaller than Lake County and Marion County, respectively. The following is a brief description of the two maintenance counties included in this update.

Lake County

Lake County is located in northwest Indiana. The Lake County CO maintenance area is in the City of East Chicago (area bounded by Columbus Drive on the north, the Indiana Harbor Canal on the west, 148th St., if extended, on the south and Euclid Avenue on the east).

Marion County

Marion County is located in central Indiana, and is part of the Indianapolis metropolitan area. However, only a small area located in the center of Marion County, bounded by 11th St. on to the north, Capitol Avenue to the west, Georgia Street to the south and Delaware to the east is classified as maintenance for CO.

II. What is a Limited Maintenance Plan?

''Limited Maintenance Plans'' are applicable in certain areas that EPA had formerly designated as nonclassifiable and nonattainment for CO. As discussed in an October 6, 1995, memorandum entitled ''Limited Maintenance Plan Option for Nonclassifiable CO Nonattainment Areas,'' EPA will consider the maintenance demonstration satisfied if the design value (the second highest 8-hour non-overlapping monitored value) is at or below 7.65 parts per million (ppm), or 85 percent of the level of the eight hour CO NAAQS of 9.0 ppm. The design value must be based on eight consecutive quarters of data. For such areas, there is no requirement to project emissions of air quality over the maintenance period. EPA believes that if the area begins the maintenance period at, or below, 85 percent of the CO 8-hour NAAQS, then the applicability of Prevention of Significant Deterioration (PSD) requirements, the control measures already in the SIP, and Federal measures should provide adequate assurance of maintenance over the ten year maintenance period. In addition, the design value for the area must continue to be at or below 7.65 ppm until the time of final EPA action.

The core provisions that are required in a limited maintenance plan for CO are: an attainment emissions inventory, a maintenance demonstration (which is satisfied by the air quality demonstration described in the previous paragraph), continued operation of an EPA approved CO monitoring network, a contingency plan, and a demonstration of transportation conformity. Each of these components has been adequately addressed by in IDEM's submittal.

III. What is EPA's Analysis of the submittal?

Attainment/Emission Inventory

The State is required to develop an attainment emission inventory to identify a level of emissions in the area which is sufficient to attain the CO NAAQS. In its submittal, IDEM provided a comprehensive emission inventory of major sources permitted in Lake and Marion Counties from the original maintenance plan's emissions (1997) compared to the most recent emissions inventory (2006). The State demonstrated that the CO emissions from major sources in Lake County and Marion County have decreased by 2,126.86 tons per year, and 22,679.12 tons per year, respectively, from 1997 to 2006. This decrease can be attributed to a number of factors, including Federally mandated programs, closings of permitted stationary sources, and source-specific operating provisions.

By opting to comply with the requirements of the limited maintenance plan option, IDEM is not required to project CO emissions for Lake and Marion Counties as part of the updates to these limited maintenance plans.

Maintenance Demonstration

To qualify for the limited CO maintenance plan option, the CO design value for the area (the second highest eight hour non-overlapping monitored value), based on eight consecutive quarters (2 years of data) must be at or below, 7.65 ppm, or 85 percent of the level of the eight hour CO NAAQS. To assess whether the area meets the applicability cutoff for the limited maintenance plan, a separate design value must be developed for every monitoring site. The highest of these design values is the design value for the whole area.

In Lake County, there is one monitoring site collecting CO data for maintenance of the CO NAAQS located at the East Chicago Post Office. The 2007 eight hour CO design value for the monitor in Lake County area is 3.0 ppm.

In Marion County, there are two CO monitoring sites in operation, one located at 50 North Illinois Street, and one at the Naval Avionics Center. The 2007 eight hour CO design values for these two monitors are 3.6 ppm (North Illinois Street), and 2.1 ppm (Naval Avionics Center). This makes the Marion County CO maintenance area's design value 3.6 ppm. The CO design values for Lake and Marion Counties are presented in the table below.

CURRENT CO DESIGN VALUE FOR LAKE AND MARION COUNTIES

Site ID	County	Site name	Year	1st Max 8-hour (ppm)	2nd Max 8-hour (ppm)	Design value (ppm)
18–089–0001	Lake	East Chicago	2006	3.2	2.4	2.4
18–089–0001	Lake	East Chicago	2007	3.1	3.0	3.0
18–097–0072	Marion	50 North Illinois	2006	2.1	2.0	2.4
18–097–0072	Marion	50 North Illinois	2007	4.3	3.6	3.6
18–097–0073	Marion	Naval Avionics Center	2006	2.3	2.1	2.1
18–097–0073	Marion	Naval Avionics Center	2007	2.3	2.0	2.1

The eight hour design values from the AIRS (Aerometric Information Retrieval System) Quick Look data report were examined for Lake County and Marion County and have not exceeded the 7.65 ppm level for the 1998 to 2007 time interval.

Current data in AIRS for 2008 show that the CO monitoring values for Lake County and Marion County continue to be below 7.65 ppm. See table below.

CURRENT CO AMBIENT MONITORING DATA FOR LAKE AND MARION COUNTIES

Site ID	County	Site name	Year	1st Max 8-hour (ppm)	2nd Max 8-hour (ppm)
18–089–0001	Lake	East Chicago	2008	3.3	3.0
18–097–0072	Marion	50 North Illinois	2008	3.2	2.1
18–097–0073	Marion	Naval Avionics Center	2008	1.3	1.2

EPA also examined at CO monitoring data for 2009. While this data has yet to be quality assured, it shows CO levels continue to be low for Lake County and Marion County.

Based on ambient air monitoring date, Lake and Marion Counties are eligible to update their maintenance plan under the limited maintenance plan policy. IDEM will continue to maintain a continuous CO monitoring network, meeting the requirements of 40 CFR Part 58, that provides adequate coverage to verify continued compliance with the CO NAAQS.

IV. What action is EPA taking?

EPA is approving a SIP revision request submitted by the State of Indiana. This SIP revision meets the requirements for a second ten year limited CO maintenance plan for Lake County and Marion County, Indiana. The SIP revision supplements the current approved limited CO maintenance plans for Lake County and Marion County, and continues to demonstrate maintenance of the CO NAAQS for an additional ten years.

We are publishing this action without prior proposal because we view this as a noncontroversial amendment and anticipate no adverse comments. However, in the Proposed Rules section of this **Federal Register** publication, we are publishing a separate document that will serve as the proposal to approve the state plan if relevant adverse written comments are filed. This rule will be effective December 14, 2009 without further notice unless we receive relevant adverse written comments by November 16, 2009. If we receive such comments, we will withdraw this action before the effective date by publishing a subsequent document that will withdraw the final action. All public comments received will then be addressed in a subsequent final rule based on the proposed action. The EPA will not institute a second comment period, therefore, any parties interested in commenting on this action should do so at this time. If we do not receive any comments, this action will be effective December 14, 2009.

V. Statutory and Executive Order Reviews

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

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

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

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

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by December 14, 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 may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, and Intergovernmental relations.

Dated: September 29, 2009.

Walter W. Kovalick Jr.,

Acting Regional Administrator, Region 5.

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

PART 52—[AMENDED]

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

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

Subpart P—Indiana

■ 2. Section 52.785 is amended by adding paragraph (c) to read as follows:

§ 52.785 Control Strategy: Carbon Monoxide.

* * * * *

(c) Approval—The Indiana Department of Environmental Management (IDEM) submitted Carbon Monoxide (CO) Limited Maintenance Plan Updates for Lake and Marion Counties on January 12, 2009. The updated Limited Maintenance Plans

demonstrate attainment of the CO National Ambient Air Quality Standard (NAAQS) for Lake and Marion Counties for an additional ten years.

[FR Doc. E9–24695 Filed 10–14–09; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2009–0473; FRL–8956–8]

Revisions to the California State Implementation Plan, San Joaquin Valley Air Pollution Control District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is finalizing approval of revisions to the San Joaquin Valley Air Pollution Control District portion of the California State Implementation Plan (SIP). These revisions were proposed in the **Federal Register** on July 13, 2009 and concern volatile organic compound (VOC) emissions from graphic arts printing operations, digital printing operations, adhesives, cleaning solvents, transfer of organic liquids, and facilities engaged in coating of wood products, flat paneling, paper, film, foil, and fabric. We are approving local rules that regulate these emission sources under the Clean Air Act as amended in 1990 (CAA or the Act).

DATES: *Effective Date:* This rule is effective on November 16, 2009.

ADDRESSES: EPA has established docket number EPA–R09–OAR–2009–0473 for this action. The index to the docket is available electronically at *http://www.regulations.gov* and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (*e.g.,* copyrighted material), and some may not be publicly available in either location (*e.g.,* CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Nicole Law, EPA Region IX, (415) 947–4126, *law.nicole@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, ''we,'' ''us'' and ''our'' refer to EPA.

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I. Proposed Action

On July 13, 2009 (74 FR 33399), EPA proposed to approve the following rules into the California SIP.

Local agency	Rule #	Rule title	Adopted	Submitted
SJVAPCD	4606	Wood Products and Flat Wood Paneling Product Coating Operations.	10/16/08	12/23/08
SJVAPCD	4607	Graphic Arts and Paper, Film, Foil, and Fabric Coatings	12/18/08	03/17/09
SJVAPCD	4624	Transfer of Organic Liquid	09/20/07	03/07/08
SJVAPCD	4653	Adhesives	12/20/07	03/07/08

We proposed to approve these rules because we determined that they complied with the relevant CAA requirements. Our proposed action contains more information on the rules and our evaluation.

II. Public Comments and EPA Responses

EPA's proposed action provided a 30-day public comment period. During this period, we received no comments.

III. EPA Action

No comments were submitted that change our assessment that the submitted rules comply with the relevant CAA requirements. Therefore, as authorized in section 110(k)(3) of the Act, EPA is fully approving these rules into the California SIP.

IV. Statutory and Executive Order Reviews

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

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

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

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the

Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by December 14, 2009. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action 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, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: August 26, 2009.

Laura Yoshii,

Acting Regional Administrator, Region IX.

■ Part 52, Chapter I, Title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

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

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

Subpart F—California

■ 2. Section 52.220 is amended by adding paragraphs (c)(354)(i)(E)(*3*) and (*4*), (363)(i)(A)(*2*) and (364) to read as follows:

§ 52.220 Identification of plan.

* * * * *

(c) * * *

(354) * * *

(i) * * *

(E) * * *

(*3*) Rule 4624, ''Transfer of Organic Liquid,'' adopted on December 20, 2007.

(*4*) Rule 4653, ''Adhesives,'' adopted on September 20, 2007.

* * * * *

(363) * * *

(i) * * *

(A) * * *

(*2*) Rule 4607, ''Graphic Arts and Paper, Film, Foil, and Fabric Coatings,'' adopted on December 18, 2008.

■ (364) New and amended regulations were submitted on December 23, 2008 by the Governor's designee.

(i) Incorporation by Reference.

(A) San Joaquin Valley Unified Air Pollution Control District.

(*1*) Rule 4606, ''Wood Products and Flat Wood Paneling Product Coating Operations,'' adopted on October 16, 2008.

* * * * *

[FR Doc. E9–24687 Filed 10–14–09; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 204, 205, 209, 225, 241, and 244

Defense Federal Acquisition Regulation Supplement (DFARS); Technical Amendments

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is making technical amendments to the Defense Federal Acquisition Regulation Supplement (DFARS) to specify the debarring and suspending official for the Defense Intelligence Agency and update other references within the DFARS text.

DATES: *Effective Date:* October 15, 2009

FOR FURTHER INFORMATION CONTACT: Ms. Amy Williams, OUSD (AT&L) DPAP (DARS), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301–3062. Telephone 703–602–0328; facsimile 703–602–7887.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule amends DFARS text as follows:

204.7107. Adds a pointer to the procedures on agency accounting identifiers in the DFARS companion resource, Procedures, Guidance, and Information.

205.301. Corrects the cross-reference to the exception for acquisitions of chemical warfare protective clothing from the restrictions on food, clothing, fabrics, and hand or measuring tools at 225.7002 and revises the cross-reference to the definition of ''qualifying country.''

209.403. Specifies the debarring and suspending official for the Defense Intelligence Agency.

225.7002–2. Revises the cross-reference to the definition of ''qualifying country.''

241.103. Correct the statutory reference to 10 U.S.C. 2688(d)(2).

244.403. Correct the reference to the current specialty metals clause, 252.225.7009, Restriction on Acquisition of Certain Articles Containing Specialty Metals.

List of Subjects in 48 CFR Parts 204, 205, 209, 225, 241, and 244

Government procurement.

Amy G. Williams,

Editor, Defense Acquisition Regulations System.

■ Therefore, 48 CFR parts 204, 205, 209, 225, 241, and 244 are amended as follows:

■ 1. The authority citation for 48 CFR parts 204, 205, 209, 225, 241, and 244 continues to read as follows:

Authority: 41 U.S.C. 421 and 48 CFR chapter 1.

PART 204—ADMINISTRATIVE MATTERS

■ 2. Section 204.7107 is revised to read as follows:

204.7107 Contract accounting classification reference number (ACRN) and agency accounting identifier (AAI).

Traceability of funds from accounting systems to contract actions is accomplished using ACRNs and AAIs. Follow the procedures at PGI 204.7107 for use of ACRNs and AAIs.

PART 205—PUBLICIZING CONTRACT ACTIONS

■ 3. In section 205.301, paragraph (a)(iii)(b) is revised to read as follows:

205.301 General.

(a) * * *

(iii) * * *

(B) ''The exception at DFARS 225.7002–2(n) applies to this acquisition, because the contracting officer has determined that this acquisition of chemical warfare protective clothing furthers an agreement with a qualifying country identified in DFARS 225.003(10).''

PART 209—CONTRACTOR QUALIFICATIONS

■ 4. Section 209.403 is amended by revising paragraph (1) of the definition

for ''debarring and suspending official to read as follows:

209.403 Definitions.

''Debarring and suspending official.''

(1) For DoD, the designees are—

Army—Commander, U.S. Army Legal Services Agency

Navy—The General Counsel of the Department of the Navy

Air Force—Deputy General Counsel (Contractor Responsibility)

Defense Advanced Research Projects Agency—The Director

Defense Information Systems Agency—The General Counsel

Defense Intelligence Agency—The Senior Procurement Executive

Defense Logistics Agency—The Special Assistant for Contracting Integrity

National Geospatial—Intelligence Agency—The General Counsel

Defense Threat Reduction Agency—The Director

National Security Agency—The Senior Acquisition Executive

Missile Defense Agency—The General Counsel

Overseas installations—as designated by the agency head

* * * * *

PART 225—FOREIGN ACQUISITION

225.7002–2 [Amended]

■ 5. Section 225.7002–2 is amended by removing the reference to ''225.872'' in paragraph (n) and adding in its place a reference to ''225.003(10)''.

PART 241—ACQUISITION OF UTILITY SERVICES

241.103 [Amended]

■ 6. Section 241.103 is amended by removing from paragraph (1) the statutory reference ''10 U.S.C. 2688(c)(3)'' and adding in its place the statutory reference ''10 U.S.C. 2688(d)(2)''.

PART 244—SUBCONTRACTING POLICIES AND PROCEDURES

■ 7. Section 244.403(1) is revised to read as follows:

244.403 Contract clause.

* * * * *

(1) 252.225–7009, Restriction on Acquisition of Certain Articles Containing Specialty Metals.

* * * * *

[FR Doc. E9–24843 Filed 10–14–09; 8:45 am]

BILLING CODE 5001–08–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

49 CFR Part 172

[Docket No. PHMSA–2009–0238 (HM–224G)]

RIN 2137–AE49

Hazardous Materials: Chemical Oxygen Generators

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA).

ACTION: Direct final rule.

SUMMARY: This direct final rule amends the Hazardous Materials Regulations to revise the quantity limitation from 25 kg ''gross'' to 25 kg ''net'' for packages of chemical oxygen generators transported aboard cargo aircraft only. The intended effect of this rule is to provide regulatory relief by raising the quantity threshold for shipments of chemical oxygen generators transported aboard cargo aircraft only. This action is necessary to address difficulties concerning implementation and compliance with the requirements for the transportation of chemical oxygen generators in outer packagings meeting certain flame penetration resistance standards and thermal protection capabilities, as evidenced by comments received from the hazardous materials industry and other interested parties. The amendment contained in this rule is a minor substantive change, in the public interest, and unlikely to result in adverse comment.

DATES: This direct final rule is effective November 16, 2009, unless an adverse comment or notice of intent to file an adverse comment is received by November 16, 2009. PHMSA will publish in the **Federal Register** a timely document confirming the effective date of this final rule.

ADDRESSES: You may submit comments identified by the docket number PHMSA–2009–0238 by any of the following methods:

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

Fax: 1–202–493–2251.

Mail: Docket Operations, U.S. Department of Transportation, West Building, Ground Floor, Room W12–140, Routing Symbol M–30, 1200 New Jersey Avenue, SE., Washington, DC 20590.

Hand Delivery: To Docket Operations; Room W12–140 on the ground floor of the West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Instructions: All submissions must include the agency name and docket number for this rule. Note that all comments received will be posted without change, including any personal information provided.

FOR FURTHER INFORMATION CONTACT: T. Glenn Foster, (202) 366–8553, U.S. Department of Transportation, Pipeline and Hazardous Materials Safety Administration, Office of Hazardous Materials Standards, 1200 New Jersey Avenue, SE., Washington, DC 20590.

SUPPLEMENTARY INFORMATION:

List of Topics

I. Background
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J. Privacy Act

I. Background

The National Transportation Safety Board found that one of the probable causes of the May 11, 1996 crash of ValuJet Airlines flight No. 596 was a fire in the airplane's cargo compartment that was initiated and enhanced by the actuation of one or more chemical oxygen generators that were being improperly carried as cargo. Following that tragedy, in which 110 lives were lost, the Department of Transportation:

—Prohibited the transportation of chemical oxygen generators (including personal-use chemical oxygen generators) on board passenger-carrying aircraft and the transportation of spent chemical oxygen generators on both passenger-carrying and cargo-only aircraft, 61 FR 26418 (May 24, 1996), 61 FR 68952 (Dec. 30, 1996), 64 FR 45388 (Aug. 19, 1999);

—Issued standards governing the transportation of chemical oxygen generators on cargo-only aircraft (and by motor vehicle, rail car and vessel), including the requirement for an approval issued by the Research and Special Programs Administration

(RSPA), the predecessor agency to the Pipeline and Hazardous Materials Safety Administration (PHMSA), 62 FR 30767 (June 5, 1997), 62 FR 34667 (June 27, 1997);

—Upgraded fire safety standards for Class D cargo compartments on aircraft to require a smoke or fire detection system and a means of suppressing a fire or minimizing the available oxygen, on certain transport-category aircraft, 63 FR 8033 (Feb. 17, 1998); and

—Imposed additional requirements on the transportation of cylinders of compressed oxygen by aircraft and prohibited the carriage of chemical oxidizers in inaccessible aircraft cargo compartments that do not have a fire or smoke detection and fire suppression system, 64 FR 45388 (Aug. 19, 1999).

In the August 19, 1999 final rule, we amended the Hazardous Materials Regulations (HMR; 49 CFR Parts 171–180) to: (1) Allow a limited number of cylinders containing medical-use oxygen to be carried in the cabin of a passenger-carrying aircraft, 49 CFR 175.10(b); (2) limit the number of oxygen cylinders that may be carried as cargo in compartments that lack a fire suppression system and require that cylinders be stowed horizontally on the floor or as close as practicable to the floor of the cargo compartment or unit load device, 49 CFR 175.85(h) & (i); and (3) require each cylinder of compressed oxygen (in the passenger cabin or a cargo compartment) to be placed in an overpack or outer packaging that meets the performance criteria of Air Transport Association Specification 300 for Type I (ATA 300) shipping containers, 49 CFR 172.102, Special Provision A52.

On January 31, 2007, PHMSA issued a final rule under Docket No. RSPA–04–17664 (HM–224B) to enhance the safety standards for transportation by air of compressed oxygen, other oxidizing gases, and chemical oxygen generators (72 FR 4442). Specifically, the final rule amended the HMR to require cylinders of compressed oxygen and chemical oxygen generators to be transported in an outer packaging that: (1) Meets the same flame penetration resistance standards as required for cargo compartment sidewalls and ceiling panels in transport category airplanes; and (2) provides certain thermal protection capabilities so as to retain its contents during an otherwise controllable cargo compartment fire. These performance requirements must remain in effect for the entire service life of the outer packaging. The outer packaging standard addresses two safety concerns—protecting a cylinder and an oxygen generator that could be exposed directly to flames from a fire and protecting a cylinder and an oxygen generator that could be exposed indirectly to heat from a fire.

In addition, an outer packaging for a cylinder containing compressed oxygen or another oxidizing gas and a package containing an oxygen generator were required to meet the standards in Part III of Appendix F to 14 CFR Part 25, Test Method to Determine Flame Penetration Resistance of Cargo Compartment Liners. An outer packaging's materials of construction must prevent penetration by a flame of 1,700 °F for five minutes, in accordance with Part III of Appendix F, paragraphs (a)(3) and (f)(5) of 14 CFR Part 25.

Further, a cylinder of compressed oxygen or another oxidizing gas must remain below the temperature at which its pressure relief device would activate and an oxygen generator must not actuate when exposed to a temperature of at least 400 °F for three hours. The 400 °F temperature is the estimated mean temperature of a cargo compartment during a halon-suppressed fire. Three hours and 27 minutes is the maximum estimated diversion time world-wide, based on an aircraft flying a southern route over the Pacific Ocean. Data collected during Federal Aviation Administration (FAA) tests indicate that, on average, a 3AA seamless steel oxygen cylinder with a pressure relief device set at cylinder test pressure will open when the cylinder reaches a temperature of approximately 300 °F. This result is consistent with calculations performed by PHMSA. In analyzing pressure relief device (PRD) function, PHMSA calculated that a 3HT seamless steel cylinder for aircraft with a PRD set at 90% of cylinder test pressure will vent at temperatures greater than 220 °F. In order to assure an adequate safety margin for all authorized cylinders, including 3HT cylinders, we amended the HMR to require cylinders of compressed oxygen and other oxidizing gases, which are contained in the specified outer packaging, to maintain an external temperature below 93 °C (199 °F) when exposed to a 400 °F temperature for three hours.

II. Appeals to the January 31, 2007 Final Rule

The following organizations submitted appeals to the January 31, 2007 final rule, in accordance with 49 CFR Part 106: Air Canada (AC); Barlen and Associates, Inc. (Barlen); PSI Plus, Inc. (PSI); and United Airlines, Inc. (United). Delta Airlines (Delta) also submitted a letter expressing its general support for United's formal appeal. The appellants based their appeals on several aspects of the January 31 final rule, most notably, the effective date of certain requirements in the rule, cost and availability of the required outer packaging, marking requirements, and thermal resistance testing. We also received requests for clarification of certain requirements of the final rule.

In response to the appeals, we published a final rule on September 28, 2007 (72 FR 55091) granting the request to delay the mandatory effective date for a new limit on PRD settings on cylinders containing compressed oxygen or other oxidizing gases transported on board aircraft from October 1, 2007 until October 1, 2008. We also clarified the thermal resistance test methods for packagings for oxygen cylinders and oxygen generators in Appendix D to Part 178, and added a new Appendix E to Part 178—Flame Penetration Resistance to incorporate the standards in Part III of Appendix F to 14 CFR Part 25, Test Method to Determine Flame Penetration Resistance of Cargo Compartment Liners Flame Penetration Resistance Test. In addition, we granted the request to include DOT specifications 3E seamless steel and 39 non-reusable (non-refillable) cylinders among the types of cylinders authorized for the transportation of compressed oxygen and other oxidizing gases aboard aircraft. Further, we provided a marking option to ensure easier identification of cylinders equipped with the new PRD and outer packagings meeting the flame penetration and thermal resistance requirements. Finally, in response to the concerns of appellants pertaining to the availability of the required packaging, we indicated that PHMSA and FAA would closely monitor the availability of the required packaging as the effective date (after September 30, 2009) of this provision approached and would consider an extension of the compliance date for this requirement if it was determined that a sufficient supply of the required outer packaging would not be available.

III. Petitions to the January 31, 2007 Final Rule

PHMSA received petitions dated September 23, 2008 and April 21, 2009 from the Council on Safe Transportation of Hazardous Articles, Inc. (COSTHA) pertaining to the mandatory compliance date for the required outer packaging. In its September 23, 2008 petition, COSTHA requested an extension of the compliance date until April 1, 2011 for the outer packaging requirement, and

also suggested that PHMSA permit the current use of non-rigid outer packagings meeting the requirements of ATA Spec 300 through April 1, 2010. COSTHA argued that the additional time would ''allow packaging manufacturers to competitively introduce lightweight, durable, and affordable packaging with an anticipated long term safety benefit.'' PHMSA denied this petition, and in our response, reiterated our intention to monitor the availability and costs of the required outer packaging and to consider an extension of the compliance date for this requirement if it were determined that a sufficient supply of the required outer packaging would not be available as we approached the compliance date.

In its petition dated April 21, 2009, COSTHA again requested the compliance date be extended to April 1, 2011 and suggested that the required outer packagings were currently not in production and would not be available in sufficient time to meet the October 1, 2009 compliance date. COSTHA further requested that PHMSA re-evaluate the entire rulemaking based on its contention that the original regulatory evaluation developed in support of the final rule was ''significantly flawed and incomplete.'' We denied this petition based on our identification of a number of packaging manufacturers that are able to produce outer packagings that conform to the performance standards established in the January 31, 2007 final rule in quantities sufficient to meet expected demand by October 1, 2009. We based our conclusion on consultations with companies that are able to produce similar packaging, and on demonstrations presented to the Department by packaging manufacturers detailing development and production plans for the required packaging, supporting test documentation, cost estimates, and samples of their packaging prototypes.

In addition, PHMSA and FAA attended a conference sponsored by American Airlines held in Tulsa, Oklahoma on March 10–11, 2009 for airline representative and packaging manufacturers to discuss issues pertaining to the HM–224B outer packaging requirements. At this meeting, eight (8) packaging manufacturers provided presentations that discussed the weight, cost, production lead-times, life expectancy, and production rate of the required outer packaging, with several manufactures providing production-ready prototypes. We also re-examined the regulatory evaluation developed in support of the final rule. We agreed with the petitioner that the regulatory evaluation underestimates the costs for outer packagings that conform to the performance standard established in the final rule. However, we also found that the evaluation significantly underestimates the expected life-span for such outer packagings. In addition, the regulatory evaluation overestimates the number of such packagings that would be required to accommodate air shipments of compressed oxygen and other oxidizing gases and chemical oxygen generators. Based on this re-evaluation, we concluded that the costs associated with the requirement that outer packagings meet certain flame penetration and thermal resistance requirements when transported aboard aircraft are within the range of the costs estimated in the regulatory evaluation. Following our denial of COSTHA's second petition, we posted an advisory alert on our website confirming the mandatory compliance for the outer packaging requirement, and provided a contact list of packaging manufacturers who have indicated they are able to produce the required packaging.

PHMSA also received a petition dated June 29, 2009 (P–1544) from Satair USA, Inc pertaining to the quantity limitation for packages of chemical oxygen generators. Currently, the HMR limits the total package weight (gross) of chemical oxygen generators to a maximum of 25 kilograms when transported aboard cargo-aircraft only. This 25 kilogram gross limit includes the hazardous material and its outer packaging. In its petition, Satair contends that because of the additional weight of the more robust outer packaging required by the January 31, 2007 final rule, much of the 25 kilogram limit is utilized by the weight of the outer packaging thereby limiting the actual weight of the hazardous material to be transported. Satair states that if the 25 kilogram gross requirement remains in place, it will severely limit the quantity of items that may be shipped within each container. In its petition, Satair requested that we amend the HMR to revise the quantity limitation for packages of chemical oxygen generators transported aboard cargo aircraft only. We agree with the petitioner. During our monitoring of the availability of the required outer packaging and conversations with several packaging manufacturers, we agreed that the weight of the outer packaging material will be increased because of the additional thermal resistance and flame penetration requirements of the January 31, 2007 final rule, and thereby limits the amount of hazardous materials that can be transported. We believe that the allowable weight of chemical oxygen generators can be increased by revising the quantity limit from ''gross'' to ''net,'' in this direct final rule without sacrificing our intent of protecting a chemical oxygen generator exposed directly to flames from a fire or exposed indirectly to heat from a fire. Therefore, in this direct final rule, we are amending the HMR to revise the quantity limitation for packages of chemical oxygen generators transported aboard cargo aircraft only from 25 kilograms ''gross'' to 25 kilograms ''net.'' We note that the revision applies to chemical oxygen generators transported by cargo-only aircraft, and that the transportation of chemical oxygen generators by passenger aircraft or rail continues to be prohibited.

IV. Summary of the Direct Final Rule

Based on petitions received in response to the final rule and our own initiatives, we are adopting a requirement that quantities of chemical oxygen generators are limited to 25 kg net mass per package for transport aboard cargo-only aircraft. Any quantity of chemical oxygen generators transported aboard passenger aircraft or rail car remains prohibited.

This direct final rule is issued under the procedures set forth in § 106.40 of the HMR. Unless an adverse comment or notice of intent to file an adverse comment is received by November 16, 2009, this rule will become effective on November 16, 2009. An adverse comment explains why a rule would be inappropriate, or would be ineffective or unacceptable without a change. Under the direct final rule process, we do not consider a comment to be adverse that: (1) Recommends another rule change, in addition to the change in the direct final rule at issue, unless the commenter states why the rule would be ineffective without the change; or (2) is a frivolous or irrelevant comment. Therefore, comments that do not specifically address the 25 kg weight limitation for packages of chemical oxygen generators transported aboard cargo only aircraft will be considered beyond the scope of this rulemaking. PHMSA will publish in the **Federal Register** in a timely document confirming the effective date of this direct final rule.

V. Regulatory Analyses and Notices

A. Statutory/Legal Authority for Rulemaking

This direct final rule is published under the authority of Federal hazardous materials transportation law

(Federal hazmat law; 49 U.S.C. 5101 *et seq.*) and 49 U.S.C. 44701. Section 5103(b) of Federal hazmat law authorizes the Secretary of Transportation to prescribe regulations for the safe transportation, including security, of hazardous material in intrastate, interstate, and foreign commerce. Section 1.53 of 49 CFR delegates the authority to issue regulations in accordance with 49 U.S.C. 5103(b) to the Administrator of the Pipeline and Hazardous Materials Safety Administration.

B. Executive Order 12866 and DOT Regulatory Policies and Procedures

This direct final rule is not considered a significant regulatory action under section 3(f) of Executive Order 12866 and, therefore, was not reviewed by the Office of Management and Budget (OMB). This rule is not significant under the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034).

In this direct final rule, we are amending the HMR to enhance safety and to offer greater flexibility in complying with the regulatory requirements for packages of chemical oxygen generators without sacrificing the current HMR level of safety. These amendments are based on petitions for rulemaking submitted by the regulated community and, for the most part, should reduce overall compliance costs. The amendment pertaining to the quantity limitation of chemical oxygen generators aboard cargo-only aircraft adopted in this direct final rule provides regulatory relief by raising the quantity threshold for such shipments.

Overall this direct final rule will enhance transportation safety and reduce the overall compliance burden on the regulated industry.

C. Executive Order 13132

This direct final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 (''Federalism''). This direct final rule preempts State, local and Indian tribe requirements, but does not amend any regulation that has direct effects on the States, the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

The Federal hazardous materials transportation law, 49 U.S.C. 5101–5127, contains an express preemption provision (49 U.S.C. 5125(b)) that preempts State, local, and Indian tribe requirements on the following subjects:

1. The designation, description, and classification of hazardous material;
2. The packing, repacking, handling, labeling, marking, and placarding of hazardous material;
3. The preparation, execution, and use of shipping documents related to hazardous material and requirements related to the number, contents, and placement of those documents;
4. The written notification, recording, and reporting of the unintentional release in transportation of hazardous material; and
5. The design, manufacture, fabrication, marking, maintenance, recondition, repair, or testing of a packaging or container represented, marked, certified, or sold as qualified for use in transporting hazardous material.

This direct final rule addresses items 1, 2 and 5 above and preempts any State, local, or Indian tribe requirements not meeting the ''substantially the same'' standard.

Federal hazardous materials transportation law provides at § 5125(b)(2) that, if DOT issues a regulation concerning any of the covered subjects, DOT must determine and publish in the **Federal Register** the effective date of Federal preemption. The effective date may not be earlier than the 90th day following the date of issuance of the final rule and not later than two years after the date of issuance. This effective date of preemption is 90 days after the publication of this final rule in the **Federal Register**.

D. Executive Order 13175

This direct final rule has been analyzed in accordance with the principles and criteria contained in Executive order 13175 (''Consultation and Coordination with Indian Tribal Governments''). Because this direct final rule will not have tribal implications, does not impose substantial direct compliance costs on Indian tribal governments, and does not preempt tribal law, the funding and consultation requirements of Executive Order 13084 do not apply, and a tribal summary impact statement is not required.

E. Regulatory Flexibility Act, Executive Order 13272, and DOT Procedures and Policies

The Regulatory Flexibility Act of 1980 requires an agency to review regulations to assess their impact on small entities unless the agency determines that a rule is not expected to have a significant impact on a substantial number of small entities. This direct final rule will not impose increased compliance costs on the regulated industry. The revisions, clarifications, and corrections we are making to the January 31, 2007 final rule will provide regulatory relief to persons transporting chemical oxygen generators on aircraft by revising the quantity limitation for packages of chemical oxygen generators transported aboard cargo aircraft only. Accordingly, pursuant to the Regulatory Flexibility Act, 5 U.S.C. 605(b), DOT certifies that this rule will not have a significant economic impact on a substantial number of small entities.

This direct final rule has been developed in accordance with Executive Order 13272 (''Proper Consideration of Small Entities in Agency Rulemaking'') and DOT's procedures and policies to promote compliance with the Regulatory Flexibility Act to ensure that potential impacts of draft rules on small entities are properly considered.

F. Unfunded Mandates Reform Act of 1995

This direct final rule does not impose unfunded mandates under the Unfunded Mandates Reform Act of 1995. It does not result in costs of $141,300,000 or more to either State, local or tribal governments, in the aggregate, or to the private sector, and is the least burdensome alternative that achieves the objective of the rule.

G. Paperwork Reduction Act

This direct final rule imposes no new information collection and recordkeeping requirements.

H. Regulation Identifier Number (RIN)

A regulation identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

I. Environmental Assessment

The National Environmental Policy Act, 42 U.S.C. 4321–4375, requires federal agencies to analyze proposed actions to determine whether the action will have a significant impact on the human environment. The Council on Environmental Quality (CEQ) regulations order federal agencies to conduct an environmental review considering: (1) The need for the proposed action; (2) alternatives to the proposed action; (3) probable environmental impacts of the proposed action and alternatives; and (4) the

agencies and persons consulted during the consideration process. 40 CFR 1508.9(b).

The provisions of this direct final rule build on current regulatory requirements to enhance the safety and security of shipments of chemical oxygen generators when transported aboard an aircraft. The net environmental impact, therefore, will be moderately positive. There are no significant environmental impacts associated with this direct final rule.

J. Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78) or you may visit *http://dms.dot.gov.*

List of Subjects in 49 CFR Part 172

Education, Hazardous materials transportation, Hazardous waste, Labeling, Markings, Packaging and containers, Reporting and recordkeeping requirements.

■ In consideration of the foregoing, we are amending title 49 Chapter I, Subchapter C, as follows:

PART 172—HAZARDOUS MATERIALS TABLE, SPECIAL PROVISIONS, HAZARDOUS MATERIALS COMMUNICATIONS, EMERGENCY RESPONSE INFORMATION, AND TRAINING REQUIREMENTS, AND SECURITY PLANS

■ 1. The authority citation for part 172 continues to read as follows:

Authority: 49 U.S.C. 5101–5128, 44701; 49 CFR 1.53.

§ 172.101 [Amended]

■ 2. In the Hazardous Materials Table, in § 172.101, for the shipping name ''Oxygen generator, chemical (*including when contained in associated equipment, e.g., passenger service units (PSUs), portable breathing equipment (PBE), etc*),'' the entry in Column (9B), is revised to read ''25 kg''.

Issued in Washington, DC on October 8, 2009 under authority delegated in 49 CFR part 106.

Cynthia Douglass,

Acting Deputy Administrator for Hazardous Materials Safety.

[FR Doc. E9–24779 Filed 10–14–09; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

49 CFR Parts 1001, 1002, 1003, 1007, 1011, 1012, 1016, 1100, 1102, 1103, 1104, 1105, 1109, 1110, 1113, 1114, 1116, 1118, 1132, 1139, 1150, 1152, 1177, 1180, 1240, 1241, 1242, 1243, 1245, 1246, 1248, 1253, 1260, 1261, 1262, 1263, 1264, 1265, 1266, 1267 and 1269

[STB Ex Parte No. 685]

Removal of Delegations of Authority to Secretary

AGENCY: Surface Transportation Board.

ACTION: Final rules.

SUMMARY: The Surface Transportation Board (Board or STB) amends its regulations by eliminating the Secretary of the Board, reassigning the delegations of authority from the Secretary to other Offices of the Board, and making additional updates to eliminate incorrect or obsolete references. Because these administrative final rules amend internal agency practice and procedure, this action is exempt from the usual requirement for notice and an opportunity for public comment under 5 U.S.C. 553(b)(A) of the Administrative Procedure Act.

DATES: These rules are effective on November 16, 2009.

ADDRESSES: Information or questions regarding this final rule should reference STB Ex Parte No. 685 and be in writing addressed to: Chief, Section of Administration, Office of Proceedings, Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001.

FOR FURTHER INFORMATION CONTACT: Cynthia T. Brown at (202) 245–0350. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.]

SUPPLEMENTARY INFORMATION: The Board is revising its regulations to eliminate the Secretary of the Board, to reassign the delegations of authority from the Secretary to other Board Offices, and to make additional updates to eliminate incorrect or obsolete references. The regulations at 49 CFR part 1011, which provide the delegations of authority by the Board, and all other rules affected by the removal of delegations of authority from the Secretary will be revised to reflect the change in delegations and other updates. The Secretary is being eliminated to increase efficiency within the Board. The duties of the Secretary will be transferred to other Offices within the Board. These rules set out the new delegations and procedures for processing cases, appeals, and inquiries from the public.

49 CFR 1001.1, Records Available From the Board and 49 CFR 1001.2, Certified Copies of Records

In sections 1001.1(a) and 1001.2, which concern availability of Board records and certification of record copies, the Board removes the references to the Secretary. In section 1001.1(a), the Board changes the reference from Secretary to Records Officer, the new custodian of records for the Board. In section 1001.2, the Board changes the reference from the Secretary to the Records Officer, to reflect the Records Officer's new responsibility for certifying copies of records.

49 CFR 1002.1, Fees for Records Search, Review, Copying, Certification, and Related Services

Sections 1002.1(a), (g)(14)(vi), and (i). The Board changes the references from the Secretary in sections 1002.1(a) and (i), which concern fees for records certification, records copying, and transcript purchases, to the Records Officer. Sections 1002.1(g)(14)(vi) and (i) will be updated to add the 4-digit code provided by the United States Postal Service to the postal ZIP code for the Board's office.

Section 1002.1(e). This section concerns fees for courier services. The position of Information Officer no longer exists, so the reference will be changed to the Records Officer. Fees for courier service can be obtained from the Records Officer or the Board's Web site.

Sections 1002.1(f), (f)(1), and (g)(8). These sections, which concern fees for search and copying services requiring computer processing and for records not considered public under the Freedom of Information Act, will be revised to remove the outdated term ''ADP'' and replace it with the term ''computer.''

49 CFR 1002.2, Filing Fees

Section 1002.2(a)(3). This section, which identifies a Board designee to receive payment of filing fees, will be revised to remove the reference to the Secretary. Routine business practices require only that the fees be payable to the Surface Transportation Board. We will not require additional specificity.

Section 1002.2(e)(2)(i) and (e)(2)(iii). These sections concern requests for waiver or reduction of fees prescribed in section 1002.2(f) and notification of the Board's action on such requests. The reference to the Secretary in section 1002.2(e)(2)(i) will be changed to ''Chief, Section of Administration,

Office of Proceedings, Surface Transportation Board'' and in section 1002.2(e)(2)(iii) to ''Chief, Section of Administration, Office of Proceedings, Surface Transportation Board.''

49 CFR 1003.1, General Information

In section 1003.1, which provides instruction for obtaining prescribed forms except insurance forms, the Board removes the reference to the Office of the Secretary and inserts a reference to the Office of Public Assistance, Governmental Affairs, and Compliance.

49 CFR 1007.3, Requests by an Individual for Information or Access and 49 CFR 1007.6, Disclosure to Third Parties

These sections, which concern requests by individuals for information and disclosure to third parties by the Board, will be updated to reflect the Board's current United States Postal Service mailing address.

49 CFR 1011.3, The Chairman, Vice Chairman, and Board Member

Section 1011.3(c)(1) refers to the Secretary as one of the designees for recording legally required votes and official acts of the Board. This reference will be changed to Clearance Clerk.

49 CFR 1011.6, Delegations of Authority by the Chairman

Sections 49 CFR 1011.6(c)(3), (d), and (g). These sections identify delegations of authority to the Secretary. Under section 1011.6(c)(3), the Secretary has authority to dispose of routine procedural matters under modified procedure not assigned to an administrative law judge or Board Member and, unless otherwise ordered by the Chairman or by a majority of the Board in individual proceedings, authority to decide whether complaint proceedings shall be assigned for oral hearing or handled under modified procedure. Section 1011.6(d) provides for the authority of the Secretary to dismiss a complaint or application at the request of the complainant or applicant. In section 1011.6(g), the Secretary has authority to sign and transmit to the Small Business Administration certifications of no significant economic impact on a substantial number of small entities for proposed rules that might be adopted by the Board and findings regarding waiver of initial regulatory flexibility analysis or delay of initial or final regulatory flexibility analyses, under the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* We are removing all references to the Secretary in these sections and delegating the authorities stated in these sections to the Director of the Office of Proceedings.

49 CFR 1011.7, Delegations of Authority by the Board to Specific Offices of the Board

Sections 49 CFR 1011.7(a), (b), and (c). These sections identify delegations of authority to specific offices of the Board. Because there is no longer an Office of the Secretary, the heading in the regulations for the Secretary (section 1011.7(a)) will be deleted and replaced with Office of Proceedings. All other references to the Secretary in section 1011.7(a) will be changed to the Director of the Office of Proceedings. The section will read: ''(a) Office of Proceedings. (1) The Director of the Office of Proceedings is delegated the following authority: * * * .'' Sections 1011.7(a)(1) and (a)(2) will be renumbered to sections 1011.7(a)(1)(i) and (a)(1)(ii), respectively. In section 1011.7(a), the cross-reference to paragraph (c)(2) will be updated to (b)(2) (to reflect the change that will be adopted below) and the 4-digit code provided by the United States Postal Service will be added to the postal ZIP code for the Board's office.

There is no longer an Office of Compliance and Enforcement so the references to that Office also will be deleted and replaced with the Office of Public Assistance, Governmental Affairs, and Compliance in sections 1011.7(a) and (c). Accordingly, the reference to the Chief, Section of Tariffs, Office of Compliance and Enforcement in section 1011.7(c) will be deleted. The reference to the Office of Proceedings in the heading to section 1011.7(b) will be deleted. Section 1011.7(b) will be renumbered as section 1011.7(2) and will read: ''(2) In addition to the authority delegated * * * .'' The remainder of section 1011.7(b) will be renumbered appropriately and the cross-reference to 49 CFR 1011.6(h) will be updated to reflect 49 CFR 1011.6(c)(3), (d), (g), and (h), to include the new delegations of authority announced in this decision. In section 1011.7(b)(16), the Board changes the reference from ''The Burlington Northern and Santa Fe'' to ''BNSF.'' Section 1011.7(c) will be renumbered as section 1011.7(b).[1]

49 CFR 1012.1, General Provisions, 49 CFR 1012.3, Public Notice, and 49 CFR 1016.311, Payment of Award

Section 49 CFR 1012.1. Section 1012.1(c) refers to written requests for copies of the votes or statements of position of Board Members eligible to participate in action taken by notation voting. The reference to the Secretary of the Board will be deleted and replaced with Records Officer.

Section 49 CFR 1012.3. This section refers to public notice of the scheduling of a Board meeting. The reference to the Secretary in section 1012.3(a) will be changed to Clearance Clerk.

Section 49 CFR 1016.311. This section refers to an applicant's submission of an award granted against the Board. The reference to the Secretary in this section will be changed to ''Chief, Section of Financial Services.''

49 CFR Parts 1100–1269

Our decision requires minor changes to 49 CFR parts 1100–1269, which contain provisions for conducting proceedings and procedures for how the public shall communicate with the Board when submitting documents and requesting reports.[2] In most instances, we remove references to the Office of the Secretary or Secretary and insert references to the Office of Proceedings, its Director, or its Chief of the Section of Administration.[3] These additions to the delegations of authority to the Director of the Office of Proceedings will appear at 49 CFR 1011.6 and 1011.7.

In the sections revised to insert references to the Chief of the Section of Administration we update references to the Secretary to reflect our decision that the Chief of the Section of Administration will be the contact for all Board filings.[4] Unless otherwise noted in the regulations, proceeding and recordation related correspondence to the Board should be addressed to the Chief of the Section of Administration.

In some instances, the change in these sections will be to delete references to the Secretary and insert a reference to the Office of Public Assistance, Governmental Affairs, and Compliance, or to its Director.[5] These updated

[1] Unless otherwise noted, the references in this decision to 49 CFR part 1011 will be to the sections of that part as numbered prior to the changes we are adopting in this decision.

[2] The affected sections shall include 49 CFR parts 1100, 1102, 1103, 1104, 1105, 1109, 1110, 1113, 1114, 1116, 1118, 1132, 1139, 1150, 1152, 1177, 1180, 1240, 1241, 1242, 1243, 1245, 1246, 1248, 1253, and 1260–1269.

[3] Sections revised to insert references to the Office of Proceedings or its Director shall include 49 CFR 1109.1, 1110.7, 1113.2, 1113.17, 1114.24, 1114.31, and 1180.4.

[4] Sections revised to insert references to the Chief of the Section of Administration shall include 49 CFR 1102.1, 1102.2, 1103.4, 1104.1, 1105.12, 1109.1, 1110.2–.3, 1110.9, 1113.2, 1116.1, 1118.3, 1132.1, 1139.7, 1139.25, 1150.10, 1152.21–.22, 1152.24–.25, 1152.27, 1152.29, 1177.2–.4, 1180.4, and 1253.20.

[5] The affected sections shall include 49 CFR 1100.4, 1103.3, 1105.12, and 1110.3.

references reflect our decision that public inquiries concerning the regulations, offers of financial assistance, public use or trails, and the availability of published notices, and requests for non-attorneys to practice before the Board should be directed to the Office of Public Assistance, Governmental Affairs, and Compliance. In parts 1240–1269, the references to the Secretary concerning availability of report forms will be deleted and replaced with the Office of Economics, Environmental Analysis, and Administration.

We also make the following technical changes. In section 1150.10(b), the cross-reference 49 CFR 1002.2(f)(33) is noted as reserved; we will revise the cross-reference to 49 CFR 1002.2(f). In section 49 CFR 1152.25(e) the Board updates the cross-reference from 49 CFR 1011.8(c)(4) and (5) to 49 CFR 1011.7(a)(2)(iv) and (v) to reflect the changes made in this decision. In section 49 CFR 1152.27(e)(1) and (e)(2) the out-of-date reference to section 1011.8 (concerning delegation of authority) will be updated to section 1011.7(a). In section 1180.4, the reference to James H. Bayne will be deleted. In 49 CFR parts 1100–1269, we also update the Board's address and add the 4-digit code provided by the United States Postal Service to the postal ZIP code for the Board's office, as necessary.[6]

Because these changes relate solely to the rules of agency practice, procedure, and organization, they will be issued as final rules without requesting public comment. See 5 U.S.C. 553(b)(A).

The Board certifies that these rule changes will not have a significant economic effect on a substantial number of small entities. The changes being made pertain to agency management, personnel, and procedure, and should have no impact on small entities.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

List of Subjects

49 CFR Part 1001

Administrative practice and procedure, Confidential business information, and Freedom of information.

49 CFR Parts 1002 and 1003

Administrative practice and procedure, Common carriers, and Freedom of information.

49 CFR Part 1007

Privacy.

49 CFR Part 1011

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

49 CFR Part 1012

Sunshine Act.

49 CFR Part 1016

Claims, Equal access to justice, and Lawyers.

49 CFR Parts 1100, 1102, 1103, and 1104

Administrative practice and procedure.

49 CFR Part 1105

Environmental impact statements, Reporting and recordkeeping requirements.

49 CFR Part 1109

Administrative practice and procedure, Maritime carriers, Motor carriers, and Railroads.

49 CFR Parts 1110, 1113, 1114, 1116, 1118, and 1132

Administrative practice and procedure.

49 CFR Part 1139

Administrative practice and procedure, Buses, Freight, Motor carriers, and Reporting and recordkeeping requirements.

49 CFR Part 1150

Administrative practice and procedure, and Railroads.

49 CFR Part 1152

Administrative practice and procedure, Railroads, Reporting and recordkeeping requirements, and Uniform System of Accounts.

49 CFR Part 1177

Administrative practice and procedure, Archives and records, Maritime carriers, and Railroads.

49 CFR Part 1180

Administrative practice and procedure, Railroads, and Reporting and recordkeeping requirements.

49 CFR Parts 1240, 1241, and 1243

Railroads and Recordkeeping requirements.

49 CFR Part 1242

Railroads, Taxes.

49 CFR Part 1245

Railroad employees, Reporting and recordkeeping requirements, and Wages.

49 CFR Part 1246

Railroad employees, Reporting and recordkeeping requirements.

49 CFR Part 1248

Freight, Railroads, Reporting and recordkeeping requirements, and Statistics.

49 CFR Part 1253

Freight forwarders, Maritime carriers, Motor carriers, Pipelines, Railroads, and Reporting and recordkeeping requirements.

49 CFR Part 1260–1269

Valuation.

It is ordered:

1. The final rules set forth in the Appendix to this decision are adopted. Notice of the rules adopted here will be published in the **Federal Register**.

2. This decision is effective on November 16, 2009.

Decided: October 5, 2009.

By the Board, Chairman Elliott, Vice Chairman Nottingham, and Commissioner Mulvey.

Kulunie L. Cannon,

Clearance Clerk.

APPENDIX

Code of Federal Regulations

■ For the reasons set forth in the preamble, the Surface Transportation Board amends parts 1001 through 1003, 1007, 1011, 1012, 1016, 1100, 1102 through 1105, 1109, 1110, 1113, 1114, 1116, 1118, 1132, 1139, 1150, 1152, 1177, 1180, 1240 through 1243, 1245, 1246, 1248, 1253, and 1260–1269 of title 49, chapter X, of the Code of Federal Regulations as follows:

PART 1001—INSPECTION OF RECORDS

■ 1. The authority citation for part 1001 continues to read as follows:

Authority: 5 U.S.C. 552, 49 U.S.C. 702, and 49 U.S.C. 721.

■ 2. Amend § 1001.1 by revising paragraph (a) introductory text to read as follows:

[6] The affected sections shall include 49 CFR 1102.1, 1104.1, 1105.12, 1110.2, 1110.9, 1116.1, 1118.3, 1139.7, 1139.25, 1152.21–.22, 1152.24–.25, 1152.27, 1177.2, 1180.4, and 49 CFR parts 1260–1269.

§ 1001.1 Records available from the Board.

(a) The following specific files and records in the custody of the Records Officer of the Surface Transportation Board are available to the public and may be inspected at the Board's office upon reasonable request during business hours (between 8:30 a.m. and 5 p.m., Monday through Friday):

* * * * *

■ 3. Revise § 1001.2 to read as follows:

§ 1001.2 Certified copies of records.

Copies of and extracts from public records will be certified by the Records Officer. Persons requesting the Board to prepare such copies should clearly state the material to be copied, and whether it shall be certified. Charges will be made for certification and for the preparation of copies as provided in part 1002 of this chapter.

PART 1002—FEES

■ 4. The authority citation for part 1002 continues to read as follows:

Authority: 5 U.S.C. 552(a)(4)(A) and 553; 31 U.S.C. 9701; and 49 U.S.C. 721. Section 1002.1(g)(11) also issued under 5 U.S.C. 5514 and 31 U.S.C. 3717.

■ 5. Amend § 1002.1 by revising paragraphs (a), (e), (f) introductory text, (f)(1), (g)(8), (g)(14)(vi), and (i) to read as follows:

§ 1002.1 Fees for records search, review, copying, certification, and related services.

* * * * *

(a) Certificate of the Records Officer, $17.00.

* * * * *

(e) Fees for courier services to transport agency records to provide on-site access to agency records stored off-site will be set at the rates set forth in the Board's agreement with its courier service provider. Rate information is available on the Board's Web site (*http://www.stb.dot.gov*) or can be obtained from the Board's Records Officer, Room 1200, Surface Transportation Board, Washington, DC 20423–0001.

(f) The fee for search and copying services requiring computer processing are as follows:

(1) A fee of $66.00 per hour for professional staff time will be charged when it is required to fulfill a request for computer data.

* * * * *

(g) * * *

(8) The fees for computer data are set forth in paragraph (f) of this section.

* * * * *

(14) * * *

(vi) The primary interest in disclosure: Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is ''primarily in the commercial interest of the requester.'' This fee waiver and reduction provision will be implemented in accordance with guidelines issued by the U.S. Department of Justice on April 2, 1987 and entitled ''New FOIA Fee Waiver Policy Guidance.'' A copy of these guidelines may be inspected or obtained from the Surface Transportation Board's Freedom of Information Office, Washington, DC 20423–0001.

* * * * *

(i) Transcript of testimony and of oral argument, or extracts therefrom, may be purchased by the public from the Board's official reporter. For information regarding the official reporter, contact the Records Officer, Surface Transportation Board, Washington, DC 20423–0001.

■ 6. Amend § 1002.2 by revising paragraphs (a)(3) and (e)(2)(i) and (iii) to read as follows:

§ 1002.2 Filing fees.

(a) * * *

(3) Fees will be payable to the Surface Transportation Board, by check payable in United States currency drawn upon funds deposited in a United States or foreign bank or other financial institution, money order payable in United States currency, or by credit card.

* * * * *

(e) * * *

(2) * * *

(i) *When to request.* At the time that a filing is submitted to the Board the applicant may request a waiver or reduction of the fee prescribed in this part. Such request should be addressed to the Chief, Section of Administration, Office of Proceedings, Surface Transportation Board.

* * * * *

(iii) *Board action.* The Chief, Section of Administration, Office of Proceedings, Surface Transportation Board will notify the applicant of the decision to grant or deny the request for waiver or reduction.

* * * * *

PART 1003—FORMS

■ 7. The authority citation for part 1003 continues to read as follows:

Authority: 49 U.S.C. 721, 13301(f).

■ 8. Amend § 1003.1 by revising paragraph (c) to read as follows:

§ 1003.1 General information.

* * * * *

(c) Copies of all prescribed forms except insurance forms are available upon request from the Office of Public Assistance, Governmental Affairs, and Compliance, Surface Transportation Board, Washington, DC 20423.

PART 1007—RECORDS CONTAINING INFORMATION ABOUT INDIVIDUALS

■ 9. The authority citation for part 1007 continues to read as follows:

Authority: 5 U.S.C. 552, 49 U.S.C. 721.

■ 10. Amend § 1007.3 by revising paragraph (a) to read as follows:

§ 1007.3 Requests by an individual for information or access.

(a) Any individual may request information on whether a system of records maintained by the Board contains any information pertaining to him or her, or may request access to his or her record or to any information pertaining to him or her which is contained in a system of records. All requests shall be directed to the Privacy Officer, Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001.

* * * * *

■ 11. Amend § 1007.6 by revising paragraph (c) to read as follows:

§ 1007.6 Disclosure to third parties.

* * * * *

(c) The accounting described in paragraph (b) of this section will be made available to the individual named in the record upon his written request, directed to the Privacy Officer, Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001, except that the accounting will not be revealed with respect to disclosures made under paragraph (a)(7) of this section 1107.6 pertaining to law enforcement activity, and will not be maintained as to disclosures involving systems of records exempted under section 1007.12.

* * * * *

PART 1011—BOARD ORGANIZATION; DELEGATIONS OF AUTHORITY

■ 12. The authority citation for part 1011 continues to read as follows:

Authority: 5 U.S.C. 553; 31 U.S.C. 9701; 49 U.S.C. 701, 721, 11123, 11124, 11144, 14122, and 15722.

■ 13. Amend § 1011.3 by revising paragraph (c)(1) to read as follows:

§ 1011.3 The Chairman, Vice Chairman, and Board Member.

* * * * *

(c)(1) The Chairman presides at all sessions of the Board and sees that every vote and official act of the Board required by law to be recorded is accurately and promptly recorded by the Clearance Clerk or the person designated by the Board for that purpose.

* * * * *

■ 14. Amend § 1011.6 by revising paragraphs (c)(3), (d), and (g) introductory text to read as follows:

§ 1011.6 Delegations of authority by the Chairman.

* * * * *

(c) * * *

(3) Unless otherwise ordered by the Board in individual proceedings, authority to dispose of routine procedural matters in proceedings assigned for handling under modified procedure, other than those assigned to an administrative law judge or a Board Member, is assigned to the Director of the Office of Proceedings. The Director of the Office of Proceedings shall also have authority, unless otherwise ordered by the Chairman or by a majority of the Board in individual proceedings, to decide whether complaint proceedings shall be handled under the modified procedure or be assigned for oral hearings. In carrying out these duties, the Director of the Office of Proceedings shall consult, as necessary, with the General Counsel and the Director of any Board office to which an individual proceeding has been assigned.

(d) Except as provided at 49 CFR 1113.3(b)(1), authority to dismiss a complaint on complainant's request, or an application on applicant's request, is delegated to the Director of the Office of Proceedings.

* * * * *

(g) The Director of the Office of Proceedings is delegated authority, under the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* to:

* * * * *

■ 15. Amend § 1011.7 by revising paragraphs (a), (b) introductory text, (b)(1), and (b)(3) to read as follows:

§ 1011.7 Delegations of authority by the Board to specific offices of the Board.

(a) *Office of Proceedings.*

(1) The Director of the Office of Proceedings is delegated the following authority:

(i) Whether (in consultation with involved Offices) to waive filing fees set forth at 49 CFR 1002.2(f).

(ii) To issue, on written request, informal opinions and interpretations (exclusive of informal opinions and interpretations on carrier tariff provisions), which are not binding on the Board. In issuing informal opinions or interpretations, the Director of the Office of Proceedings shall consult with the Directors of the appropriate Board offices. Such requests must be directed to the Director of the Office of Proceedings, Surface Transportation Board, Washington, DC 20423–0001. Authority to issue informal opinions and interpretations on carrier tariff provisions is delegated at paragraph (b)(2) of this section to the Office of Public Assistance, Governmental Affairs, and Compliance.

(2) In addition to the authority delegated at 49 CFR 1011.6(c)(3), (d),(g), and (h), the Director of the Office of Proceedings shall have authority initially to determine the following:

(i) Whether to designate abandonment proceedings for oral hearings on request.

(ii) Whether offers of financial assistance satisfy the statutory standards of 49 U.S.C. 10904(d) for purposes of negotiations or, in exemption proceedings, for purposes of partial revocation and negotiations.

(iii) Whether:

(A) To impose, modify, or remove environmental or historic preservation conditions; and

(B) In abandonment proceedings, to impose public use conditions under 49 U.S.C. 10905 and the implementing regulations at 49 CFR 1152.28.

(iv) In abandonment proceedings, when a request for interim trail use/rail banking is filed under 49 CFR 1152.29, to determine whether the National Trails System Act, 16 U.S.C. 1247(d), is applicable and, where appropriate, to issue Certificates of Interim Trail Use or Abandonment (in application proceedings) or Notices of Interim Trail Use or Abandonment (in exemption proceedings).

(v) In any abandonment proceeding where interim trail use/rail banking is an issue, to make such findings and issue decisions as may be necessary for the orderly administration of the National Trails System Act, 16 U.S.C. 1247(d).

(vi) Whether to institute requested declaratory order proceedings under 5 U.S.C. 554(e).

(vii) To issue decisions, after 60 days' notice by any person discontinuing a subsidy established under 49 U.S.C. 10904 and at the railroad's request:

(A) In application proceedings, immediately issuing decisions authorizing abandonment or discontinuance; and

(B) In exemption proceedings, immediately vacating the decision that postponed the effective date of the exemption.

(viii) In proceedings under the Feeder Railroad Development Program under 49 U.S.C. 10907 and the implementing regulations at 49 CFR part 1151:

(A) Whether to accept or reject primary applications under 49 CFR 1151.2(b); competing applications under section 1151.2(c); and incomplete applications under 49 CFR 1151.2(d).

(B) Whether to grant waivers from specific provisions of 49 CFR part 1151.

(ix) In exemption proceedings subject to environmental or historic preservation reporting requirements, to issue a decision, under 49 CFR 1105.10(g), making a finding of no significant impact where no environmental or historic preservation issues have been raised by any party or identified by the Board's Section of Environmental Analysis.

(x) Whether to issue notices of exemption under 49 U.S.C. 10502:

(A) For acquisition, lease, and operation transactions under 49 U.S.C. 10901 and 10902 and the implementing regulations at 49 CFR part 1150, subparts D and E;

(B) For connecting track constructions under 49 U.S.C. 10901 and the implementing regulations at 49 CFR 1150.36;

(C) For rail transactions under 49 U.S.C. 11323 and the implementing regulations at 49 CFR 1180.2(d); and

(D) For abandonments and discontinuances under 49 U.S.C. 10903 and the implementing regulations at 49 CFR 1152.50.

(xi) When an application or a petition for exemption for abandonment is filed, the Director will issue a notice of that filing pursuant to 49 CFR 1152.24(e)(2) and 49 CFR 1152.60, respectively.

(xii) Whether to issue a notice of exemption under 49 U.S.C. 13541 for a transaction under 49 U.S.C. 14303 within a motor passenger carrier corporate family that does not result in adverse changes in service levels, significant operational changes, or a change in the competitive balance with motor passenger carriers outside the corporate family.

(xiii) Whether to issue rail modified certificates of public convenience and necessity under 49 CFR part 1150, subpart C.

(xiv) Whether to waive the regulations at 49 CFR part 1152, subpart C, on appropriate petition.

(xv) To reject applications, petitions for exemption, and verified notices (filed in class exemption proceedings) for noncompliance with the environmental rules at 49 CFR part 1105.

(xvi) To reject applications by BNSF Railway Company to abandon rail lines in North Dakota exceeding the 350-mile cap of section 402 of Public Law 97–102, 95 Stat. 1465 (1981), as amended by The Department of Transportation and Related Agencies Appropriations Act, 1992, Public Law 102–143, section 343 (Oct. 28, 1991).

(b) *Office of Public Assistance, Governmental Affairs, and Compliance.* The Office of Public Assistance, Governmental Affairs, and Compliance is delegated the authority to:

(1) Reject tariffs and railroad transportation contract summaries filed with the Board that violate applicable statutes, rules, or regulations. Any rejection of a tariff or contract summary may be by letter signed by or for the Director, Office of Public Assistance, Governmental Affairs, and Compliance.

(2) * * *

(3) Grant or withhold special tariff authority granting relief from the provisions of 49 CFR part 1312. Any grant or withholding of such relief may be by letter signed by or for the Director, Office of Public Assistance, Governmental Affairs, and Compliance.

* * * * *

PART 1012—MEETINGS OF THE BOARD

■ 16. The authority citation for part 1012 continues to read as follows:

Authority: 5 U.S.C. 552b(g), 49 U.S.C. 701, 721.

■ 17. Amend § 1012.1 by revising paragraph (c) to read as follows:

§ 1012.1 General provisions.

* * * * *

(c) These regulations are not intended to govern situations in which members of the Board consider individually and vote by notation upon matters which are circulated to them in writing. Copies of the votes or statements of position of all Board Members eligible to participate in action taken by notation voting will be made available, as soon as possible after the date upon which the action taken is made public or any decision or order adopted is served, in a public reading room or other easily accessible place within the Board, or upon written request to the Records Officer.

■ 18. Amend § 1012.3 by revising paragraph (a) to read as follows:

§ 1012.3 Public notice.

(a) Unless a majority of the Board determines that such information is exempt from disclosure under the Act, public notice of the scheduling of a meeting will be given by filing a copy of the notice with the Clearance Clerk of the Board for posting and for service on all parties of record in any proceeding which is the subject of the meeting or any other person who has requested notice with respect to meetings of the Board, and by submitting a copy of the notice for publication in the **Federal Register**.

* * * * *

PART 1016—SPECIAL PROCEDURES GOVERNING THE RECOVERY OF EXPENSES BY PARTIES TO BOARD ADJUDICATORY PROCEEDINGS

Subpart C—Procedures for Considering Applications

■ 19. The authority citation for part 1016 continues to read as follows:

Authority: 5 U.S.C. 504(c)(1), 49 U.S.C. 721.

■ 20. Revise § 1016.311 to read as follows:

§ 1016.311 General provisions.

An applicant seeking payment of an award shall submit to the appropriate official of the paying agency a copy of the Board's final decision granting the award, accompanied by a statement that the applicant will not seek review of the decision in the United States courts. Where the award is granted against the Surface Transportation Board the applicant shall make its submission to the Chief, Section of Financial Services, Surface Transportation Board, Washington, DC 20423–0001. The Board will pay the amount awarded to the applicant within 60 days of the applicant's submission unless the judicial review of the award or of the underlying decision of the adversary adjudication has been sought by the applicant or any other party to the proceeding.

PART 1100—GENERAL PROVISIONS

■ 21. The authority citation for part 1100 continues to read as follows:

Authority: 49 U.S.C. 721.

■ 22. Revise § 1100.4 to read as follows:

§ 1100.4 Information and inquires.

Persons with questions concerning these rules should either send a written inquiry addressed to the Director, Office of Public Assistance, Governmental Affairs, and Compliance, Surface Transportation Board or should telephone the Office of Public Assistance, Governmental Affairs, and Compliance.

PART 1102—COMMUNICATIONS

■ 23. The authority citation for part 1102 continues to read as follows:

Authority: 49 U.S.C. 721.

■ 24. Amend § 1102.1 to read as follows:

§ 1102.1 How Addressed.

All communications should be addressed to the Chief, Section of Administration, Office of Proceedings, Surface Transportation Board, Washington, DC 20423–0001 unless otherwise specifically directed by another Board regulation. All communications should designate the docket number and title, if any. The person communicating shall state his address, and the party he represents.

■ 25. Amend § 1102.2 by revising paragraph (e) to read as follows:

§ 1102.2 Ex parte communications prohibited; penalties provided.

* * * * *

(e) *Procedure required of Board members and employees upon receipt of ex parte communications concerning the merits of a proceeding.* Any person who receives an *ex parte* communication concerning the merits of a proceeding must promptly transmit either the written communication, or a written summary of the oral communication with an outline of the surrounding circumstances to the Chief, Section of Administration, Office of Proceedings, Surface Transportation Board. The Section Chief shall place all of the material in the correspondence section of the public docket of the proceeding. A recipient of such *ex parte* communication, who has doubt as to the nature of the communication, may request a ruling on the question from the Board's Designated Agency Ethics Official. The Designated Agency Ethics Official shall promptly reply to such requests. The Chief, Section of Administration, Office of Proceedings, shall promptly notify the Chairman of the Board of such *ex parte* communications sent to the Section Chief. The Designated Agency Ethics Official shall promptly notify the Chairman of all requests for rulings sent to the Designated Agency Ethics Official. The Chairman may require that any communication be placed in the correspondence section of the docket when fairness requires that it be made public, even if it is not a prohibited communication. The Chairman may direct the taking of such other action as may be appropriate under the circumstances.

* * * * *

PART 1103—PRACTITIONERS

■ 26. The authority citation for part 1103 continues to read as follows:

Authority: 21 U.S.C. 862; 49 U.S.C. 703(e), 721.

■ 27. Amend § 1103.3 by revising paragraphs (c)(1) and (j) to read as follows:

§ 1103.3 Persons not attorneys-at-law—qualifications and requirements for practice before the Board.

* * * * *

(c)(1) *Application for admission.* An application filed pursuant to this rule under oath for admission to practice shall be submitted between January and May 1 of the year in which the examination is to be taken. The application is to be completed in full on the form provided by the Board, and shall be addressed to the Director, Office of Public Assistance, Governmental Affairs, and Compliance, Surface Transportation Board, Washington, DC 20423–0001, to the attention of the room number indicated on the form.

* * * * *

(j) *Examination results.* Results will be released within 90 days after the examination. Individual results will be forwarded to the applicants at least 1 week before being publicly released. To protect the privacy of those taking the examination, individual grades will not be released over the telephone to anyone. Requests for grades may, however, be submitted in writing to the Office of Public Assistance, Governmental Affairs, and Compliance to the attention of the address stated in the application form.

* * * * *

■ 28. Amend § 1103.4 by revising paragraph (d) to read as follows:

§ 1103.4 Initial appearances.

* * * * *

(d) Filing a letter with the Chief, Section of Administration, Office of Proceedings, Surface Transportation Board stating that practitioner is authorized to represent a party. The party represented, their address, and the docket number of the proceeding must also be identified at the time of the initial appearance.

PART 1104—FILING WITH THE BOARD—COPIES—VERIFICATION—SERVICE—PLEADINGS, GENERALLY

■ 29. The authority citation for part 1104 continues to read as follows:

Authority: 5 U.S.C. 553 and 559; 18 U.S.C. 1621; 21 U.S.C. 862; and 49 U.S.C. 721.

■ 30. Amend § 1104.1 by revising paragraph (a) to read as follows:

§ 1104.1 Address, identification, and electronic filing option.

(a) Except as provided in § 1115.7, pleadings should be addressed to the ''Chief, Section of Administration, Office of Proceedings, Surface Transportation Board, Washington, DC 20423–0001,'' and should designate the docket number and title of the proceeding, if known.

* * * * *

PART 1105—PROCEDURES FOR IMPLEMENTATION OF ENVIRONMENTAL LAWS

■ 31. The authority citation for part 1105 continues to read as follows:

Authority: 16 U.S.C. 470f, 1456, and 1536; 42 U.S.C. 4332 and 6362(b); and 49 U.S.C. 701 note (1995) (Savings Provisions), 721(a), 10502, and 10903–10905.

■ 32. Amend § 1105.12 by revising Appendix to § 1105.12—Sample Newspaper Notices to read as follows:

§ 1105.12 Sample newspaper notices for abandonment exemption cases.

* * * * *

Appendix to § 1105.12—Sample Newspaper Notices

Sample Local Newspaper Notice for Out-Of-Service Abandonment Exemptions

Notice of Intent To Abandon or To Discontinue Rail Service

(Name of railroad) gives notice that on or about (insert date notice of exemption will be filed with the Surface Transportation Board), it intends to file with the Surface Transportation Board, Washington, DC 20423, a notice of exemption under 49 CFR 1152 Subpart F—Exempt Abandonments permitting the (abandonment of or discontinuance of service on) a____mile line of railroad between railroad milepost ____, near (station name), which traverses through United States Postal Service ZIP Codes (ZIP Codes) and railroad milepost ____, near (station name) which traverses through United States Postal Service ZIP Codes (ZIP Codes) in____County(ies), (State). The proceeding will be docketed as No. AB____(Sub-No.____X).

The Board's Section of Environmental Analysis (SEA) will generally prepare an Environmental Assessment (EA), which will normally be available 25 days after the filing of the notice of exemption. Comments on environmental and energy matters should be filed no later than 15 days after the EA becomes available to the public and will be addressed in a Board decision. Interested persons may obtain a copy of the EA or make inquiries regarding environmental matters by writing to the Section of Environmental Analysis (SEA), Surface Transportation Board, Washington, DC 20423 or by calling that office at [INSERT TELEPHONE NUMBER].

Appropriate offers of financial assistance to continue rail service can be filed with the Board. Requests for environmental conditions, public use conditions, or rail banking/trails use also can be filed with the Board. An original and 10 copies of any pleading that raises matters other than environmental issues (such as trails use, public use, and offers of financial assistance) must be filed directly with the Board's Section of Administration, Office of Proceedings, 395 E Street, SW., Washington, DC 20423–0001 [*See* 49 CFR 1104.1(a) and 1104.3(a)], and one copy must be served on applicants' representative [*See* 49 CFR 1104.12(a)]. Questions regarding offers of financial assistance, public use or trails use may be directed to the Board's Office of Public Assistance, Governmental Affairs, and Compliance at [INSERT TELEPHONE NUMBER]. Copies of any comments or requests for conditions should be served on the applicant's representative: (Name, address and phone number).

Sample Local Newspaper Notice for Petitions for Abandonment Exemptions

Notice of Intent To Abandon or To Discontinue Rail Service

(Name of railroad) gives notice that on or about (insert date petition for abandonment exemption will be filed with the Surface Transportation Board) it intends to file with the Surface Transportation Board, Washington, DC 20423, a petition for exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903, *et seq.,* permitting the (abandonment of or discontinuance of service on) a____mile line of railroad between railroad milepost_____, near (station name) which traverses through United States Postal Service ZIP Codes (ZIP Codes), and railroad milepost__, near (station name) which traverses through United States Postal Service ZIP Codes (ZIP Codes) in____County(ies), (State). The proceeding has been docketed as No. AB____(Sub-No.____X).

The Board's Section of Environmental Analysis (SEA) will generally prepare an Environmental Assessment (EA), which will normally be available 60 days after the filing of the petition for abandonment exemption. Comments on environmental and energy matters should be filed no later than 30 days after the EA becomes available to the public and will be addressed in a Board decision. Interested persons may obtain a copy of the EA or make inquiries regarding environmental matters by writing to SEA, Surface Transportation Board, Washington, DC 20423 or by calling SEA at [INSERT TELEPHONE NUMBER].

Appropriate offers of financial assistance to continue rail service can be filed with the Board. Requests for environmental conditions, public use conditions, or rail banking/trails use also can be filed with the Board. An original and 10 copies of any pleading that raises matters other than environmental issues (such as trails use, public use, and offers of financial assistance) must be filed directly with the Board's

Section of Administration, Office of Proceedings, 395 E Street, SW., Washington, DC 20423–0001 [*See* 49 CFR 1104.1(a) and 1104.3(a)], and one copy must be served on applicants' representative [*See* 49 CFR 1104.12(a)]. Questions regarding offers of financial assistance, public use or trails use may be directed to the Board's Office of Public Assistance, Governmental Affairs, and Compliance at [INSERT TELEPHONE NUMBER]. Copies of any comments or requests for conditions should be served on the applicant's representative (name and address).

PART 1109—USE OF ALTERNATIVE DISPUTE RESOLUTION IN BOARD PROCEEDINGS AND THOSE IN WHICH THE BOARD IS A PARTY

■ 33. The authority citation for part 1109 continues to read as follows:

Authority: 5 U.S.C. 571 *et seq.*

■ 34. Revise § 1109.1 to read as follows:

§ 1109.1 Invoking ADR in Board proceedings.

Any proceeding may be held in abeyance for 90 days while administrative dispute resolution (ADR) procedures (such as arbitration and mediation) are pursued. (Additional 90 day periods can be requested.) The period while any proceeding is held in abeyance to facilitate ADR will not be counted towards the statutory deadlines. All parties are required to indicate their written consent for ADR treatment. Requests that a proceeding be held in abeyance while ADR procedures are pursued should be submitted to the Chief, Section of Administration, Office of Proceedings. The Director of the Office of Proceedings shall promptly issue an order in response to such requests. Unless arbitration or some other binding process involving a neutral has been undertaken, any party believing that ADR procedures are not yielding the intended results shall inform the Chief, Section of Administration, Office of Proceedings and all parties in writing, and normal agency procedures will be reactivated by the Director of the Office of Proceedings by notice served on all the parties.

PART 1110—PROCEDURES GOVERNING INFORMAL RULEMAKING PROCEEDINGS

■ 35. The authority citation for part 1110 continues to read as follows:

Authority: 49 U.S.C. 721.

■ 36. Amend § 1110.2 by revising paragraph (c)(1) to read as follows:

§ 1110.2 Opening of proceeding.

* * * * *

(c) * * *

(1) Be submitted, along with 15 copies if possible, to the Chief, Section of Administration, Office of Proceedings, Surface Transportation Board, Washington, DC 20423–0001;

* * * * *

■ 37. Amend § 1110.3 by revising paragraph (d) to read as follows:

§ 1110.3 Publication of notices.

* * * * *

(d) In addition to being published in the **Federal Register**, notices of proposed rulemaking and subsequent notices and decisions in rulemaking proceedings, will be served on the parties by the Office of Proceedings and made available to the public through the Office of Public Assistance, Governmental Affairs, and Compliance. To the extent possible, the date of service will be the same as the date of publication in the **Federal Register**. When the service and publication dates are not the same, the date of publication in the **Federal Register** is controlling for the purpose of determining time periods set by these procedures or by notices issued in individual proceedings.

■ 38. Revise § 1110.7 to read as follows:

§ 1110.7 Availability of dockets.

Dockets of pending rulemaking proceedings are maintained in the Office of Proceedings. These dockets are available for inspection by any person, and copies may be obtained upon payment of the prescribed fee.

■ 39. Revise § 1110.9 to read as follows:

§ 1110.9 Petition for waiver.

Any person may petition the Board for a permanent or temporary waiver of any rule. Petitions should be filed with the Chief, Section of Administration, Office of Proceedings, Surface Transportation Board, Washington, DC 20423–0001, and should identify the rule involved.

PART 1113—ORAL HEARING

■ 40. The authority citation for part 1113 continues to read as follows:

Authority: 5 U.S.C. 559; 49 U.S.C. 721.

■ 41. Amend § 1113.1 by revising paragraph (a) to read as follows:

§ 1113.1 Scheduling hearings; continued hearings.

(a) *Assignment; service and posting of notice.* In those proceedings in which an oral hearing is to be held, the Board will assign a time and place for hearing. Notice of hearings will be posted on the Board's Web site, will be served upon the parties and such other persons as may be entitled to receive notice under the Act, and will be available for inspection at the Board's office.

* * * * *

■ 42. Amend § 1113.2 by revising paragraphs (a) and (d) to read as follows:

§ 1113.2 Subpoenas.

(a) *Issuance.* A subpoena may be issued upon the direction of the Board on its own motion or upon request. A subpoena may be issued by the Board or by the officer presiding at a hearing and must be signed by the Director of the Office of Proceedings or a member of the Board.

* * * * *

(d) *Return.* If service of subpoena is made by a United States marshal or his deputy, service should be evidenced by his return on the subpoena. If made by any other person, such person shall make an affidavit stating the date, time and manner of service; and return such affidavit on, or with, the original subpoena in accordance with the form thereon. In case of failure to make service the reasons for the failure should be stated on the original subpoena. The written acceptance of service of a subpoena by the person subpoenaed will be sufficient without other evidence of return. The original subpoena bearing or accompanied by the required return, affidavit, statement, or acceptance of service, should be returned forthwith to the Chief, Section of Administration, Office of Proceedings, unless otherwise directed.

* * * * *

■ 43. Amend § 1113.17 by revising paragraph (c) to read as follows:

§ 1113.17 Transcript of record.

* * * * *

(c) *Objections to corrections.* Parties disagreeing with corrections suggested pursuant to paragraph (b) of this section should file written objections in the same manner as suggested corrections are to be filed. Objections to suggested corrections should be filed not later than 15 days after the filing with the Board of suggested corrections. If no objections are timely filed, the Office of Proceedings shall make the suggested corrections to the transcript. If objections are timely filed, the officer who presided at the hearing shall determine the merits of the suggested correction and enter an appropriate decision in the proceeding.

* * * * *

PART 1114—EVIDENCE; DISCOVERY

■ 44. The authority citation for part 1114 continues to read as follows:

Authority: 5 U.S.C. 559; 49 U.S.C. 721.

■ 45. Amend § 1114.24 by revising paragraph (h) to read as follows:

§ 1114.24 Depositions; procedures.

* * * * *

(h) *Return.* The officer shall securely seal the deposition in an envelope endorsed with sufficient information to identify the proceeding and marked ''Deposition of (here insert name of witness)'' and shall either personally deliver or promptly send the original and one copy of all exhibits by registered mail to the Office of Proceedings. A deposition to be offered in evidence must reach the Board not later than 5 days before the date it is to be so offered.

* * * * *

■ 46. Amend § 1114.31 by revising paragraph (a)(4) to read as follows:

§ 1114.31 Failure to respond to discovery.

(a) * * *

(4) *Ruling on motion to compel in stand-alone cost and simplified standards rate cases.* Within 5 business days after a conference with the parties convened pursuant to paragraph (a)(3) of this section, the Director of the Office of Proceedings will issue a summary ruling on the motion to compel discovery. If no conference is convened, the Director of the Office of Proceedings will issue this summary ruling within 10 days after the filing of the reply to the motion to compel. Appeals of a Director's ruling will proceed under 49 CFR 1115.9, and the Board will attempt to rule on such appeals within 20 days after the filing of the reply to the appeal.

* * * * *

PART 1116—ORAL ARGUMENT BEFORE THE BOARD

■ 47. The authority citation for part 1116 continues to read as follows:

Authority: 49 U.S.C. 721.

■ 48. Amend § 1116.1 by revising paragraph (a) to read as follows:

§ 1116.1 Requests.

(a) *Addressee.* Requests for oral argument should be addressed to the Chief, Section of Administration, Office of Proceedings, Surface Transportation Board, Washington, DC 20423–0001.

* * * * *

PART 1118—PROCEDURES IN INFORMAL PROCEEDINGS BEFORE EMPLOYEE BOARDS

■ 49. The authority citation for part 1118 continues to read as follows:

Authority: 49 U.S.C. 721.

■ 50. Amend § 1118.3 by revising paragraph (d) to read as follows:

§ 1118.3 Appeals.

* * * * *

(d) *Where filed.* Appeals and replies to appeals of decisions issued by employee boards must be filed with the Chief, Section of Administration, Office of Proceedings, Surface Transportation Board, 395 E St., SW., Washington, DC 20423–0001.

* * * * *

PART 1132—PROTESTS REQUESTING SUSPENSION AND INVESTIGATION OF COLLECTIVE RATEMAKING ACTIONS

■ 51. The authority citation for part 1132 continues to read as follows:

Authority: 49 U.S.C. 721, 13301(f), and 13703.

■ 52. Amend § 1132.1 by revising the section heading and paragraph (d) to read as follows:

§ 1132.1 Protest against collective ratemaking actions.

* * * * *

(d) *Copies; service.* In connection with proceedings involving proposals subject to the special procedures in Ex Parte No. MC–82, New Procedures in Motor Carrier Rev. Proc. 339 I.C.C. 324, and set forth at 49 CFR part 1139, an original and 10 copies of every protest or reply filed under this section should be furnished for the use of the Board. Except as provided for proposals subject to the special procedures in Ex Parte No. MC–82, the original and 10 copies of each protest, or of each reply filed under this section, must be filed with the Board, and one copy simultaneously must be served upon the publishing carrier or collective ratemaking organization, and upon other persons known by protestant to be interested. These pleadings should be directed to the attention of the Chief, Section of Administration, Office of Proceedings, Surface Transportation Board.

* * * * *

PART 1139—PROCEDURES IN MOTOR CARRIER REVENUE PROCEEDINGS

■ 53. The authority citation for part 1132 continues to read as follows:

Authority: 49 U.S.C. 721, 13703.

■ 54. Revise § 1139.7 to read as follows:

§ 1139.7 Service.

The detailed information called for herein shall be in writing and shall be verified by a person or persons having knowledge thereof. The original and 10 copies of each verified statement for the use of the Board shall be filed with the Chief, Section of Administration, Office of Proceedings, Surface Transportation Board, Washington, DC 20423–0001. A copy of each statement shall be mailed by first-class mail to each party of record in the last formal proceeding concerning a general rate increase in the affected area or territory. However, one copy of each statement shall be sent by express mail to any person undertaking to bear the cost. Written request for this expedited service must be made no less than 5 days before the statement is due to be filed with the Board. Otherwise, the service requirements of 49 CFR 1104.12 should be observed. Information with respect to carrier affiliates may be served on the parties in summary form, if so desired. A copy of each statement shall be furnished to any interested person on request.

■ 55. Revise § 1139.25 to read as follows:

§ 1139.25 Service.

The detailed information called for herein shall be in writing and shall be verified by a person or persons having knowledge thereof. The original and 16 copies of each verified statement for the use of the Board shall be filed with the Chief, Section of Administration, Office of Proceedings, Surface Transportation Board, Washington, DC 20423–0001. One copy of each statement shall be sent first-class mail to each of the regional offices of the Board in the area affected by the proposed increase, where it will be open to public inspection. A copy of each statement shall be mailed by first-class mail to each party of record in the last formal proceeding concerning a general increase in bus passenger fares in the affected area or territory. Otherwise, the service requirements of § 1130.1 shall be observed.

PART 1150—CERTIFICATE TO CONSTRUCT, ACQUIRE, OR OPERATE RAILROAD LINES

■ 56. The authority citation for part 1150 continues to read as follows:

Authority: 49 U.S.C. 721(a), 10502, 10901, and 10902.

■ 57. Amend § 1150.10 by revising paragraph (b) to read as follows:

§ 1150.10 Procedures.

* * * * *

(b) *Filing procedures.* The original and 10 copies of the application and all documents shall be filed with the Chief, Section of Administration, Office of Proceedings. A filing fee in the amount set forth in 49 CFR 1002.2(f) is required to file an application. Copies of documents shall be furnished promptly to interested parties upon request. The application shall include a stamped self-addressed envelope to be used to notify applicant of the docket number. Additionally, if possible, telephonic communication of the docket number shall be made.

* * * * *

PART 1152—ABANDONMENT AND DISCONTINUANCE OF RAIL LINES AND RAIL TRANSPORTATION UNDER 49 U.S.C. 10903

■ 58. The authority citation for part 1152 continues to read as follows:

Authority: 11 U.S.C. 1170; 16 U.S.C. 1247(d) and 1248; 45 U.S.C. 744; and 49 U.S.C. 701 note (1995) (section 204 of the ICC Termination Act of 1995), 721(a), 10502, 10903–10905, and 11161.

■ 59. Amend § 1152.21 by revising the third paragraph of section (4)(vi) of the notice of intent to read as follows:

§ 1152.21 Form of notice.

* * * * *

(4) * * *

(vi) * * *

* * * * *

Written comments and protests, including all requests for public use and trail use conditions, should indicate the proceeding designation STB No. AB ____ (Sub-No. ____) and must be filed with the Chief, Section of Administration, Office of Proceedings, Surface Transportation Board, Washington, DC 20423–0001, no later than (insert the date 45 days after the date applicant intends to file its application). Interested persons may file a written comment or protest with the Board to become a party to this abandonment (or discontinuance) proceeding. A copy of each written comment or protest shall be served upon the representative of the applicant (insert name, address, and phone number). The original and 10 copies of all comments or protests shall be filed with the Board with a certificate of service. Except as otherwise set forth in part 1152, each document filed with the Board must be served on all parties to the abandonment proceeding. 49 CFR 1104.12(a).

■ 60. Amend § 1152.22 by revising the third paragraph of section (iv) of the notice of application in paragraph (i) to read as follows:

§ 1152.22 Contents of application.

* * * * *

(i) * * *

(iv) * * *

* * * * *

Written comments and protests, including all requests for public use and trail use conditions, must indicate the proceeding designation STB No. AB ____ (Sub-No. ____) and should be filed with the Chief, Section of Administration, Office of Proceedings, Surface Transportation Board (Board), Washington, DC 20423–0001, no later than (insert the date 45 days after the date applicant intends to file its application). Interested persons may file a written comment or protest with the Board to become a party to this abandonment (or discontinuance) proceeding. A copy of each written comment or protest shall be served upon the representative of the applicant (insert name, address, and phone number). The original and 10 copies of all comments or protests shall be filed with the Board with a certificate of service. Except as otherwise set forth in part 1152, every document filed with the Board must be served on all parties to the abandonment proceeding. 49 CFR 1104.12(a).

* * * * *

■ 61. Amend § 1152.24 by revising paragraph (a) to read as follows:

§ 1152.24 Filing and service of application.

(a) An original and 10 copies of applications, typewritten or printed on paper approximately 8½ inches by 11 inches with 1½ inch left margin, shall be filed with the Chief, Section of Administration, Office of Proceedings, Washington, DC 20423–0001. The original shall bear the date and signature and shall be complete in itself; the signature may be stamped or typed and the notarial seal may be omitted on the copies. A check, money order or payment by credit card payable to the Surface Transportation Board must also be submitted to cover the applicable filing fee. If the applicant carrier is in bankruptcy, the application shall also be filed on the bankruptcy court.

* * * * *

■ 62. Amend § 1152.25 by revising paragraphs (c)(1) and (e)(1)(iii) to read as follows:

§ 1152.25 Participation in abandonment or discontinuance proceedings.

* * * * *

(c) *Filing and service of written comments, protests, along with evidence and argument, and replies.* (1) Written comments and protests, as well as public use and trail use requests, shall be filed with the Board (the Chief, Section of Administration, Office of Proceedings, Surface Transportation Board, Washington, DC 20423–0001) within 45 days of the filing with the Board of an abandonment or discontinuance application.

* * * * *

(e) * * *

(1) * * *

(iii) The applicability and administration of the Trails Act [16 U.S.C. 1247(d)] in abandonment proceedings under 49 U.S.C. 10903 (and abandonment exemption proceedings), issued pursuant to delegations of authority at 49 CFR 1011.7(a)(2)(iv) and (v), will be acted on by the entire Board as set forth at 49 CFR 1011.2(a)(7). An original and 10 copies of all appeals, and replies to appeals, under this section must be filed with the Board.

* * * * *

■ 63. Amend § 1152.27 by revising paragraphs (c)(1)(i) introductory text, (c)(2)(ii), and (e) to read as follows:

§ 1152.27 Financial assistance procedures.

* * * * *

(c) *Submission of financial assistance offer*—(1) *Abandonment and discontinuance applications and petitions for exemption*—(i) *Service and filing.* An offeror must serve its offer of assistance on the carrier owning and operating the line and all parties to the abandonment or discontinuance application or exemption proceeding. The offer must be filed concurrently with the Chief, Section of Administration, Office of Proceedings, Surface Transportation Board, Washington, DC 20423–0001.

* * * * *

(2) * * *

(ii) *Service and filing.* An offeror must serve its offer of assistance on the carrier that instituted the exempt filing as well as all other parties to the proceeding. The offer must be filed concurrently with the Chief, Section of Administration, Office of Proceedings, Surface Transportation Board, Washington, DC 20423–0001.

* * * * *

(e) *Review of offers*—(1) *Abandonment and discontinuance applications.* The Board will review each offer submitted to determine if a financially responsible person has offered assistance. If that criterion is met, the Board will issue a decision postponing the effective date of the authorization for abandonment or

discontinuance. This decision will be issued within 15 days of the service of the decision granting the application (or within 5 days after the offer is filed if the time for filing has been tolled under paragraph (c)(1)(i)(C) of this section, or within 5 days after expiration of the 120 day (4 month) period described in 49 U.S.C. 10904, if that occurs first). Under the delegation of authority at § 1011.7(a), the Director of the Office of Proceedings will make the initial determination whether offers of financial assistance satisfy the standards of 49 U.S.C. 10904(d) for purposes of instituting negotiations. Appeals of initial decisions determining whether offers of financial assistance satisfy the standards of 49 U.S.C. 10904(d) for purposes of instituting negotiations will be acted upon by the entire Board pursuant to 49 CFR 1011.2(a)(7).

(2) *Exemption proceedings.* The Board will review each offer submitted to determine if a financially responsible person has offered assistance. If that criterion is met, the Board will postpone the effective date either of the decision granting a petition for individual exemption or the notice of exemption under the class exemption and partially revoke the exemption or (in the case of a class exemption) the notice of exemption to the extent it applies to 49 U.S.C. 10904. The decision to postpone and partially revoke will be issued within 15 days of the service date of a decision granting a petition for exemption, or within 35 days of the **Federal Register** publication described in paragraph (b)(2)(ii) of this section (or within 5 days after the offer is filed if the time for filing has been tolled under paragraph (c)(1)(i)(C) or (c)(2)(ii) (C) or (D) of this section). Under the delegation of authority at section 1011.7(a), the Director of the Office of Proceedings will make the initial determination whether offers of financial assistance satisfy the standards of 49 U.S.C. 10904(d) for purposes of partial revocation and institution of negotiations. Appeals of initial decisions determining whether offers of financial assistance satisfy the standards of 49 U.S.C. 10904(d) for purposes of partial revocation and institution of negotiations will be acted upon by the entire Board pursuant to 49 CFR 1011.2(a)(7).

* * * * *

■ 64. Amend § 1152.29 by revising paragraph (e)(2) to read as follows:

§ 1152.29 Prospective use of rights-of-way for interim trail use and rail banking.

* * * * *

(e) * * *

(2) A railroad that receives authority from the Board to abandon a line (in a regulated abandonment proceeding under 49 U.S.C. 10903, or by individual or class exemption issued under 49 U.S.C. 10502) shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line (e.g., discontinued operations, salvaged the track, canceled tariffs, and intends that the property be removed from the interstate rail network). The notice shall provide the name of the STB proceeding and its docket number, a brief description of the line, and a statement that the railroad has consummated, or fully exercised, the abandonment authority on a certain date. The notice shall be filed within 1 year of the service date of the decision permitting the abandonment (assuming that the railroad intends to consummate the abandonment). Notices will be deemed conclusive on the point of consummation if there are no legal or regulatory barriers to consummation (such as outstanding conditions, including Trails Act conditions). If, after 1 year from the date of service of a decision permitting abandonment, consummation has not been effected by the railroad's filing of a notice of consummation, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. In that event, a new proceeding would have to be instituted if the railroad wants to abandon the line. Copies of the railroad's notice of consummation shall be filed with the Chief, Section of Administration, Office of Proceedings. In addition, the notice of consummation shall be sent to the State Public Service Commission (or equivalent agency) of every state through which the line passes. If, however, any legal or regulatory barrier to consummation exists at the end of the 1-year time period, the notice of consummation must be filed not later than 60 days after satisfaction, expiration or removal of the legal or regulatory barrier. For good cause shown, a railroad may file a request for an extension of time to file a notice so long as it does so sufficiently in advance of the expiration of the deadline for notifying the Board of consummation to allow for timely processing.

* * * * *

PART 1177—RECORDATION OF DOCUMENTS

■ 65. The authority citation for part 1177 continues to read as follows:

Authority: 49 U.S.C. 721, 11301.

■ 66. Revise § 1177.2 to read as follows:

§ 1177.2 To whom documents should be submitted for recordation.

Documents to be recorded shall be submitted in person, via the Board's website, or by mail addressed to the Chief, Section of Administration, Office of Proceedings, Surface Transportation Board, Washington, DC 20423–0001. All documents submitted by mail should clearly state ''Documents for Recordation'' on the envelope.

■ 67. Amend § 1177.3 by revising paragraph (d) introductory text to read as follows:

§ 1177.3 Requirements for submission.

* * * * *

(d) Be accompanied by a letter of transmittal requesting the recording of the document. For a sample of a letter, see § 1177.4. Documents submitted concurrently under the same recordation number may be included in a single transmittal letter. Otherwise, each document must have its own letter of transmittal. The letter should be addressed to the Chief, Section of Administration, Office of Proceedings and include the following information:

* * * * *

■ 68. Amend § 1177.4 by revising the first two sentences of paragraph (b) to read as follows:

§ 1177.4 Sample forms.

* * * * *

(b) *Sample Letter of Transmittal.*

[Chief, Section of Administration, Office of Proceedings' Name] Chief, Section of Administration, Office of Proceedings, Surface Transportation Board, Washington, DC.

Dear Section Chief: I have enclosed an original and one copy/counterpart of the document(s) described below, to be recorded pursuant to Section 11301 of Title 49 of the U.S. Code.

* * * * *

PART 1180—RAILROAD ACQUISITION, CONTROL, MERGER, CONSOLIDATION PROJECT, TRACKAGE RIGHTS, AND LEASE PROCEDURES

■ 69. The authority citation for part 1180 continues to read as follows:

Authority: 5 U.S.C. 553 and 559; 11 U.S.C. 1172; 49 U.S.C. 721, 10502, 11323–11325.

■ 70. Amend § 1180.4 by revising paragraphs (c)(2)(ii), (c)(6)(iii), (g)(1) introductory text, and (g)(2)(i) to read as follows:

§ 1180.4 Procedures.

* * * * *

(c) * * *

(2) * * *

(ii) The application shall be filed with Chief, Section of Administration, Office of Proceedings, Surface Transportation Board, Washington, DC 20423–0001.

* * * * *

(6) * * *

(iii) The Board's Office of Proceedings will provide informal opinions and interpretations, which are not binding on the Board, regarding the format of or information to be included in the application.

* * * * *

(g) *Notice of exemption.* (1) To qualify for an exemption under section 1180.2(d), a railroad must file a verified notice of the transaction with the Board at least 30 days before the transaction is consummated indicating the proposed consummation date. Before a notice is filed, the railroad shall obtain a docket number from the Board's Section of Administration, Office of Proceedings.

* * * * *

(2)(i) To qualify for an exemption under section 1180.2(d)(7) (acquisition or renewal of trackage rights agreements), in addition to the notice, the railroad must file a caption summary suitable for publication in the **Federal Register**. The caption summary must be in the following form:

Surface Transportation Board

Notice of Exemption

Finance Docket No.

(1)—Trackage Rights—(2)

(2) (3) to grant (4) trackage rights to (1) between (5). The trackage rights will be effective on (6).

This notice is filed under section 1180.2(d)(7). Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not stay the transaction.

Dated:

By the Board.

[Insert name]

Director, Office of Proceedings.

The following key identifies the information symbolized in the summary.

(1) Name of the tenant railroad.

(2) Name of the landlord railroad.

(3) If an agreement has been entered use ''has agreed'', but if an agreement has been reached but not entered use ''will agree.''

(4) Indicate whether ''overhead'' or ''local'' trackage rights are involved.

(5) Describe the trackage rights.

(6) State the date the trackage rights agreement is proposed to be consummated.

(ii) To qualify for an exemption under section 1180.2(d)(8) (acquisition of temporary trackage rights), in addition to the notice, the railroad must file a caption summary suitable for publication in the **Federal Register**. The caption summary must be in the following form:

Surface Transportation Board

Notice of Exemption

STB Finance Docket No.

(1)—Temporary Trackage Rights—(2)

(2)(3) to grant overhead temporary trackage rights to (1) between (4). The temporary trackage rights will be effective on (5). The authorization will expire on (6).

This notice is filed under § 1180.2(d)(8). Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not stay the transaction.

Dated:

By the Board.

[Insert name]

Director, Office of Proceedings.

PARTS 1240–1259—REPORTS

■ 71. Revise the note to parts 1240–1259 to read as follows:

Note: The report forms prescribed by parts 1241–1259 are available upon request from the Office of Economics, Environmental Analysis, and Administration, Surface Transportation Board, Washington, DC 20423–0001.

PART 1241—ANNUAL, SPECIAL, OR PERIODIC REPORTS—CARRIERS SUBJECT TO PART I OF THE INTERSTATE COMMERCE ACT

■ 72. The authority citation for part 1241 continues to read as follows:

Authority: 49 U.S.C. 11145.

■ 73. Revise the note to part 1241 to read as follows:

Note: The report forms prescribed by part 1241 are available upon request from the Office of Economics, Environmental Analysis, and Administration, Surface Transportation Board, Washington, DC 20423–0001.

PART 1242—SEPARATION OF COMMON OPERATING EXPENSES BETWEEN FREIGHT SERVICE AND PASSENGER SERVICE FOR RAILROADS

■ 74. The authority citation for part 1242 continues to read as follows:

Authority: 49 U.S.C. 721, 11142.

■ 75. Revise the note to part 1242 to read as follows:

Note: The report forms prescribed by part 1242 are available upon request from the Office of Economics, Environmental Analysis, and Administration, Surface Transportation Board, Washington, DC 20423–0001.

PART 1243—QUARTERLY OPERATING REPORTS—RAILROADS

■ 76. The authority citation for part 1243 continues to read as follows:

Authority: 49 U.S.C. 721, 11145.

■ 77. Revise the note to part 1243 to read as follows:

Note: The report forms prescribed by part 1243 are available upon request from the Office of Economics, Environmental Analysis, and Administration, Surface Transportation Board, Washington, DC 20423–0001.

PART 1245—CLASSIFICATION OF RAILROAD EMPLOYEES; REPORTS OF SERVICE AND COMPENSATION

■ 78. The authority citation for part 1245 continues to read as follows:

Authority: 49 U.S.C. 721, 11145.

■ 79. Revise the note to part 1245 to read as follows:

Note: The report forms prescribed by part 1245 are available upon request from the Office of Economics, Environmental Analysis, and Administration, Surface Transportation Board, Washington, DC 20423–0001.

PART 1246—NUMBER OF RAILROAD EMPLOYEES

■ 80. The authority citation for part 1246 continues to read as follows:

Authority: 49 U.S.C. 721, 11145.

■ 81. Amend § 1246.1 by revising the note to read as follows:

§ 1246.1 Monthly report of number of railroad employees.

* * * * *

Note: The report forms prescribed by parts 1245 and 1246 are available upon request from the Office of Economics, Environmental Analysis, and Administration, Surface Transportation Board, Washington, DC 20423–0001.

PART 1248—FREIGHT COMMODITY STATISTICS

■ 82. The authority citation for part 1248 continues to read as follows:

Authority: 49 U.S.C. 721, 11144 and 11145.

■ 83. Revise the note to part 1248 to read as follows:

Note: The report forms prescribed by part 1248 are available upon request from the Economics, Environmental Analysis, and Administration, Surface Transportation Board, Washington, DC 20423–0001.

PART 1253—RATE–MAKING ORGANIZATION; RECORDS AND REPORTS

■ 84. The authority citation for part 1253 continues to read as follows:

Authority: 49 U.S.C. 721, 10706, 13703, 11144, and 11145.

■ 85. Revise the note to part 1253 to read as follows:

Note: The report forms prescribed by part 1253 are available upon request from the Office of Economics, Environmental Analysis, and Administration, Surface Transportation Board, Washington, DC 20423–0001.

■ 86. Amend § 1253.20 by revising paragraph (c) to read as follows:

§ 1253.20 Other records.

* * * * *

(c) All rate bureaus are required to:

(1) Advise the Board of any change in legal address by notifying the Chief, Section of Administration, Office of Proceedings; and

(2) Submit information to the Board when requested.

PARTS 1260–1269—VALUATION

■ 87. Revise the note to parts 1260—1269 to read as follows:

Note: The report forms prescribed by parts 1260–1269 are available upon request from the Office of Economics, Environmental Analysis, and Administration, Surface Transportation Board, Washington, DC 20423–0001.

[FR Doc. E9–24674 Filed 10–14–09; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 0810141351–9087–02]

RIN 0648–XS34

Fisheries of the Exclusive Economic Zone Off Alaska; Northern Rockfish in the Bering Sea and Aleutian Islands Management Area

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

ACTION: Temporary rule; modification of closure.

SUMMARY: NMFS is opening directed fishing for northern rockfish in the Bering Sea and Aleutian Islands Management Area (BSAI). This action is necessary to fully use the 2009 total allowable catch (TAC) of northern rockfish in the BSAI.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), October 11, 2009, through 1200 hrs, A.l.t., December 31, 2009. Comments must be received at the following address no later than 4:30 p.m., A.l.t., October 30, 2009.

ADDRESSES: Send comments to Sue Salveson, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region, NMFS, Attn: Ellen Sebastian. You may submit comments, identified by 0648–XS34, by any one of the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal eRulemaking Portal website at *http://www.regulations.gov*.
- Mail: P.O. Box 21668, Juneau, AK 99802.
- Fax: (907) 586–7557.
- Hand delivery to the Federal Building: 709 West 9th Street, Room 420A, Juneau, AK.

All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

NMFS will accept anonymous comments. Enter ''N/A'' in the required fields, if you wish to remain anonymous. Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe portable document file (pdf) file formats only.

FOR FURTHER INFORMATION CONTACT: Patty Britza, 907–586–7376.

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

NMFS closed the directed fishery for northern rockfish in the BSAI under § 679.20(d)(1)(iii) on January 1, 2009 (74 FR 7359, February 17, 2009).

As of October 7, 2009, NMFS has determined that approximately 4,794 metric tons of northern rockfish remain unharvested in the BSAI. Therefore, in accordance with § 679.25(a)(1)(i), (a)(2)(i)(C) and (a)(2)(iii)(D), and to fully utilize the 2009 TAC of northern rockfish in the BSAI, NMFS is terminating the previous closure and is opening directed fishing for northern rockfish in the BSAI. This will enhance the socioeconomic well-being of harvesters in this area. The Administrator, Alaska Region (Regional Administrator) considered the following factors in reaching this decision: (1) the current catch of northern rockfish in the BSAI and, (2) the harvest capacity and stated intent on future harvesting patterns of vessels in participating in this fishery.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) and 679.25(c)(1)(ii) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the opening of northern rockfish in the BSAI. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of October 7, 2009.

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

Without this inseason adjustment, NMFS could not allow the fishery for northern rockfish in the BSAI to be harvested in an expedient manner and in accordance with the regulatory schedule. Under § 679.25(c)(2), interested persons are invited to submit written comments on this action to the above address until October 26, 2009.

This action is required by § 679.20 and § 679.25 and is exempt from review under Executive Order 12866.

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

Dated: October 9, 2009.

Emily H. Menashes,

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

[FR Doc. E9–24824 Filed 10–9–09; 8:45 am]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register

Vol. 74, No. 198

Thursday, October 15, 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.

FEDERAL TRADE COMMISSION

16 CFR Part 310

Telemarketing Sales Rule; Extension of Comment Period in the Notice of Proposed Rulemaking

AGENCY: Federal Trade Commission (''Commission'' or ''FTC'').

ACTION: Extension of comment period.

SUMMARY: In a **Federal Register** document announced on July 30, 2009,[1] and published in the **Federal Register** on August 19, 2009 (''Notice),[2] the Federal Trade Commission requested comment on its Notice of Proposed Rulemaking (''NPRM'') in connection with proposed debt relief amendments to the Telemarketing Sales Rule (''TSR''). The NPRM stated that comments must be received on or before October 9, 2009. In response to a request to extend the comment period received on September 17, 2009, the Commission has determined to extend the comment period until October 26, 2009.

DATES: Written comments addressing the debt relief amendments to the TSR must be received on or before October 26, 2009.

ADDRESSES: Interested parties are invited to submit written comments electronically or in paper form. For important information concerning the comments you file, please review the **SUPPLEMENTARY INFORMATION** section below. Comments in electronic form should be filed at the following electronic address: (https://secure.commentworks.com/ftc-TSRDebtRelief) (following the instructions on the web-based form). Comments in paper form should be mailed or delivered to the following address: Federal Trade Commission, Office of the Secretary, Room H-135 (Annex T), 600 Pennsylvania Avenue, NW, Washington, DC 20580, in the manner detailed in the **SUPPLEMENTARY INFORMATION** section below.

FOR FURTHER INFORMATION CONTACT: Allison Brown, Division of Financial Practices, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, DC 20580, (202) 326-3224.

SUPPLEMENTARY INFORMATION: On August 19, 2009, the Commission published an NPRM proposing amendments to the Telemarketing Sales Rule (16 CFR part 310) to address concerns about debt relief services. In that Notice, the Commission solicited comment regarding the proposed Rule and provided for a 60-day comment period. Thus, the comment period for the NPRM would close October 9, 2009.

On September 17, 2009, U.S. Congressman Dan Burton sent a letter to FTC Chairman Jon D. Leibowitz requesting a 120-day extension of the comment period, and on October 2, 2009, U.S. Congressman Pete Sessions and nine other Members of Congress[4] sent a letter to Chairman Leibowitz similarly requesting a 120-day extension of the comment period. In their letters, Congressman Burton and the other Members of Congress state that the NPRM involves issues that are important to many Members of Congress, who were unable to give the issues proper consideration due to the August recess and ensuing and pressing Congressional business. They also state that many members of the public will be unable to participate in the comment process given the current comment deadline.

The Commission concludes that although an extension is warranted, an extension of 120 days is unnecessary to ensure that interested parties have an adequate opportunity to prepare and submit comments and would cause undue delay. In addition, the FTC staff is holding a public forum on November 4, 2009 to discuss the comments received on the proposed rule and allow members of the public to express views about the proposed rule. The public forum provides another opportunity to provide information to the Commission. Requests to participate in the public forum are due on October 9, 2009.[5]

Accordingly, the Commission has decided to extend the comment period from October 9, 2009 to October 26, 2009. Interested parties are invited to submit written comments electronically or in paper form. Comments should refer to ''Telemarketing Sales Rule - Debt Relief Amendments, R411001'' 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 any individual's: Social Security Number; date of birth; driver's license number, 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 orconfidential,'' as provided in Section 6(f) of the Federal Trade Commission Act (''FTC Act''), 15 U.S.C. 46(f), and FTC 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, must be clearly labeled ''Confidential,'' and must comply with FTC Rule 4.9(c), 16 CFR 4.9(c).[6]

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://

[1] The Notice was announced in a press release on July 30, 2009, available at: (http://www.ftc.gov/opa/2009/07/tsr.shtm).

[2] 74 FR 41988 (Aug. 19, 2009).

[4] The other signatories are Rep. John Sullivan, Rep. Steve Scalise, Rep. Lynne Westmoreland, Rep. Sam Johnson, Rep. Sue Myrick, Rep. Marsha Blackburn, Rep. Mike Coffman, Rep. Tom Price, and Rep. Mary Fallin.

[5] Additional information about the public forum is available at (http://www1.ftc.gov/opa/2009/08/tsrforum.shtm).

[6] The comment must 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* FTC Rule 4.9(c), 16 CFR 4.9(c).

secure.commentworks.com/ftc-TSRDebtRelief) (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-TSRDebtRelief). If this Notice appears at (http://www.regulations.gov/search/Regs/home.html#home), 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 ''Telemarketing Sales Rule - Debt Relief Amendments - R411001'' 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 T), 600 Pennsylvania Avenue, NW, Washington, DC 20580. The FTC requests that any comment filed in paper form be sent by courier or overnight service, if possible, to avoid security related delays.

Comments on any proposed filing, recordkeeping, or disclosure requirements that are subject to paperwork burden review under the Paperwork Reduction Act should additionally be submitted to: Office of Information and Regulatory Affairs, Office of Management and Budget (''OMB''), Attention: Desk Officer for Federal Trade Commission. Comments should be submitted via facsimile to (202) 395-5167 because U.S. postal mail at the OMB is subject to delays due to heightened security precautions.

The 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).

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. E9–24730 Filed 10–14–09: 8:45 am]

BILLING CODE 6750–01–S

FEDERAL TRADE COMMISSION

16 CFR Part 610

RIN 3084-AA94

Free Annual File Disclosures Amendments to Rule to Prevent Deceptive Marketing of Credit Reports and to Ensure Access to Free Annual File Disclosures

AGENCY: Federal Trade Commission.

ACTION: Notice of proposed rulemaking; request for comment.

SUMMARY: Section 205 of the Credit CARD Act of 2009 requires the Federal Trade Commission (''FTC'' or ''Commission'') to issue a rule by February 22, 2010, to prevent deceptive marketing of ''free credit reports.''To that end, the Commission proposes, and seeks comment on, amendments to the Commission's Free Annual File Disclosures Rule, 16 CFR Part 610. The proposed amendments would require certain advertisements for ''free credit reports'' to include prominent disclosures designed to prevent consumers from confusing these ''free'' offers with the federally mandated free annual file disclosures available through the single centralized source. In addition, the Commission proposes amendments to delay advertisements for products and services through the centralized source until after the consumer receives his or her free annual file disclosure, and to prohibit other practices that may interfere with the free file disclosure process. Finally, the Commission proposes certain technical amendments to the Rule.

DATES: Comments must be received on or before November 30, 2009.

ADDRESSES: Interested parties are invited to submit written comments electronically or in paper form, by following the instructions in the Request for Comments part of the SUPPLEMENTARY INFORMATION section below. Comments in electronic form should be submitted by using the following weblink: (*http://public.commentworks.com/ftc/FreeCreditReportNPRM*) (and following the instructions on the web-based form). Comments in paper form should be mailed or delivered to the following address: Federal Trade Commission, Office of the Secretary, Room H-135 (Annex T), 600 Pennsylvania Avenue, NW, Washington, DC 20580, in the manner detailed in the **SUPPLEMENTARY INFORMATION** section below.

FOR FURTHER INFORMATION CONTACT: Katherine Armstrong, Attorney, or Steven Toporoff, Attorney, Division of Privacy and Identity Protection, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Washington, DC 20580, (202) 326-2252.

SUPPLEMENTARY INFORMATION:

I. Background

In this Notice, the Commission is proposing to amend its Free Annual File Disclosures Rule (''Free Reports Rule'' or ''Rule''),[1] which went into effect in 2004. This Rule sets out the procedures that nationwide consumer reporting agencies[2] (''CRAs'') and nationwide specialty consumer reporting agencies[3] must follow to comply with section 612 of the Fair Credit Reporting Act (''FCRA''), which gives consumers the right to obtain free annual file disclosures from the nationwide CRAs through a single centralized source. The Commission's proposed amendments implement the Credit Card Accountability Responsibility and Disclosure Act of 2009 (''Act''),[4] which directs the Commission to promulgate a rule within nine months requiring certain disclosures in the advertising for ''free credit reports'' to reduce consumer confusion. The Commission also is proposing a number of changes to address certain practices that the Commission believes interfere with or detract from consumers' ability to obtain their free annual file disclosures, as well as certain technical corrections described below.

A. The Free Annual File Disclosures Rule

The Fair and Accurate Credit Transactions Act of 2003 (''FACT Act'') amended the FCRA and directed the Commission to promulgate a rule specifying the procedures for consumers

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[1] 16 CFR Part 610.

[2] Section 603(p) of the FCRA defines a ''nationwide consumer reporting agency'' as a consumer reporting agency that compiles and maintains files on consumers on a nationwide basis. At this time, there are three nationwide consumer reporting agencies – Equifax Inc., Experian, and TransUnion LLC.

[3] Nationwide specialty consumer reporting agencies are defined in section 603(w) of the FCRA. Specifically, section 603(w) defines ''nationwide specialty consumer reporting agency'' as a CRA that compiles and maintains files on consumers on a nationwide basis relating to (1) medical records or payments; (2) residential or tenant history, (3) check writing history, (4) employment history, or (5) insurance claims.

[4] Pub. L. 111-24, 123 Stat. 1734 (May 22, 2009).

to obtain free annual file disclosures from nationwide CRAs and nationwide specialty consumer reporting agencies.[5] To carry out this directive, the Commission promulgated the Free Reports Rule, which became effective in a structured roll-out beginning on the west coast in December 2004 and ending on the east coast in September 2005.[6] The purpose of the Rule was to enable consumers to detect and dispute inaccurate or incomplete information in the files of nationwide CRAs.

The Rule requires that the nationwide CRAs jointly establish and operate a centralized source from which consumers can obtain free annual file disclosures through a single dedicated Internet website (AnnualCreditReport.com),[7] a toll-free telephone number, or a postal address.[8] Consumers may request and obtain their free annual file disclosures from each nationwide CRA at one time or stagger their requests throughout the year.

B. The Advertising of ''Free Credit Reports''

Since issuance of the Rule, there has been a proliferation of confusing advertising regarding where consumers can obtain their free annual file disclosures. For example, shortly after the Rule went into effect, imposter websites appeared that misspelled AnnualCreditReport.com or used sound-alike website names that did not link to the authorized AnnualCreditReport.com website.

In addition, the nationwide CRAs and others have advertised ''free credit reports'' that are tied to the purchase of products and services, such as credit scores and credit monitoring. Although some advertising predated the Rule, the bulk of the advertising for ''free credit reports'' now takes advantage of consumers' general knowledge that free file disclosures are available under federal law. These advertisements direct consumers not to AnnualCreditReport.com, the authorized source for free annual file disclosures, but to commercial websites operated by the nationwide CRAs or others that sell a variety of products and services. Further, when a consumer uses an Internet search engine to find the website for free annual file disclosures, the search engine will usually list ''sponsored'' links – again, selling products and services – such as ''FreeCreditReport.com'' first.[9]

As a result of this advertising, consumers are often misled and confused about where to go to obtain the free annual file disclosure mandated by federal law. Indeed, as discussed further below, the Commission has received numerous consumer complaints demonstrating such confusion, and concerns about the issue have been the topic of numerous articles and online discussions.[10]

The Commission has taken action to address these practices. For example, in 2005, the Commission sent 29 warning letters to operators of more than 130 ''imposter'' sites. That same year, the Commission filed an action against Consumerinfo.com, Inc.,[11] a marketer of ''free credit reports.'' In that action, the Commission alleged that Consumerinfo.com, which advertised ''free credit reports'' to consumers on the Internet, through emails, and through television and radio advertisements, engaged in deceptive acts or practices in violation of section 5 of the FTC Act, including the failure:

> to disclose or to disclose adequately in their advertisements or on their websites that the ''free'' credit reports they were offering were not associated with the annual free credit report program pursuant to the FACT Act, but rather a commercial promotion, and that consumers cannot obtain their statutorily-mandated free report through Defendant's websites.[12]

Two years later, the Commission entered a second order with Consumerinfo.com settling allegations that it violated the 2005 order.[13]

In addition to law enforcement, the Commission has undertaken extensive education efforts to alert consumers of their legal rights to obtain their free annual file disclosures. For example, in the past five years, the Commission has distributed approximately 1.5 million copies of the Commission's brochure *Your Access to Free Credit Reports*, which was published in both English and Spanish. In addition, (*www.ftc.gov/freereports*) contains materials on the Free Reports Rule and has garnered more than 8.6 million hits. Most recently, the Commission distributed educational videos through its own website and at (*www.youtube.com/ftcvideos*) to educate consumers about AnnualCreditReport.com, the only federally recognized source for free annual file disclosures. These videos have been viewed or downloaded more than 400,000 times.

C. Section 205 of the Act and Proposed Section 610.4 of the Free Reports Rule

Despite the Commission's efforts, the aggressive advertising for ''free credit reports'' tied to the purchase of products and services continues to confuse consumers. To address consumer confusion, Congress enacted section 205 of the Act (''section 205'').[14] Section 205 directs the Commission to promulgate a rule within nine months that would require advertisements for ''free credit reports'' in any medium to include certain prominent disclosures. With respect to television and radio advertisements, section 205 specifies the language for the required disclosure as: ''This is not the free credit report provided for by Federal law.''For television advertisements, this disclosure must appear in both the audio and visual portion of the advertisement. For all other media, section 205 directs the Commission to issue a rule determining the content and placement of the disclosures.[15] Finally, section 205 requires the following interim advertising disclosure if a rule is not finalized within nine months: ''Free credit reports are available under Federal law at: AnnualCreditReport.com.''

The Commission proposes to add section 610.4 to this part to carry out the mandate of section 205. This proposal is intended to implement the clear Congressional directive to combat the deceptive marketing of ''free credit reports'' through ''prominent'' disclosures. In enacting section 205, Congress was well aware of current practices in this area, as well as the

[5] Prior to the FACT Act, consumers could purchase file disclosures from consumer reporting agencies, but could only receive a free file disclosure under limited circumstances. For example, section 615 of the FCRA provides that consumers denied credit or employment based upon information contained in a consumer report may obtain a free file disclosure from the CRA that provided the report. 15 U.S.C. 1681m.

[6] 69 FR 35468 (June 24, 2004). The Commission staggered implementation of the Rule across the country to manage requests for free file disclosures.

[7] Most requests for file disclosures through the centralized source occur through the AnnualCreditReport.com website. AnnualCreditReport.com is the only federally authorized website for obtaining free annual file disclosures.

[8] 16 CFR 610.2(a).

[9] ''FreeCreditReport.com'' is owned and operated by Consumerinfo.com, Inc., an Experian company.

[10] *See* discussion of disclosure for Internet websites below at II.C.4.d of this document.

[11] *FTC v. Consumerinfo.com, Inc.*, SACV05-801 AHS (MLGx) (C.D. Cal. Aug. 15, 2005).

[12] *Id.* The settlement in this action required the defendant to pay consumer redress, prohibited the defendant from making deceptive and misleading claims about ''free'' reports, and required disclosure of the terms and conditions of any ''free'' offers. The defendant also agreed to forgo $950,000 in ill-gotten gains.

[13] *FTC v. Consumerinfo.com, Inc.*, SACV05-801 AHS (MLGx) (C.D. Cal., Jan. 8, 2007) (prohibiting defendant from failing to make required disclosures mandated by the 2005 Order and requiring $300,000 payment for consumer redress).

[14] Pub. L. 111-24, 123 Stat. 1734 (May 22, 2009).

[15] *Id.*

Commission's efforts to address them in the *Consumerinfo.com* settlements.[16] As explained more fully below, it is clear that Congress sought a marked and substantial change from the status quo, requiring more significant disclosures than any currently required or used in advertisements for ''free credit reports.''Accordingly, the Commission proposes specific prominent disclosures to prevent consumer confusion and deceptive marketing of ''free credit reports.'' Such disclosures are designed to prevent consumer deception and confusion without impeding the truthful advertising and marketing of products and services that consumers may choose to purchase.

As described in the Section-by-Section analysis below, proposed section 610.4 includes general requirements to ensure that the required disclosures are sufficiently prominent, such as requiring that all audio disclosures be delivered in a slow and deliberate manner. This section also includes requirements that are specific to each of the various media in which advertising may occur. For Internet-based advertisements, for example, proposed section 610.4 requires that any advertisements for ''free credit reports'' appearing on a commercial website include a distinct landing page – not easily bypassed and containing no distracting text – directing consumers to AnnualCreditReport.com.

Where possible, the minimum disclosure standards in the proposed amended rule are drawn from comparable FTC law addressing the prominence of specific required disclosures – in particular the Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992 (''Pay Per Call Rule'').[17] They also draw upon relevant Commission law enforcement actions and business education materials.

D. Proposed Changes to Section 610.2

In addition to adding provisions to implement section 205, the Commission also proposes several changes to section 610.2 of the Rule to address certain practices that the Commission believes interfere with or detract from consumers' ability to obtain their free annual file disclosures through the centralized source. In many respects, these proposed changes complement section 610.4 in that they would restrict practices that may confuse or mislead consumers.

Section 610.2 of the Rule currently permits the nationwide CRAs to advertise their proprietary products and services through the centralized source. When it promulgated the Rule, the Commission recognized the potential for confusion from such advertising and marketing, but chose not to restrict it.[18] Instead, to address concerns about confusion from such advertising, the Commission restricted communications on the centralized source that ''interfere with, detract from, contradict, or otherwise undermine the purpose of the centralized source.''[19]

The Commission does not believe that the standard set forth in the Rule has worked well. Consumers are subjected to substantial amounts of advertising for the nationwide CRAs' proprietary products or services while navigating AnnualCreditReport.com to obtain their free annual file disclosures. Indeed, when consumers access the website, they encounter offers for a variety of add-on goods or services – such as credit scores and credit monitoring services – which they must purchase or decline before obtaining their free annual file disclosures.[20]

To address this concern, the Commission proposes to amend section 610.2(g) to delay any advertising or marketing for products or services through the centralized source until after consumers have obtained their free annual file disclosures. To ensure that there is no uncertainty as to when advertising or marketing may begin, the proposed amended Rule specifies that advertising or marketing may only begin once consumers have obtained their file disclosures through telephone, mail, or Internet requests. The Commission believes that consumers are less likely to be confused or deceived if they are presented with commercial messages after they have obtained their disclosures. The Commission notes that the proposed delay does not prevent truthful advertising or marketing after consumers obtain their free file disclosures.

The Commission also proposes the addition of a new section 610.2(h) to prohibit a number of other practices that may interfere with or undermine consumers' ability to obtain their free annual file disclosures. This new provision: (1) prohibits the placement of hyperlinks to the nationwide CRAs' websites that transport consumers away from the AnnualCreditReport.com website; (2) prohibits the nationwide CRAs that participate in the centralized source process from requiring consumers to establish an account to obtain a disclosure; and (3) prohibits the nationwide CRAs from imposing any ''terms and conditions'' on consumers' access to their file disclosures. As above, these restrictions are designed to address practices that interfere with a consumer's right to obtain disclosures through the centralized source; they do not prevent the truthful advertising and marketing of products and services outside of this context.

II. Section-by-Section Discussion of Proposed Amendments to the Rule

This section discusses each of the proposed amendments to the Rule. The Commission seeks comment on each of these proposals.

A. Proposed section 610.2: Operation of the centralized source

Proposed section 610.2 retains the current Rule's general restriction on communications or instructions that interfere with, detract from, contradict, or otherwise undermine the purpose of the centralized source.[21] In addition, the Commission proposes to add a restriction on any advertising or marketing for products or services, or any communications or instructions that advertise or market any products or services, through the centralized source until after the consumer has obtained his or her annual file disclosure. As discussed above, the Commission believes such a restriction is needed to address the proliferation of distracting and confusing advertising for products and services to which consumers are exposed on AnnualCreditReport.com, and to ensure that consumers easily can exercise their federal right to obtain their free annual file disclosures. By delaying such advertising, consumers can focus first on obtaining their free annual file disclosure and can decide afterwards whether to purchase additional products or services.

The proposed Rule amendments also add language to clarify when consumers

[16] *See, e.g.*, 155 Cong. Rec. S6178, S6179 (June 4, 2009) (statement of Sen. Levin) (emphasizing the inadequacy of current disclosures accompanying offerings for ''free credit reports'').

[17] 16 CFR Part 308.

[18] *Id.* Among other things, the Commission reasoned that the FACT Act required nationwide CRAs to inform consumers of the availability of credit scores when providing file disclosures to them and that there was a benefit to those consumers wishing to purchase a credit score to do so at the same time that they obtain their annual file disclosures. 69 FR at 35486.

[19] 16 CFR 610.2(g)(1).

[20] Consumer complaints received by the Commission show that promotions selling products and services confuse and frustrate consumers attempting to obtain their free annual file disclosures. Indeed, consumers report feeling compelled to purchase these advertised products or services in order to obtain their free annual file disclosure.

[21] The current restriction found in section 610.2(g)(1) will be renumbered as proposed section 610.2(g)(2).

have ''obtained'' an annual file disclosure. Specifically, proposed section 610.2(g)(1)(i) provides that, for telephone and written requests for annual file disclosures, the consumer ''has obtained'' the file disclosure when the file disclosure is mailed to the consumer. Similarly, proposed section 610.2(g)(1)(ii) provides that, for file disclosures requested through the Internet, the consumer ''has obtained'' the file disclosure when it is delivered to the consumer through the Internet. The Commission intends this provision to mean that the delivery is made in a form that permits the consumer to store, download, print, or otherwise maintain the file disclosure for future reference.[22] Proposed section 610.2(g)(2) retains the requirement that any advertising on the centralized source shall not ''interfere with, detract from, contradict, or otherwise undermine the purpose of the centralized source.''

B. Proposed section 610.2(h): Additional prohibited practices

Proposed section 610.2(h) prohibits three additional types of conduct that the Commission believes interfere with and undermine consumers' ability to obtain their free annual file disclosures through the centralized source. Specifically, proposed section 610.2(h) prohibits: (1) hyperlinks to commercial websites from the centralized source; (2) any requirement that consumers establish an account in order to obtain their free annual file disclosures; and (3) any requirement that consumers agree to ''terms and conditions'' in order to obtain their free annual file disclosures. Each of these proposed conduct prohibitions is discussed below.

1. Proposed section 610.2(h)(i): Prohibition on hyperlinks to commercial websites

Proposed section 610.2(h)(i) prohibits hyperlinks to commercial or proprietary websites on the website for the centralized source. Currently, the landing page to AnnualCreditReport.com contains hyperlinks to the websites of the three nationwide CRAs. If a consumer clicks on one of the CRA's hyperlinks, the consumer is transported to that CRA's commercial website, where the consumer is unable to obtain his or her free annual file disclosure provided by federal law. The proposed prohibition is intended to reduce the possibility that consumers attempting to obtain their free annual file disclosures will be transferred to commercial websites that do not provide the federally mandated free file disclosures and, indeed, may instead be selling various products or services.

2. Proposed section 610.2(h)(ii): Prohibition on requiring the establishment of accounts

Proposed section 610.2(h)(ii) prohibits requiring a consumer to establish an ''account'' as a prerequisite for obtaining an annual file disclosure through the centralized source. The Commission believes that such a practice interferes with the operation of the Rule because it imposes a condition – namely, the requirement that the consumer establish an account – on the consumer's ability to obtain free annual file disclosures. Such a prerequisite is contrary to the intent of the Rule and existing Commission commentary on the provision of file disclosures.[23] Further, because establishing an account generally requires the collection of personally identifiable information, this practice runs counter to the prohibition in section 610.2(b)(ii), which limits the collection of information to that which is reasonably necessary to properly identify the consumer and to process the consumer's transaction(s).

3. Proposed section 610.2(h)(iii): Prohibition on requiring terms and conditions

Finally, proposed section 610.2(h)(iii) prohibits asking or requiring consumers to agree to terms and conditions as a prerequisite for obtaining their free annual file disclosures through the centralized source. Apart from providing appropriate identifying information, a consumer's right to obtain a free annual file disclosure should be unfettered and without any restrictions or conditions.

C. Proposed Section 610.4: Prevention of deceptive marketing of free credit reports

Proposed section 610.4 implements the Act's prominent disclosure requirements for any advertisement for ''free credit reports.''As detailed below, the proposed rule requirements specify the wording and placement of the disclosures.

1. Proposed section 610.4(a): The term ''free credit report''

As a preliminary matter, proposed section 610.4(a) defines the term ''free credit report,'' as used in this section of the Rule, as follows:

> a consumer report or file disclosure that is prepared by or obtained, directly or indirectly, from a nationwide consumer reporting agency (as defined in section 603(p) of the [FCRA]); that is represented, either expressly or impliedly, to be available to the consumer free of charge; and that is, in any way, tied to the purchase of a product or service.

The proposed definition has three parts. First, because the term ''credit report'' is undefined in section 205 of the Act, the FCRA, or the Free Reports Rule, the Commission proposes to define the term to include a ''consumer report'' or ''file disclosure'' under the FCRA. Second, the term ''free credit report'' includes only those consumer reports or file disclosures that are represented to be free of charge. Third, the term covers only ''free credit report'' offers tied to the purchase of a product or service. The qualifier ''tied to the purchase of a product or service'' makes clear that providers of truly free consumer reports – including the free file disclosures provided through the centralized source – need not comply with the advertising disclosure requirements of this section.

2. Proposed section 610.4(b): The term ''www.AnnualCreditReport.com and 877-322-8228''

Proposed section 610.4(b) provides that if the centralized source's website (currently ''(*www.AnnualCreditReport.com*) '') or toll-free telephone number (currently 877-322-8228) were to change, the new website or toll-free telephone number would be substituted in all disclosures required by this proposed section of the Rule.

3. Proposed section 610.4(c): General requirements for advertising disclosures

Proposed section 610.4(c) implements the Act's mandate that the required advertising disclosures for ''free credit reports'' be ''prominent'' by setting forth requirements for visual, audio, and program-length advertisements.[24] These proposed presentation requirements are designed to ensure that the mandated

[22] *Cf.* Franchise Rule, 16 CFR 436.6(b) (addressing disclosures in an online environment).

[23] *See* FTC Commentary on the Fair Credit Reporting Act, 16 CFR 600 Appendix, comment 610-2 (''A consumer reporting agency may not add conditions not set out in the FCRA as a prerequisite to the required disclosure.'').

[24] These minimum disclosure standards are drawn from several Commission trade regulation rules. *See* Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992 (''Pay Per Call Rule''), 16 CFR Part 308; Door-to-Door Sales Rule, 16 CFR Part 429; Franchise Rule, 16 CFR Part 436; Business Opportunity Rule, 16 CFR Part 437; and Regulations under the Fair Packaging and Labeling Act, 16 CFR Part 500.

disclosures can be readily understood by consumers.

a. Proposed section 610.4(c)(1): Language usage

Proposed section 610.4(c)(1) requires that any advertising disclosure mandated by this section be provided in the same language as that principally used in the advertisement. This proposal draws from identical language in section 308.3(a)(1) of the Pay Per Call Rule.[25] The Commission believes that a disclosure in a language different from that which is principally used in an advertisement would be deceptive.

b. Proposed section 610.4(c)(2): Visual disclosures

Proposed section 610.4(c)(2) requires that a visual disclosure be: (1) of a color or shade that readily contrasts with the background of the advertisement; (2) in a font that is easy to read; and (3) parallel to the base of the advertisement. These proposed requirements draw from comparable provisions in the Pay Per Call Rule. Specifically, section 308.3(a)(2) of the Pay Per Call Rule provides that television, video, and print advertising disclosures be of a color or shade that readily contrasts with the background of the advertisement. The Commission believes that a contrast between the disclosure and the background on which it appears is fundamental to ensure readability.[26] In addition, the font used for the disclosures should be easily readable. For example, if the required disclosure were sufficiently large, but in an old English text font, the disclosure would not be easily readable. Finally, section 308.3(3) of the Pay Per Call Rule requires that the disclosures in print advertisements be parallel with the base of the advertisement. The Commission has found that visual disclosures that are parallel to the base of the advertisement are more noticeable to consumers.[27]

c. Proposed section 610.4(c)(3): Audio disclosures

Proposed section 610.4(c)(3) requires that audio disclosures for ''free credit reports'' be delivered in a slow and deliberate manner and in a reasonably understandable volume. This provision is identical to section 308.3(a)(4) of the Pay Per Call Rule and is necessary to ensure that audio disclosures can be heard and understood by consumers.[28]

d. Proposed section 610.4(c)(4): Program-length advertisements

Proposed section 610.4(c)(4) requires that any program-length television, radio, or Internet-hosted multi-media advertisement for ''free credit reports'' provide the required disclosures at the beginning, near the middle, and at the end of the advertisement. This provision is identical to section 308.3(a)(6) of the Pay Per Call Rule.[29] It is designed to enable consumers tuning in to the program-length advertisement at different stages of the broadcast to receive the required disclosure.

e. Proposed section 610.4(c)(5): Inconsistent and contrary information

Proposed section 610.4(c)(5) prohibits anything ''contrary to, inconsistent with, or in mitigation of, the required disclosure'' in any advertisement in any medium. This section also prohibits any audio, visual, or print technique that is likely to detract significantly from the communication of any required disclosure. This provision is identical to section 308.3(a)(5) of the Pay Per Call Rule,[30] and is designed to prevent circumvention of the Rule requirements through the conveyance of contrary or inconsistent information, or other actions that undermine the disclosures to consumers.

4. Proposed section 610.4(d): Media-specific advertising disclosures

Proposed section 610.4(d) incorporates the statutory requirements relating to prominence in specific media. The proposed wording and presentation of required advertising disclosures for each type of media are described below.

a. Proposed section 610.4(d)(1): Disclosures for television advertisements

As mandated by section 205 of the Act, proposed section 610.4(d)(1) of the amended Rule requires that all advertisements for ''free credit reports'' broadcast on television include the following disclosure: ''This is not the free credit report provided for by Federal law.''

Proposed section 610.4(d)(1) also requires that the disclosure appear simultaneously in the audio and visual parts of the advertisement, be at least four (4) percent of the vertical picture height, and appear for a minimum of four seconds. This proposal is consistent with the Act, which specifically requires that all television advertising disclosures be provided simultaneously in the audio and visual parts of the advertisement.[31] In addition, the proposed requirement that the visual disclosure be at least four (4) percent of the vertical picture height and appear on the screen for four seconds is consistent with comparable Federal Election Commission requirements for the disclosure of the funding source of a political advertisement on television.[32]

b. Proposed section 610.4(d)(2): Disclosures for radio advertisements

Proposed section 610.4(d)(2) requires that all advertisements for ''free credit reports'' broadcast on radio include the following disclosure: ''This is not the free credit report provided for by

[25] *See also* 16 CFR 429.1(a) (requiring disclosure of right to cancel door-to-door sales ''in the same language, *e.g.*, Spanish, as that principally used in the oral sales presentation'').

[26] *See, e.g., In re Tender Corp.,* C-4261 (2009); *In re Budget Rent-A-Car System, Inc.*, C-4212 (2008) (requiring disclosures to appear in ''print that contrasts with the background against which it appears''); *see also* Federal Trade Commission Guidance, Dot Com Disclosures: Information about Online Advertising, at 12, *available at* (*http://www.ftc.gov/bcp/edu/pubs/business/ecommerce/bus41.pdf*) (''Dot Com Disclosures'') (''A disclosure in a color that contrasts with the background emphasizes the text of the disclosure and makes it more noticeable. Information in a color that blends in with the background of the advertisement is likely to be missed.'')

[27] *See, e.g., In re Swisher Int'l, Inc.,* C-3964 (2000) (requiring warnings on cigar advertisements to appear ''parallel . . . to the base of the advertisement); Regulation under Section 4 of the Fair Packaging and Labeling Act, 16 CFR 500.4 (requiring statement of identity for packaged goods to appear ''in lines generally parallel to the base on which the packaging or commodity rests as it is designed to be displayed'').

[28] *See, e.g., In re Kmart Corp .,* C-4197 (2007) (requiring audio disclosures to be made ''in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it''); *In re Darden Restaurants, Inc.,* C-4189 (2007) (same); *In re Palm, Inc.,* C-4044 (2002) (same); Dot Com Disclosures at 14 (Audio disclosures should be ''in a volume and cadence sufficient for a reasonable consumer to hear and understand it.'').

[29] *Cf. In re Synchronal Corp.*, 116 FTC 1189 (1993) (requiring video or commercial advertisements 15 minutes or longer to disclose that program is a paid advertisement within the first 30 seconds and immediately before presentation of ordering instructions).

[30] *Cf.* Franchise Rule, 16 CFR 436.9(a) and Business Opportunity Rule, 16 CFR 437.1(a)(21) (prohibiting the making of any claim or representation, orally or visually, or in writing, that contradicts the information required to be disclosed by the Rule); Guides for Environmental Marketing Claims, 16 CFR 260.6(a) (noting that an absence of contrary claims will help make disclosures clear and prominent).

[31] *See generally* Maria Grubbs Hoy and J. Craig Andrews, *Adherence of Prime-Time Televised Advertising Disclosures to the ''Clear and Conspicuous'' Standard: 1990 Versus 2002,* 23 J. Mktg. Pub. Pol. 170 (2004) (citing numerous studies demonstrating that disclosures made in ''dual modality'' – audio and video simultaneously – are more effective at communicating information to consumers); *see also In re Kraft, Inc.*, 114 F.T.C. 40 (1991), *aff'd*, 970 F.2d 311 (7 th Cir. 1992) (in which the Commission noted that ''given the distracting visual and audio elements and the brief appearance of complex superscript in the middle of the commercial,'' it was unlikely that a visual disclosure alone would be effective as a corrective measure).

[32] *See* 11 CFR 110.11(c)(3)(iii)(B).

Federal law.''This section incorporates the Act's specific required disclosure language for radio advertisements.

c. Proposed section 610.4(d)(3): Disclosures for print advertisements

Proposed section 610.4(d)(3) requires that all advertisements for ''free credit reports'' in print include the following disclosure: ''This is not the free credit report provided for by Federal law. To get your free report, visit (*www.AnnualCreditReport.com*) or call 877-322-8228.''Proposed section 610.4(d)(3) further requires that each letter of the disclosure be, at a minimum, one half the size of the larger of the largest letter or numeral used in the name of the website or the telephone number to which consumers are referred to receive what is advertised as a free credit report.

Section 205 of the Act does not specify the wording of the advertising disclosure required in print advertisements; rather, it only requires that the disclosure be ''prominent'' and authorizes the Commission to determine the appropriate wording of the advertising disclosure through this rulemaking. The Commission's proposal adopts the wording for the disclosure for television and radio advertisements, but also adds language directing consumers to AnnualCreditReport.com or the toll free number where they can obtain their free annual file disclosures provided by law. The Commission believes that this additional language will assist consumers in obtaining their free annual file disclosures, consistent with the purpose of the Act.

The proposed type size requirement in this section – a minimum of one-half the size of the larger of the largest letter or numeral used in the name of the website or the telephone number to which consumers are referred to obtain their ''free credit report'' – is identical to section 308.3(b)(v)(2)(i) of the Pay Per Call Rule. Tying the type size of the proposed disclosure to that of the website or telephone number promoting the ''free credit report'' ensures that the disclosure is ''prominent'' and increases the likelihood that the required disclosure will be effectively communicated to consumers.

d. Proposed section 610.4(d)(4): Disclosures for Internet websites

Proposed section 610.4(d)(4) requires that any website on which ''free credit reports'' are offered for sale must first display on a separate landing page the following visual disclosure: ''This is not the free credit report provided for by Federal law. To get your free report, visit (*www.AnnualCreditReport.com*) or call 877-322-8228.''Proposed section 610.4(d)(4) also requires that the landing page contain no other information aside from the statement: ''Go to [hyperlink to company's website.]''Further, this proposed disclosure must: (1) be visible to consumers without requiring them to scroll down the web page; (2) contain an operational hyperlink directing consumers to (*www.AnnualCreditReport.com*) that appears before the hyperlink to the advertised company's commercial website; and (3) be in a type at least twice the size as the hyperlink to the company's website or display of the company's Uniform Resource Locator. Finally, the proposed Rule provides that the landing page must occupy the full screen and that no other information, graphics, or material may be shown to the consumer unless and until the consumer has affirmatively selected one of the two hyperlinks, described above.

The Commission believes that this proposal implements the clear purpose and language of the Act. First, the Act specifies that the disclosures be ''prominent.''In specifying this language, Congress was aware of the prolific and confusing advertising with respect to ''free credit reports,'' as well as the disclosures currently being used to distinguish such offers from the free annual file disclosures mandated by federal law.[33] Thus, its use of the word ''prominent'' must be viewed as an expression of intent that the new disclosures be more noticeable and more effective than those currently required or used in advertising for ''free credit reports.''To fulfill this statutory mandate, the Commission proposes that the disclosure be on a separate landing page and in a prominent type size with little additional text; these format requirements are designed to ensure that consumers see the disclosure and are not distracted by competing messages.[34]

Second, the Act gives the Commission discretion to determine the timing, placement, and format of Internet disclosures, subject to the overarching goal that the disclosures be prominent. Specifically, section 205 of the Act directs the Commission to promulgate a rule ''for advertisements on the Internet [that] shall include whether the disclosure . . . shall appear on the advertisement or the website on which the free credit report is made available.'' Consistent with case law construing similar uses of the word ''or,'' as well as the Act's clear purpose, the Commission believes that the word ''or'' indicates alternatives and requires that alternatives be considered separately, thus allowing the Commission maximum flexibility to select the most effective option.[35] In this case, the Commission believes that a separate disclosure on the website where consumers go to obtain advertised ''free credit reports'' is likely to be the most effective way to ensure prominence and prevent consumer confusion.

Indeed, the Commission notes that some Internet advertising, such as pop-up screens and banner ads, are size-restricted. In light of such restrictions, it would be difficult to design a disclosure in this context that would satisfy the statutory ''prominence'' requirement.[36] Further, based on its experience in designing disclosures, the Commission has found that certain disclosures are most effective when given at the moment that a consumer is making a decision regarding a product or

[33] *See* 155 Cong. Rec. S6178, S6179 (June 4, 2009) (statement of Sen. Levin) (''[Section 205] will not achieve its purpose unless the mandated disclosure is made in a clear, prominent, and effective manner, a standard that disclosures in many current promotions do not achieve. The cleverly deemphasized disclosure currently on FreeCreditReport.com, for example, would not be sufficient.''); *see also* Robert N. Mayer and Tyler Barrick, Univ. of Utah, ''Web Sites Offering 'Free' Credit Reports'' (Apr. 26, 2007), *available at* (*http://www.consumerwebwatch.org/pdfs/creditsites.pdf*) (''[C]onsumers using the alternative sites because of confusion about annualcreditreport.com and its alternatives may end up paying needlessly for something they are entitled by law to receive for free.'').

[34] Commission precedent establishes that disclosures in fine print or buried in dense blocks of text are not prominent. The mandate that disclosures be ''clear and conspicuous'' or ''clear and prominent'' dates back more than 60 years. *See, e.g., Hillman Periodicals v. FTC*, 174 F.2d 122 (2d Cir. 1949) (upholding Commission order that company selling shortened versions of books disclose that its publications are abridged ''in immediate connection with the title and in clear, conspicuous type'').

[35] *See Azure v. Morton*, 514 F.2d 897, 900 (9 th Cir. 1975) (''As a general rule, the use of a disjunctive in a statute indicates alternatives and requires that they be treated separately.''); *see also Garcia v. United States*, 469 U.S. 70, 73 (1984) (''Cannons of construction indicate that terms connected in the disjunctive . . . be given separate meanings.''); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979); *FCC v. Pacifica Foundation*, 438 U.S. 726, 739-740 (1978). *See also* 155 Cong. Rec. at S6179 (statement of Sen. Levin)(''Section 205(b)(2)(B) . . .is intended to allow the FTC to require disclosures on an internet ad, on the website to which the ad is linked, on the 'home' website of the company advertising 'free' credit reports, or on any combination of the three.'').

[36] Indeed, Congress expressed concern not only with deceptive advertising that directs consumers to contact commercial websites that are unaffiliated with AnnualCreditReport.com, but with the inadequate disclaimers and disclosures that are buried in fine print or appear in places where most consumers will not *see* them. *See* 155 Cong. Rec. at S6179 (statement of Sen. Levin) (''[B]uried in the small print it is revealed that customers that request a free credit report must also opt out of a credit monitoring service or else they will be charged $15 a month, indefinitely.'').

service.[37] Here, the proposed disclosure would occur at the moment that a consumer is seeking to exercise his federal right to obtain his free annual disclosure online – a critical time to prevent deception and the possible purchase of unwanted goods and services.[38]

Third, the proposed requirement for Internet advertising is consistent with the Act's specific mandates for television advertising. As noted above, while the Act provides the Commission with discretion for many forms of advertising, it contains specific mandates for television advertising to ensure that such advertising be sufficiently prominent. Specifically, with respect to television, the Act states that the disclosures must appear in both the audio and visual portions of the advertisement. This approach reflects the well-established principle of marketing communication that dual-modality disclosures ''have been found to achieve much higher levels of message recall than single-modality disclosures.''[39] Similarly, required disclosures for Internet advertisements should reflect the same clarity, prominence, and unavoidability that are the hallmarks of the form of disclosure Congress mandated for television advertisements.[40]

Overall, the Commission believes that requiring a clear and unavoidable disclosure is a necessary step in the evolution of efforts to combat pervasive and confusing marketing of free credit reports. As discussed above, the Commission has combated such confusion through warning letters to companies, increased consumer outreach, and law enforcement. Despite these efforts, a robust industry selling ''free credit reports'' tied to the purchase of products and services continues unabated. Indeed, the Commission continues to receive consumer complaints demonstrating ongoing confusion in the ''free credit report'' marketplace.[41] The Commission thus proposes a disclosure on the landing page to ensure that the disclosure is prominent and that consumers view it at the most relevant time – when they seek to exercise their federal right to obtain free annual file disclosures online. As noted above, however, nothing in this proposal is intended to prevent the truthful advertising and marketing of products and services that consumers may choose to purchase.

e. Proposed section 610.4(d)(5): Disclosures for Internet-hosted multi-media advertising

Proposed section 610.4(d)(5) requires that all Internet-hosted multi-media advertisements for ''free credit reports'' disseminated in both audio and visual format include the following disclosure: ''This is not the free credit report provided by Federal law. To get your free report, visit (*www.AnnualCreditReport.com*) or call 877-322-8228.''This section further requires that the disclosure appear simultaneously in the audio and visual part of the advertisement and that the visual disclosure be in a type at least the same size as the largest hyperlink to the company's website, display of the Uniform Resource Locator of the company's website, or display of the company's telephone number appearing in the advertisement.

This proposed section is intended to address innovative forms of advertising for ''free credit reports'' in multi-media platforms, such as smart phone applications, youtube.com, and comparable visual and audio mechanisms. The Commission believes that, as with the disclosure for television advertising, the required disclosures for Internet-hosted multi-media advertising must appear simultaneously in the audio and visual part of the advertisement.

Further, to be prominent, the visual disclosure must be in a type at least the same size as the largest hyperlink to the company's website, display of the company's web address, or display of the company's telephone number appearing in the advertisement. The Commission believes that tying the size of the disclosure to the size of the company's web address or telephone numbers will ensure that the disclosures are more readily noticed and understood by consumers.

f. Proposed section 610.4(d)(6): Disclosures for telephone requests

Proposed section 610.4(d)(6) requires that when consumers call any telephone number appearing in any advertisement for free credit reports other than the number of the centralized source, consumers must first receive the following audio disclosure: ''You have reached [name of company or service]. This is not the source for the free credit report provided for by Federal law. To get your free credit report, call 877-322-8228 or visit (*www.AnnualCreditReport.com*).'' The Commission believes that the Act's broad mandate to require advertising disclosure ''for any advertisement for a free credit report in any medium'' includes inbound telemarketing.[42] To prevent confusion, the Commission believes that consumers calling telephone numbers advertised in the marketing of ''free credit reports'' must be informed that they have reached a telephone number that is not related to the federally-recognized source of free reports. Finally, to satisfy the standard of prominence, the Commission believes that this disclosure should be made at the outset of the call. The proposed requirements are drawn from the Commission's Telemarketing Sales Rule which, among other things, prohibits telemarketers from failing to disclose that the purpose of the call is to sell goods or services and the nature of the goods or services.[43]

g. Proposed section 610.4(d)(7): Telemarketing solicitations

Section 610.4(d)(7) requires that any telemarketing call made to a consumer that offers a ''free credit report'' include, at the first mention of ''free credit report,'' the following disclosure: ''This is not the source for the free credit report provided by Federal law. To get your free credit report, call 877-322-8228 or visit (*www.AnnualCreditReport.com.*) ''As noted above, the Commission believes that the Act's broad mandate to cover

[37] *See* Dot Com Disclosures at 11 (disclosures are more likely to be effective if they are provided when the consumer is considering the purchase).

[38] *See generally FTC v. TALX Corp.,* Civ. No. 4:09-cv-01071 (E.D. Mo. 2009) (requiring ''clear and prominent'' disclosures on the principal website screen or landing page where the disclosures are most relevant).

[39] Michael B. Mazis and Louis A. Morris, *Channel*, in *Warnings and Risk Communication*, 106 (Michael S. Wogalter, et al., eds., 1999) (citations omitted).

[40] *See* Dot Com Disclosures (noting that general advertising law principles apply regardless of the medium used).

[41] The confusion and frustration consumers experience when trying to exercise their federal right to obtain a free annual file disclosure has also been the subject of numerous articles and online discussions. *See*, *e.g.* Robert N. Mayer and Tyler Barrick, Univ. of Utah, ''Web Sites Offering 'Free' Credit Reports'' (Apr. 26, 2007), *available at* (*http://www.consumerwebwatch.org/pdfs/creditsites.pdf*) (''Consumers unaware of their right to obtain free credit reports from annualcreditreport.com may buy expensive services from other sites, believing they are getting a credit report for free.''); Byron Acochido and Jon Swartz, ''Free'' credit reports sometimes aren't free; And it's not easy to figure out which score to use'' USA Today, Nov. 28, 2007, *available at* (*http://www.usatoday.com/money/perfi/credit/2007-11-27-credit-scores_N.htm*) (''Consumers are also getting tricked into paying for basic credit reports before obtaining the ones they can get free, as mandated by the federal government in 2003.'').

[42] *Cf.* Telemarketing Sales Rule, 16 CFR 310.2(bb) (defining a telemarketer as ''any person who, in connection with telemarketing, initiates or receives telephone calls to or from a customer''); 16 CFR 310.2(cc) (defining telemarketing as a ''plan, program, or campaign which is conducted to induce the purchase of goods or services'').

[43] 16 CFR 310.3.

''any advertisement for a free credit report in any medium'' includes telemarketing solicitations.

D. Elimination of Obsolete ''Roll-out'' Provisions of the Current Rule

Finally, the Commission proposes to eliminate from the current Rule the ''roll-out'' provisions contained in sections 610.2(i) and 610.3(g). When the Commission promulgated the current Rule, it provided for a structured ''roll-out'' of the availability of free file disclosures, beginning in the western states on December 1, 2004, and concluding with eastern states on September 1, 2005. This provision of the current Rule is now obsolete and retaining it in the amended Rule would serve no useful purpose. Accordingly, the proposed amended Rule would delete sections 610.2(i) and 610.3(g) of the current Rule.[44]

III. Request for Comments

The Commission invites comment on all aspects of the proposed amendments to the Free Reports Rule and on the specific issues on which comment is solicited elsewhere in this document:

- The extent to which the advertising or marketing of credit products and services through the centralized source interferes with or undermines consumers' ability to obtain their free annual file disclosures, and whether the proposed limitation on advertising would address this concern.
- Whether the Commission should adopt a ban on all advertising through the centralized source, and what the benefits and costs of such a ban would be.
- Are there effective methods other than those proposed by the Commission to reduce confusing and deceptive advertising regarding ''free credit reports''? How do the costs and benefits of these methods compare with those proposed by the Commission?
- Whether there are additional examples of communications or instructions that may ''interfere with, detract from, contradict, or otherwise undermine the purpose of the centralized source'' that the Commission should consider adding to the list of examples in proposed section 610.2(g)(3).
- Whether the proposed definitions of ''free credit report'' and ''(*www.AnnualCreditReport.com*) and 877-322-8228'' are complete and accurate, and whether there are alternative definitions the Commission should consider.
- Whether the Commission's proposal for Internet-hosted multi-media advertising is sufficient to ensure that the Rule would continue to cover advertising for ''free credit reports'' in the evolving technology marketplace.
- When the amendments to the Free Reports Rule should go into effect, in light of the requirement for interim advertising disclosures in section 205 of the Act? Are there particular sections of the proposed Rule amendments that require more time for covered entities to comply with the proposed Rule's requirements?
- Ways to minimize any burdens imposed by the proposed Rule, while also ensuring that consumers have unfettered access to their free file disclosures.

Interested parties are invited to submit written comments electronically or in paper form. Comments should refer to ''Free Annual File Disclosures, Rule No. R411005'' 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 any 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 Federal Trade Commission Act (''FTC Act''), 15 U.S.C. 46(f), and FTC 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, must be clearly labeled ''Confidential,'' and must comply with FTC Rule 4.9(c), 16 CFR 4.9(c).[45]

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: (*http://public.commentworks.com/ftc/FreeCreditReportNPRM*) (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 (*http://public.commentworks.com/ftc/FreeCreditReportNPRM*). If this document appears at (*http://www.regulations.gov/search/Regs/home.html#home*), 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 document and the news release describing it.

A comment filed in paper form should include the ''Free Annual File Disclosures Rulemaking, Rule No. R411005'' 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 T), 600 Pennsylvania Avenue, NW, 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.

Comments on any proposed filing, recordkeeping, or disclosure requirements that are subject to paperwork burden review under the Paperwork Reduction Act should additionally be submitted to: Office of Information and Regulatory Affairs, Office of Management and Budget (''OMB''), Attention: Desk Officer for Federal Trade Commission. Comments should be submitted via facsimile to (202) 395-5167 because U.S. postal mail at the OMB is subject to delay due to heightened security precautions.

The 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

[44]In addition to the proposed revisions and additions discussed above, proposed section 610.2(b)(2)(iv)(D) removes an erroneous reference to ''national credit reporting agencies.''

[45]The comment must 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* FTC Rule 4.9(c), 16 CFR 4.9(c).

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*).

IV. Communications by Outside Parties to the Commissioners or Their Advisors

Written communications and summaries or transcripts of oral communications respecting the merits of this proceeding from any outside party to any Commissioner or Commissioner's advisor will be placed on the public record.[46]

V. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (''RFA'')[47] requires the Commission to provide an Initial Regulatory Flexibility Analysis (''IRFA'') with a proposed rule, and a Final Regulatory Flexibility Analysis (''FRFA'') with a final rule, unless the Commission certifies that the rule will have no significant economic impact on a substantial number of small entities.[48]

The Commission anticipates that the proposed Rule amendments will have no significant economic impact on a substantial number of small entities. As noted above, proposed section 610.2 will amend the Rule to limit advertising through the centralized source and prohibit other conduct in connection with the provision of annual file disclosures to consumers. By its terms, amended section 610.2 will apply exclusively to the nationwide CRAs that currently operate and maintain the centralized source pursuant to section 612(a) of the FCRA, 15 U.S.C. 1681j(a). None of the three nationwide CRAs is a small entity.[49]

In addition, proposed section 610.4 sets forth prohibitions and disclosures concerning the advertising or marketing of ''free credit reports'' tied to the purchase of other goods or services, such as credit scores or credit monitoring services, pursuant to section 205 of the Act. The Commission believes that the universe of entities offering ''free credit reports'' is likely to be small, comprised mostly of the three nationwide CRAs and their subsidiaries and affiliates. Further, staff estimates, based upon its knowledge of industry practices and members, that there may also be a small number of independently operating credit reporting agencies or resellers of consumer reports that, in theory, might offer ''free credit reports'' subject to the Rule. For example, when the Rule was first implemented, several resellers of reports appeared, using imposter websites, such as those misspelling AnnualCreditReport.com, or using sound-alike websites names that did not link to AnnualCreditReport.com. In 2005, the Commission staff sent warning letters to the known operators of those suspect sites, totaling 29 operators. While this suggests that the total number of independent resellers of reports may be small, Commission staff does not know the exact number of any such independent reporting agencies or how many of those independent agencies, if any, might be small businesses.[50] Nonetheless, Commission staff believes that the number of small entities offering ''free credit reports'' is likely to be insubstantial. The overall economic impact of the proposed rule amendments set forth at section 610.4 is not likely to have a significant impact on a substantial number of small entities.

Accordingly, this document serves as notice to the Small Business Administration of the Commission's certification of no economic impact. Nonetheless, the Commission has determined to prepare the following analysis:

A. Description of the Reasons That Action by the Agency Is Being Considered

The Commission proposes, and seeks comment on, amendments to the Free Reports Rule to implement section 205 of the Act, which mandates that advertisements offering ''free credit reports'' contain prominent prescribed disclosures informing consumers that federally mandated free file disclosures are available at AnnualCreditReport.com. Further, the Free Reports Rule requires, among other things, a centralized source through which consumers may request a free annual file disclosure from each nationwide CRA. Through this Notice, the Commission proposes, and seeks comment on, amendments to the Rule that would eliminate practices that interfere with consumers' ability to obtain free annual file disclosures through the centralized source, in violation of section 610.2(g) of the current Rule.

B. Statement of the Objectives of, and Legal Basis for, the Proposed Rule Amendments

The proposed amendments to the Free Reports Rule implement section 205 of the Act, which directs the Commission to prevent deceptive advertising of ''free credit reports.''In addition, the Commission seeks to eliminate practices that interfere with consumers' ability to obtain file disclosures through the centralized source, in violation of section 610.2(g) of the current Rule.

C. Small Entities to Which the Proposed Rule Amendments Will Apply

As noted above, the proposed Rule amendments set forth in section 610.2 will apply to the nationwide CRAs that are required to provide free annual file disclosures through the centralized source pursuant to section 612(a) of the FCRA, 15 U.S.C. 1681j(a). The Commission has not identified any nationwide CRA that is a small entity. The proposed amendments to the Rule set forth in proposed section 610.4 pertaining to the advertising of free credit reports pursuant to section 205 of the Act will apply to the nationwide CRAs and their subsidiaries, as well as independent resellers of annual file disclosures. Commission staff believes, based upon its knowledge of the industry and its members, that few, if any, of these entities are likely to be small. Nonetheless, the Commission specifically requests additional comment on the number of entities likely to be affected by the proposed section 610.4 to the Rule and the

[46] *See* 16 CFR 1.26(b)(5).

[47] 5 U.S.C. 601-612.

[48] 5 U.S.C. 603-605.

[49] Covered entities under the proposed amended Rule will be classified as small businesses if they satisfy the Small Business Administration's relevant size standards, as determined by the Small Business Size Standards component of the North American Industry Classification System (''NAICS''). The closest NAICS size standard relevant to this rulemaking is for ''credit bureaus,'' which is $7 million maximum in annual receipts. *See* (*http://www.sba.gov/idc/groups/public/documents/sba_homepage/serv_sstd_tablepdf.pdf*).

See also 69 FR 35468, at 35494-495 (June 24, 2004) (''[T]he Commission is aware of three entities that meet the rule definition . . . of a 'nationwide consumer reporting agency.' The Commission has concluded that none of these is a small entity.''). In the original Notice of Proposed Rulemaking for the Free Reports Rule, the Commission specifically asked several questions related to the existence, number and nature of small business entities covered by the proposed Free Reports Rule. The Commission received no comments responsive to those questions. 69 FR at 35495.

[50] A Consumer Reports WebWatch study of 24 websites offering ''free'' credit reports found that 18 were owned by or were closely associated with one of the three major CRAs – Experian, Equifax, and TransUnion. The remaining six sellers of free credit reports may be independently operating consumer reporting agencies. *See* Robert N. Mayer and Tyler Barrick, Univ. Of Utah, ''Web Sites Offering 'Free' Credit Reports'' (Apr. 26, 2007), *available at* (*http://www.consumerwebwatch.org/pdfs/creditsites.pdf*) (concluding that the marketing of ''free'' credit reports is concentrated in the hands of the three major CRAs).

number of those, if any, that are small entities.

D. Projected Reporting, Recordkeeping, and Other Compliance Requirements

The amendments proposed in section 610.4 would set forth statutorily-mandated advertising disclosures for offering of ''free credit reports'' in television and radio advertisements, as well as other media, including print and Internet advertising. These proposed amendments to the Rule impose no reporting or recordkeeping obligations. The amendments proposed in section 610.2 would limit advertising on the centralized source until after consumers have obtained their free annual file disclosures, as well as prohibit practices that interfere with consumers' ability to obtain free annual file disclosures through the centralized source. As discussed more fully below in connection with the Paperwork Reduction Act, Commission staff estimates that these proposed amendments to the Rule will impose no more than a de minimis, one-time burden of 12 hours to be completed by professional technical personnel and/or management personnel.

E. Duplicative, Overlapping, or Conflicting Federal Rules

The Commission has not identified any other federal statutes, rules, or policies that would duplicate, overlap, or conflict with the proposed rule amendments. The Commission invites comment on this issue.

F. Significant Alternatives to the Proposed Rule Amendments

As previously noted, the proposed amendments to the Rule will affect only nationwide CRAs and their subsidiaries, as well as independent resellers of credit reports. The Commission is unaware of any nationwide CRAs or independent resellers of credit reports that are small entities and therefore it does not include any special exemptions, delayed compliance dates, or other regulatory alternatives specifically to reduce burdens on such entities. Nonetheless, the Commission seeks additional comment regarding: (1) the existence of small entities for which the proposed rule amendments would have a significant economic impact; and (2) suggested alternatives that would reduce the economic impact of the proposed rule amendments on such small entities. If the comments filed in response to this document identify any small entities that would be significantly affected by the proposed rule amendments, as well as alternatives that would reduce compliance costs on such entities, the Commission will consider the feasibility of such alternatives and determine whether they should be incorporated into any amended final rule.

VI. Paperwork Reduction Act

The Commission is submitting this proposed amended Rule and a Supporting Statement for Information Collection Provisions to the Office of Management and Budget (''OMB'') for review under the Paperwork Reduction Act (''PRA''), 44 U.S.C. 3501-3521. In this Notice, the Commission proposes to amend the Free Reports Rule to implement section 205 of the Act Specifically, the amendments would require any entity engaged in the marketing of ''free credit reports'' to include in its advertisements prescribed disclosures appropriate for the medium in which the advertisements appear. In addition, the Commission proposes to amend the Rule to eliminate unnecessary interference with consumers' ability to obtain their annual file disclosures from the centralized source.

The Commission invites comments that will enable it to: (1) evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will serve a useful purpose; (2) evaluate the accuracy of the Commission's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) enhance the quality, utility, and clarity of the information to be collected; and (4) minimize the burden of the collections of information on those who must comply, including through the use of appropriate automated, electronic, mechanical, or other technological techniques, or other forms of information technology.

A. Current Rule and Associated PRA Burden

The current Rule requires nationwide CRAs and nationwide specialty CRAs to disclose information to third parties by requiring those consumer reporting agencies to provide to consumers, upon request, one free annual file disclosure. It also requires the nationwide CRAs to provide consumers with the ability to request this disclosure through a centralized Internet website, a toll-free telephone number, and a postal address. In addition, the current Rule requires the nationwide CRAs to establish a standardized form for Internet and mail requests, and it provides a model standardized form that may be used to comply with that requirement.

B. Proposed Section 610.4

Proposed section 610.4 would require all advertisements for ''free credit reports'' to contain certain prescribed disclosures tailored to the medium used. As such, these disclosures do not constitute a ''collection of information,'' as defined by OMB's regulations that implement the PRA.[51] Accordingly, implementation of section 205 of the Act presents no associated PRA collection of information burden.

C. Proposed Amended Section 610.2

The proposed amendments to section 610.2 of the Rule are designed to prevent interference with consumers' ability to obtain their free annual file disclosures through the centralized source, as permitted by law. The proposed amendments will not modify the nationwide CRAs' current obligation to provide consumers with free annual file disclosures upon request. Nor are the proposed amendments to section 610.2 likely to increase or decrease the estimated number of annual file disclosures made available to consumers, whether through the Internet, telephone, or mail. Rather, the amendments are intended to make it easier for consumers to obtain their free annual file disclosures from the centralized source without distracting advertising, including advertising leading consumers to commercial websites.

Moreover, the proposed amendments to section 610.2 are unlikely to increase significantly the administrative burden on the nationwide CRAs providing consumers with annual file disclosures through the centralized source. As discussed above, the proposed amendments to section 610.2 would require the nationwide CRAs to remove links on the centralized source to their commercial or proprietary websites. Finally, if a nationwide CRA chooses to advertise products and services – such as credit scores or credit monitoring – through the centralized source, it can do so only after the consumer has obtained his or her free annual file disclosure. Accordingly, in order to advertise through the centralized source, the nationwide CRAs must establish a mechanism to verify that consumers have completed their transaction.

[51] *See* 5 CFR 1320.3(c)(2) (excluding from the definition of ''collection of information'' the ''public disclosure of information originally supplied by the Federal government to the recipient for the purpose of disclosure to the public'').

1. Estimated Hours Burden and Associated Labor Cost

Commission staff believes that the above-noted proposed administrative amendments to section 610.2 will impose no more than a de minimis, one-time burden, as the three nationwide CRAs reconfigure the centralized source and their own proprietary websites. Commission staff estimates that these steps will take approximately 12 hours to complete per CRA.[52]

Commission staff estimates labor costs by applying appropriate estimated hourly cost figures to the burden hours (12) described above. It is difficult to calculate with precision the labor costs association with the proposed Rule amendments, because they entail varying compensation levels of management (*e.g.*, administrative services, computer and information systems, systems analysts, and network and computer system administrators). FTC staff assumes that professional technical personnel and/or management personnel will implement the amendments, at an hourly rate of $39.42.[53]

Based upon the above estimates and assumptions, the total labor cost for each of the three nationwide CRAs to comply with the proposed amendments to the Rule is $473.00 (12 hours × $39.42) or, cumulatively, $1,419.

2. Estimated Capital/Other Non-Labor Cost Burden

Commission staff believes that the proposed Rule amendments will not impose any capital or other non-labor costs. Commission staff assumes that the nationwide CRAs will continue their current practice of using third-party contractors (instead of their own employees) to fulfill consumer requests for annual file disclosures, pursuant to the Rule. Because of the way these contracts are typically established, these costs will likely be incurred on a continuing basis, and will be calculated based on the number of annual file disclosures requested by consumers. As discussed above, Commission staff believes that the proposed amendments, while making it easier for consumers to obtain their free annual file disclosures from the centralized source, will not increase the burden on industry to supply such file disclosures, nor affect the overall number of file disclosures provided to consumers annually, because consumers will likely be redirected from websites that require consumers to pay for their ''free credit report'' to the centralized source.

[52]This figure derives from consultation with FTC staff experienced in web design and operations.

[53]This estimate is based on mean hourly wages found at (*http://www.bls.gov/ncs/ncswage2008.htm#Wage_Tables*) (National Compensation Survey: Occupational Earnings in the United States 2008, US Department of Labor released August 2009, Bulletin 2720, Table 3) for the various managerial and technical staff support exemplified above.

Proposed Rule

List of Subjects in 16 CFR Part 610

Fair Credit Reporting Act, Consumer reports, Consumer reporting agencies, Credit, Trade practices.

Authority and Issuance

For the reasons discussed in the preamble, the Federal Trade Commission proposes to amend title 16, Chapter I, Subchapter F, of the Code of Federal Regulations, part 610, as follows:

1. The authority citation for part 610 is revised to read as follows:

Authority: 15 U.S.C. 1681a, g, and h; sec. 211(a) and (d), Pub. L. 108-159, 117 Stat. 1968 and 1972 (15 U.S.C. 1681j). Pub. L. 111-24.

2. Revise § 610.2 to read as follows:

§ 610.2 Centralized source for requesting annual file disclosures from nationwide consumer reporting agencies.

(a) *Purpose.* The purpose of the centralized source is to enable consumers to make a single request to obtain annual file disclosures from all nationwide consumer reporting agencies, as required under section 612(a) of the Fair Credit Reporting Act, 15 U.S.C. 1681j(a).

(b) *Establishment and operation.* All nationwide consumer reporting agencies shall jointly design, fund, implement, maintain, and operate a centralized source for the purpose described in paragraph (a) of this section. The centralized source required by this part shall:

(1) Enable consumers to request annual file disclosures by any of the following request methods, at the consumers' option:

(i) A single, dedicated Internet website,

(ii) A single, dedicated toll-free telephone number; and

(iii) Mail directed to a single address;

(2) Be designed, funded, implemented, maintained, and operated in a manner that:

(i) Has adequate capacity to accept requests from the reasonably anticipated volume of consumers contacting the centralized source through each request method, as determined in accordance with paragraph (c) of this section;

(ii) Collects only as much personally identifiable information as is reasonably necessary to properly identify the consumer as required under the Fair Credit Reporting Act, section 610(a)(1), 15 U.S.C. 1681h(a)(1), and other applicable laws and regulations, and to process the transaction(s) requested by the consumer;

(iii) Provides information through the centralized source website and telephone number regarding how to make a request by all request methods required under § 610.2(b)(1) of this part; and

(iv) Provides clear and easily understandable information and instructions to consumers, including, but not necessarily limited to:

(A) Providing information on the progress of the consumer's request while the consumer is engaged in the process of requesting a file disclosure;

(B) For a website request method, providing access to a ''help'' or ''frequently asked questions'' screen, which includes specific information that consumers might reasonably need to request file disclosures, the answers to questions that consumers might reasonably ask, and instructions whereby a consumer may file a complaint with the centralized source and with the Federal Trade Commission;

(C) In the event that a consumer requesting a file disclosure through the centralized source cannot be properly identified in accordance with the Fair Credit Reporting Act, section 610(a)(1), 15 U.S.C. 1681h(a)(1), and other applicable laws and regulations, providing a statement that the consumers' identity cannot be verified; and directions on how to complete the request, including what additional information or documentation will be required to complete the request, and how to submit such information; and

(D) A statement indicating that the consumer has reached the website or telephone number for ordering free annual credit reports as required by federal law; and

(3) Make available to consumers a standardized form established jointly by the nationwide consumer reporting agencies, which consumers may use to make a request for an annual file disclosure, either by mail or on the Internet website required under § 610.2(b)(1) of this part, from the centralized source required by this part. The form provided at 16 CFR Part 698, Appendix D, may be used to comply with this section.

(c) *Requirement to anticipate.* The nationwide consumer reporting agencies shall implement reasonable procedures to anticipate, and to respond to, the volume of consumers who will contact

the centralized source through each request method, to request, or attempt to request, a file disclosure, including developing and implementing contingency plans to address circumstances that are reasonably likely to occur and that may materially and adversely impact the operation of the nationwide consumer reporting agency, a centralized source request method, or the centralized source.

(1) The contingency plans required by this section shall include reasonable measures to minimize the impact of such circumstances on the operation of the centralized source and on consumers contacting, or attempting to contact, the centralized source.

(i) Such reasonable measures to minimize impact shall include, but are not necessarily limited to:

(A) The extent reasonably practicable under the circumstances, providing information to consumers on how to use another available request method;

(B) The extent reasonably practicable under the circumstances, communicating, to a consumer who attempts but is unable to make a request, the fact that a condition exists that has precluded the centralized source from accepting all requests, and the period of time after which the centralized source is reasonably anticipated to be able to accept the consumers' request for an annual file disclosure; and

(C) Taking all reasonable steps to restore the centralized source to normal operating status as quickly as reasonably practicable under the circumstances.

(ii) Reasonable measures to minimize impact may also include, as appropriate, collecting request information but declining to accept the request for processing until a reasonable later time, provided that the consumer is clearly and prominently informed, to the extent reasonably practicable under the circumstances, of when the request will be accepted for processing.

(2) A nationwide consumer reporting agency shall not be deemed in violation of § 610.2(b)(2)(i) of this part if a centralized source request method is unavailable to accept requests for a reasonable period of time for purposes of conducting maintenance on the request method, provided that the other required request methods remain available during such time.

(d) *Disclosures required*. If a nationwide consumer reporting agency has the ability to provide a consumer report to a third party relating to a consumer, regardless of whether the consumer report is owned by that nationwide consumer reporting agency or by an associated consumer reporting agency, that nationwide consumer reporting agency shall, upon proper identification in compliance with section 610(a)(1) of the Fair Credit Reporting Act, 15 U.S.C. 1681h(a)(1), provide an annual file disclosure to such consumer if the consumer makes a request through the centralized source.

(e) *High request volume and extraordinary request volume* – (1) *High request volume*. Provided that a nationwide consumer reporting agency has implemented reasonable procedures developed in accordance with paragraph (c) of this section, entitled ''requirement to anticipate,'' the nationwide consumer reporting agency shall not be deemed in violation of paragraph (b)(2)(i) of this section for any period of time in which a centralized source request method, the centralized source, or the nationwide consumer reporting agency experiences high request volume, if the nationwide consumer reporting agency:

(i) Collects all consumer request information and delays accepting the request for processing until a reasonable later time; and

(ii) Clearly and prominently informs the consumer of when the request will be accepted for processing.

(2) *Extraordinary request volume*. Provided that the nationwide consumer reporting agency has implemented reasonable procedures developed in compliance with paragraph (c) of this section, entitled ''requirement to anticipate,'' the nationwide consumer reporting agency shall not be deemed in violation of paragraph (b)(2)(i) of this section for any period of time during which a particular centralized source request method, the centralized source, or the nationwide consumer reporting agency experiences extraordinary request volume.

(f) *Information use and disclosure*. Any personally identifiable information collected from consumers as a result of a request for annual file disclosure, or other disclosure required by the Fair Credit Reporting Act, made through the centralized source, may be used or disclosed by the centralized source or a nationwide consumer reporting agency only:

(1) To provide the annual file disclosure or other disclosure required under the FCRA requested by the consumer;

(2) To process a transaction requested by the consumer at the same time as a request for annual file disclosure or other disclosure;

(3) To comply with applicable legal requirements, including those imposed by the Fair Credit Reporting Act and this part; and

(4) To update personally identifiable information already maintained by the nationwide consumer reporting agency for the purpose of providing consumer reports, provided that the nationwide consumer reporting agency uses and discloses the updated personally identifiable information subject to the same restrictions that would apply, under any applicable provision of law or regulation, to the information updated or replaced.

(g) *Communications provided through centralized source*.

(1) Any advertising or marketing for products or services, or any communications or instructions that advertise or market any products or services, through the centralized source must be delayed until after the consumer has obtained his or her annual file disclosure.

(i) In the case of requests made by mail or telephone, the consumer ''has obtained his or her annual file disclosure'' when the file disclosure is mailed, and a nationwide consumer reporting agency may include advertising for other products or services with the file disclosure.

(ii) In the case of requests made through the centralized source Internet website, the consumer ''has obtained his or her annual file disclosure'' when the file disclosure is delivered to the consumer through the Internet, and the nationwide consumer reporting agency that provided the disclosure may then advertise other products or services.

(2) Any communications, instructions, or permitted advertising or marketing shall not interfere with, detract from, contradict, or otherwise undermine the purpose of the centralized source stated in paragraph (a) of this section.

(3) Examples of interfering, detracting, inconsistent, and/or undermining communications include:

(i) Centralized source materials that represent, expressly or by implication, that a consumer must purchase a paid product or service in order to receive or to understand the annual file disclosure;

(ii) Centralized source materials that represent, expressly or by implication, that annual file disclosures are not free, or that obtaining an annual file disclosure will have a negative impact on the consumers' credit standing; and

(iii) Centralized source materials that falsely represent, expressly or by implication, that a product or service offered ancillary to receipt of a file disclosure, such as a credit score or credit monitoring service, is free, or fail to clearly and prominently disclose that consumers must cancel a service, advertised as free for an initial period of

time, to avoid being charged, if such is the case.

(h) *Other practices prohibited through the centralized source.* The centralized source shall not:

(1) Contain hyperlinks to commercial or proprietary websites on the website for the centralized source.

(2) Ask or require consumers to set up an account as a prerequisite for obtaining an annual file disclosure; or

(3) Ask or require consumers to agree to terms and conditions as a prerequisite for obtaining an annual file disclosure.

3. In § 610.3, remove paragraph (g).

4. Add § 610.4 to read as follows:

§ 610.4 Prevention of deceptive marketing of free credit reports

(a) *Free credit report.* For purposes of this section, ''free credit report'' means a consumer report or file disclosure that is prepared by or obtained, directly or indirectly, from a nationwide consumer reporting agency (as defined in section 603(p) of the Fair Credit Reporting Act); that is represented, either expressly or impliedly, to be available to the consumer free of charge; and that is, in any way, tied to the purchase of a product or service.

(b) *www.AnnualCreditReport.com and 877-322-8228.* The disclosures mandated by this section use the Uniform Resource Locator address ''*www.AnnualCreditReport.com*'' and toll-free telephone number, 877-322-8228. These are the locator address and toll-free telephone number currently used by the centralized source. If the locator address or toll-free telephone number changes in the future, the new address or telephone number shall be substituted.

(c) *General requirements for advertising disclosures.* The disclosures covered by paragraph (d) of this section shall comply with the following requirements:

(1) All disclosures shall be made in the same language as that principally used in the advertisement;

(2) Visual disclosures shall be of a color or shade that readily contrasts with the background of the advertisement, in a font easily read by a reasonable consumer, and be parallel to the base of the advertisement;

(3) Audio disclosures shall be delivered in a slow and deliberate manner and in a reasonably understandable volume;

(4) Program-length television, radio, or Internet-hosted multi-media advertisement disclosures shall be made at the beginning, near the middle, and at the end of the advertisement; and

(5) Nothing contrary to, inconsistent with, or in mitigation of, the required disclosures shall be used in any advertisement in any medium; nor shall any audio, visual, or print technique be used that is likely to detract significantly from the communication of any disclosure.

(d) *Medium-specific advertising disclosures.* All advertisements that include offers of free credit reports shall include the disclosures required by this section.

(1) *Television advertisements.* All advertisements for free credit reports broadcast on television shall include the following disclosure: ''This is not the free credit report provided for by Federal law.'' The disclosure shall appear simultaneously in the audio and visual part of the advertisement. The visual disclosure shall be at least 4 percent of the vertical picture height, and appear for a minimum of four seconds.

(2) *Radio advertisements.* All advertisements for free credit reports broadcast on radio shall include the following disclosure: ''This is not the free credit report provided for by Federal law.''

(3) *Print advertisements.* All print advertisements for free credit reports shall include the following disclosure: ''This is not the free credit report provided for by Federal law. To get your free report, visit *www.AnnualCreditReport.com* or call 877-322-8228.'' Each letter of the disclosure shall be, at minimum, one-half the size of the largest letter or numeral used in the name of the website or the telephone number to which consumers are referred to receive what is advertised as a free credit report.

(4) *Internet websites.*

(i) Any website offering free credit reports must first display a separate landing page to consumers before the consumer may obtain the report from that website.

(ii) The landing page must display the following visual disclosure: ''This is not the free credit report provided for by Federal law. To get your free report, visit *www.AnnualCreditReport.com* or call 877-322-8228.'' The landing page may contain no other information aside from the statement: ''Go to [hyperlink to company's website.]'' The required disclosure must:

(A) Be visible to consumers without requiring them to scroll down the webpage;

(B) Include an operational hyperlink that will direct consumers exclusively to *www.AnnualCreditReport.com* that appears before the hyperlink to the company's website; and

(C) Appear in type at least twice the size as any hyperlink to the company's website or display of the Uniform Resource Locator of the company's website.

(iii) The landing page must occupy the full screen and no other information, graphics, or material may be shown to the consumer unless and until the consumer has affirmatively selected one of the two hyperlinks described in paragraph (d)(4)(ii) of this section.

(5) *Internet-hosted multi-media advertising.* All advertisements for free credit reports disseminated through Internet-hosted multi-media in both audio and visual format shall include the following disclosure: ''This is not the free credit report provided for by Federal law. To get your free report, visit *www.AnnualCreditReport.com* or call 877-322-8228.'' The disclosure shall appear simultaneously in the audio and visual part of the advertisement. The visual disclosure shall be in type at least the same size as the largest hyperlink to the company's website, the Uniform Resource Locator of the company's website, or the company's telephone number appearing in the advertisement.

(6) *Telephone requests.* When consumers call any telephone number, other than the number of the centralized source, appearing in an advertisement that represents free credit reports are available at the number, consumers must first receive the following audio disclosure: ''You have reached [name of company or service]. This is not the source for the free credit report provided for by Federal law. To get your free credit report, call 877-322-8228 or visit *www.AnnualCreditReport.com.*''

(7) *Telemarketing solicitations.* When telemarketing sales calls are made that include offers of free credit reports, the call must include at the first mention of a credit report thefollowing disclosure: ''This is not the source for the free credit report provided by Federal law. To get your free credit report, call 877-322-8228 or visit *www.AnnualCreditReport.com.*''

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. E9–24729 Filed 10–14–09: 10:06 am]

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DEPARTMENT OF HOMELAND SECURITY

DEPARTMENT OF THE TREASURY

Bureau of Customs and Border Protection

19 CFR Parts 113 and 191

[USCBP–2009–0021]

RIN 1505–AC18

Drawback of Internal Revenue Excise Tax

AGENCY: Customs and Border Protection, Department of Homeland Security; Department of the Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document proposes to amend title 19 of the Code of Federal Regulations to preclude situations where imported merchandise subject to Federal excise tax is allowed into the United States, in effect, 99 percent free of that tax through application of a drawback claim. Specifically, the proposed amendments would preclude the filing of a substitution drawback claim for internal revenue excise tax paid on imported merchandise in situations where no excise tax was paid upon the substituted merchandise or where the substituted merchandise is the subject of a different claim for refund or drawback of tax under any provision of the Internal Revenue Code. This document also proposes to amend title 19 by adding a basic importation and entry bond condition to foster compliance with the amended drawback provision. These proposed amendments are necessary to protect the revenue by clarifying the relationship between drawback claims and Federal excise tax liability.

DATES: Comments must be received on or before November 16, 2009.

ADDRESSES: You may submit comments, identified by *USCBP docket number*, by *one* of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments via docket number USCBP–2009–0021.
- *Mail:* Trade and Commercial Regulations Branch, Regulations and Rulings, Office of International Trade, U.S. Customs and Border Protection, 799 9th Street, NW. (Mint Annex), Washington, DC 20229–1179.

Instructions: All submissions received must include the agency name and USCBP docket number for this proposed rulemaking. All comments received will be posted without change to *http://www.regulations.gov*, including any personal information provided. For detailed instructions on submitting comments and additional information on the rulemaking process, see the ''Public Participation'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.* Submitted comments may also be inspected during regular business days between the hours of 9 a.m. and 4:30 p.m. at the Trade and Commercial Regulations Branch, Regulations and Rulings, Office of International Trade, U.S. Customs and Border Protection, 799 9th Street, NW., 5th Floor, Washington, DC Arrangements to inspect submitted comments should be made in advance by calling Joseph Clark at (202) 325–0118.

FOR FURTHER INFORMATION CONTACT: William Rosoff, Entry Process and Duty Refunds, Regulations and Rulings, Office of International Trade, (202) 325–0047.

SUPPLEMENTARY INFORMATION:

Public Participation

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of the proposed rule. Customs and Border Protection (CBP) also invites comments that relate to the economic, environmental, or federalism effects that might result from this proposed rule. If appropriate to a specific comment, the commenter should reference the specific portion of the proposed rule, explain the reason for any recommended change, and include data, information, or authority that support such recommended change.

Background

This document proposes amendments to title 19 of the Code of Federal Regulations (19 CFR) that would preclude the filing of a substitution drawback claim for internal revenue excise tax paid on imported merchandise in situations where no excise tax was paid upon the substituted merchandise or where the substituted merchandise is the subject of a different claim for refund or drawback of excise tax under any provision of the Internal Revenue Code.

The statutory and regulatory framework giving rise to this situation is explained below.

I. Excise Taxation Under the Internal Revenue Code of 1986

The Internal Revenue Code (IRC) of 1986, as amended (IRC), codified as title 26 of the United States Code (26 U.S.C.), is the main body of domestic statutory tax law of the United States and includes, *inter alia*, laws covering Federal excise taxes. Federal excise taxes are imposed on the manufacture and distribution of certain non-essential consumer goods, such as distilled spirits, wines, beer, tobacco products, imported taxable fuel and petroleum products.

Distilled Spirits, Wines, and Beer: Imposition of Federal Excise Tax and Exemptions

Chapter 51 of the IRC sets forth excise tax collection and related provisions applicable to distilled spirits, wines, and beer. In general, this chapter provides that a Federal excise tax is imposed on all wines, distilled spirits, and beer produced in or imported into the United States. 26 U.S.C. 5041, 5001, and 5051.

Statutory exceptions to the imposition of Federal excise tax exist; for example, domestically produced wine, distilled spirits, and beer are exempt from the tax if removed from bonded premises for export. 26 U.S.C. 5362(c), 5214(a), 5053. In addition, upon the exportation of domestically-produced wine, distilled spirits, or beer removed from bonded premises with payment of tax, drawback is allowed in an amount equal to the tax paid. 26 U.S.C. 5062, 5055.

Tobacco: Imposition of Federal Excise Tax and Exemptions

Under Chapter 52, a Federal excise tax is imposed on all tobacco products and cigarette papers and tubes manufactured in or imported into the United States. 26 U.S.C. 5701. The tax on domestically-produced tobacco products and cigarette papers and tubes is imposed at the time that the product comes into existence, that is, when a product meets one of the definitions under the IRC. The Federal excise tax on imported and domestically-produced tobacco products and cigarette papers and tubes is generally not paid or determined until the products are released from customs custody or removed from bonded premises. 26 U.S.C. 5702, 5703. Tobacco products and cigarette papers and tubes may be removed from bonded premises, without the payment of Federal excise tax, for export. 26 U.S.C. 5704. In addition, upon exportation of tobacco products and cigarette papers and tubes upon which the tax has been paid,

drawback of the tax paid is allowed. 26 U.S.C. 5706.

Other Excise Taxes

Chapter 32 of the IRC imposes various manufacturers excise taxes, including taxes on gasoline, diesel fuel, and kerosene (taxable fuel). The tax on imported taxable fuel is imposed on entry into the United States for consumption, use, or warehousing. If taxable fuel is exported, the IRC provides that the tax paid on the fuel may be refunded to the taxpayer or an amount equal to the tax paid on the fuel may be paid to the person exporting the fuel. Chapter 38 of the IRC also imposes various environmental taxes, including a tax on petroleum products entered into the United States for consumption, use, or warehousing.

Implementing Excise Tax Regulations

Regulations implementing the provisions of chapters 51 and 52 of the IRC are contained in chapter 1 of title 27 of the CFR (27 CFR chapter 1). The Alcohol and Tobacco Tax and Trade Bureau (TTB) within the Department of the Treasury is responsible for the administration of chapter 51 and the regulations promulgated thereunder. Regulations implementing the provisions of chapters 32 and 38 are contained in title 26 of the CFR and are administered by the Internal Revenue Service.

II. Drawback Under the Tariff Act of 1930

Section 313 of the Tariff Act of 1930, as amended, (19 U.S.C. 1313), concerns drawback and refunds. Drawback is a refund of certain duties, taxes and fees paid by the importer of record and granted to a drawback claimant upon the exportation, or destruction under CBP supervision, of eligible articles under specified conditions. The purpose of drawback is to place U.S. exporters on equal footing with foreign competitors by refunding most of the duties paid on imports used in domestic manufactures intended for export.

There are several types of drawback. Within section 313, paragraph (j) provides for ''unused merchandise drawback,'' which is intended to permit drawback to be claimed on imported merchandise on which was paid any duty, tax, or fee imposed under Federal law upon entry or importation if such merchandise was exported or was destroyed under CBP supervision, and was not used within the United States before such exportation or destruction, within the 3-years from the date of importation.

Substitution Drawback (19 U.S.C. 1313(j)(2))

Section 313(j)(2) (19 U.S.C. 1313(j)(2)), hereafter referred to in this document as ''(j)(2) substitution drawback,'' is a type of drawback that permits other merchandise to be substituted for the imported merchandise for purposes of satisfying the exportation or destruction requirement. Specifically, 19 U.S.C. 1313(j)(2) provides for the payment of drawback, not to exceed 99 percent of the duties, taxes, and fees paid on the imported merchandise, based on the exportation or destruction of ''any other merchandise (whether imported or domestic)'' that is: (1) Commercially interchangeable with the imported merchandise on which duties, taxes, and fees were paid; (2) exported or destroyed within 3 years of the date of importation of the imported merchandise; and (3) not used within the United States before such exportation or destruction and is in the possession of the party claiming drawback.

Implementing CBP Drawback Regulations

Regulations implementing 19 U.S.C. 1313 are set forth in part 191 of title 19 of the Code of Federal Regulations (19 CFR part 191). Within part 191, subpart C sets forth the regulations pertaining to unused merchandise drawback and includes, in § 191.32, standards applicable to (j)(2) drawback claims.

III. Reasons for Regulatory Change

Integrity of Federal Excise Tax System at Risk

In recent years, CBP has received and approved a number of (j)(2) substitution drawback claims involving imported bottled and bulk wine and domestically-produced wine. A hypothetical example of this type of transaction follows:

> A domestic winery imports 100 cases of bottled wine, pays Federal excise tax on the wine, and sells the imported wine in the United States. The domestic winery then exports 100 cases of its domestic wine without payment of Federal excise tax. The domestic winery files a (j)(2) drawback claim with CBP on the basis that the 100 cases of domestically-produced wine are commercially interchangeable with the 100 cases of imported wine. The domestic winery receives a refund of 99 percent of the Federal excise taxes that it paid on the 100 cases of imported wine.

In the above hypothetical, imported wine is introduced into the U.S. market, in effect, free of 99 percent of Federal excise tax. As a result, the U.S. Treasury ultimately receives only 1 percent of the Federal excise tax on the imported wine.

Diverse Commodities Potentially Impacted

In addition to the claims processed by CBP involving (j)(2) substitution drawback on wine, given the present statutory and regulatory structure within which these claims are administered, other products that are subject to excise tax under the IRC may also be the subject of such drawback claims where the excise taxes on the good have been refunded, remitted, or not paid (*e.g.*, distilled spirits and beer (IRC chapters 51 and 52; 26 U.S.C. 5001; 5051); tobacco products and cigarette papers and tubes (IRC chapter 52; 26 U.S.C. 5701); imported taxable fuel (IRC chapter 32; 26 U.S.C. 4081); petroleum products (IRC chapter 38; 26 U.S.C. 4611)).

Congressional Intent

The allowance of (j)(2) substitution drawback claims in circumstances in which internal revenue taxes have not been paid on the substituted domestic product is incompatible with Congress' intent to levy excise taxes under the IRC and circumvents the intended administration of drawback under the comprehensive framework of section 313.

As part of Congress' extensive review of the drawback statute, effected by the Customs Modernization and Informed Compliance Act (Mod Act), Public Law No. 103–182, 632, 107 Stat. 2057 (1993) (enacted as Title VI of the North American Free Trade Agreement Implementation Act), a provision was added to section 313(v) that provides that, ''[m]erchandise that is exported or destroyed to satisfy any claim for drawback shall not be the basis of any other claim for drawback; except that appropriate credit and deductions for claims covering components or ingredients of such merchandise shall be made in computing drawback payments.'' Based on the foregoing statutory prohibition against multiple drawback claims, 19 U.S.C. 1313(v) precludes the use of merchandise on which there has been a remission of duties, taxes, and fees from being used to claim drawback of duties, taxes, and fees paid on other merchandise upon its exportation or destruction.

The legislative history of this provision indicates that Congress did not intend to allow multiple drawback claims on the exportation or destruction of goods. As noted in the House Report accompanying the legislation, section 632(a)(7) provides that under the amended statute, ''only one drawback

claim per exportation or destruction of goods would be allowed.'' H.R. Rep. No. 103–361(l), at 130, *reprinted in* 1993 United States Code Congressional and Administrative News (U.S.C.C.A.N.) 2552, 2680.

In the context of amending 19 U.S.C. 1313 as part of the Mod Act, Congress also added language to subsection (u) of section 313 which restricted eligibility for drawback to imported merchandise that had been regularly entered or withdrawn for consumption. This limiting language was added, as described in the legislative history, because it codified ''current Customs practice against piggybacking other duty exemption benefits (foreign-trade zones, bonded warehouses and duty-free temporary importation) onto the drawback benefits.'' H.R. Rep. No. 103–361(I) at 130, *reprinted in* 1993 U.S.C.C.A.N. at 2680. The addition of this limiting language ensured that companies could not claim drawback on the ''importation'' of goods which had never actually been entered for consumption in the United States, but rather had been physically located in a foreign trade zone and then exported without the payment of duties. The ability to obtain substitution drawback under 19 U.S.C. 1313(j)(2), thus introducing imported wine into the U.S. market nearly free of Federal excise tax, is an example of ''piggybacking'' a previously existing Federal excise tax exemption benefit (exporting domestically-produced wine without payment of excise tax) onto the drawback benefits.

The IRC is quite specific regarding the circumstances in which internal revenue taxes are, and are not, required to be paid on domestic and imported merchandise. *See* chapters 32, 38, 51, and 52 of the IRC. The fact that a party would be able to avoid the payment of internal revenue taxes on both imported and domestically-produced merchandise by relying on the provisions of two discrete statutory programs administered by different agencies for different purposes is contrary to Congressional intent, as discussed above.

Congress is cognizant of the possibility that the interplay of tariff provisions could lead to a situation where collection of internal revenue tax might be at risk in an import transaction. For example, Congress structured U.S. note 1(b) to subchapter I of Chapter 98 of the Harmonized Tariff Schedule of the United States (HTSUS) to avoid this outcome. The subchapter I provisions allow duty-free or reduced-duty treatment for articles exported and returned that were not advanced in value or improved in condition by any process of manufacture or other means while abroad. U.S. note 1(b) was structured to ensure collection of the tax by stating that the provisions of the subchapter (with certain exceptions not relevant here) do not apply to any article ''[o]f a kind with respect to the importation of which an internal-revenue tax is imposed at the time such article is entered, unless such article was subject to an internal-revenue tax imposed upon production or importation at the time of its exportation from the United States and it shall be proved that such tax was paid before exportation and was not refunded.'' The net effect of U.S. note 1(b) to subchapter I of chapter 98, HTSUS, is to ensure that internal revenue tax is imposed on merchandise that is entered for consumption in the United States. Section 10.3 of title 19 of the CFR (19 CFR 10.3) implements the provisions of U.S. note 1(b) to subchapter I of chapter 98, HTSUS. The amendments proposed in this document would similarly ensure that internal revenue taxes will be paid in cases involving (j)(2) substitution drawback.

Explanation of Proposed Amendments

For the reasons outlined above, this document proposes to amend § 191.32 of title 19 of the CFR (19 CFR 191.32) by adding a new paragraph (b)(4) to preclude drawback of internal revenue tax imposed under the IRC in connection with a (j)(2) substitution drawback claim if no excise tax was paid on the substituted exported merchandise or if that merchandise was subject to a claim for refund or drawback of tax under any provision of the IRC. In addition, this document proposes to amend § 113.62 of title 19 of the CFR (19 CFR 113.62), which sets forth basic importation and entry bond conditions, to add a new condition under which the principal agrees not to file, or transfer the right to file, a substitution drawback claim that would be inconsistent with the terms of new § 191.32(b)(4). The consequences of default specified in newly re-designated paragraph (n) of § 113.62 would apply in the case of a breach of this bond condition.

Conforming regulatory texts are also being published by TTB in this edition of the **Federal Register**.

Executive Order 12866 and the Regulatory Flexibility Act

This proposed rule is not considered to be a significant regulatory action under Executive Order 12866 because it will not have an annual effect on the economy of $100 million and does not raise novel policy concerns. The Office of Management and Budget has not reviewed this regulatory evaluation under that Order.

Regarding the impact of the proposed rule on small entities as required by the Regulatory Flexibility Act (5 U.S.C. 604), as amended by the Small Business Regulatory Enforcement and Fairness Act of 1996, a small entity may be a small business (defined as any independently owned and operated business not dominant in its field that qualifies as a small business per the Small Business Act); a small not-for-profit organization; or a small governmental jurisdiction (locality with fewer than 50,000 people).

As stated above, these changes are intended to preclude the filing of (j)(2) substitution drawback claims in circumstances in which internal revenue taxes have not been paid on the substituted domestic product, or where that merchandise is subject to a different claim for refund or drawback of IRC taxes. The proposed amendments still allow for the return of 99 percent of the duties, taxes, and fees paid on the imported merchandise upon export, or when IRC taxes have been paid on substituted domestic product and the substituted merchandise is not the subject of a separate claim for refund or drawback of such taxes.

To the extent that small entities have filed (j)(2) substitution drawback claims that would no longer be permitted, this regulation, if finalized as proposed, could have an economic impact on a substantial number of small entities. However, this proposed rule does not restrict import and export activities for any entities, regardless of size; these proposed amendments merely reflect Congress' intent regarding statutory prohibitions against multiple drawback claims and serve to clarify the application of existing statutory provisions. Thus, the impacts of this rule would not rise to the level that would be considered economically significant.

CBP welcomes comments on this assumption. The most helpful comments are those that can give us specific information or examples of a direct impact on small entities. If we do not receive comments that demonstrate that the rule causes small entities to incur significant direct costs, we may, during the process of drafting the final rule, certify that this action does not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

As there are no new collections of information proposed in this document,

the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507) are inapplicable.

Signing Authority

The amendments contained in this document are being issued by CBP in accordance with § 0.1(a)(1) of title 19 of the CFR (19 CFR 0.1(a)(1)), pertaining to the authority of the Secretary of the Treasury (or his/her delegate) to approve regulations related to certain CBP revenue functions.

List of Subjects

19 CFR Part 113

Bonds, Customs duties and inspection, Exports, Imports, Reporting and recordkeeping requirements.

19 CFR Part 191

Administrative practice and procedure, Bonds, Claims, Commerce, Customs duties and inspection, Drawback, Exports, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

For the reasons set forth in the preamble, CBP and the Treasury Department propose to amend 19 CFR parts 113 and 191 as set forth below:

PART 113—CUSTOMS BONDS

1. The general authority citation for part 113 continues to read as follows:

Authority: 19 U.S.C. 66, 1623, 1624.

2. Section 113.62 is amended by redesignating paragraph (m) as paragraph (n) and adding a new paragraph (m) to read as follows:

§ 113.62 Basic importation and entry bond conditions.

* * * * *

(m) *Agreement to comply with CBP regulations applicable to substitution drawback claims.* In the case of imported merchandise that is subject to internal revenue tax imposed under the Internal Revenue Code of 1986, as amended (IRC), the principal agrees not to file, or to transfer to a successor the right to file, a substitution drawback claim involving such tax if the substituted merchandise has been, or will be, the subject of a removal from bonded premises without payment of tax, or the subject of a claim for refund or drawback of tax, under any provision of the IRC.

* * * * *

PART 191—DRAWBACK

3. The general authority citation for part 191 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States), 1313, 1624;

* * * * *

4. Section 191.32 is amended:

a. At the end of paragraph (b)(2), by removing the word ''and'';

b. At the end of paragraph (b)(3), by removing the period and adding, in its place, ''; and''; and

c. By adding a new paragraph (b)(4) to read as follows:

§ 191.32 Substitution drawback.

* * * * *

(b) * * *

(4) For purposes of drawback of internal revenue tax imposed under Chapters 32, 38, 51, and 52 of the Internal Revenue Code of 1986, as amended (IRC), drawback granted on the export or destruction of substituted merchandise will be limited to the amount of taxes paid (and not returned by refund, credit, or drawback) on the substitute merchandise.

* * * * *

Approved: October 8, 2009.

Jayson P. Ahern,

Acting Commissioner, U.S. Customs and Border Protection.

Timothy E. Skud,

Deputy Assistant Secretary of the Treasury.

[FR Doc. E9–24789 Filed 10–14–09; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Parts 5 and 908

[Docket No. FR–5351–P–01]

RIN 2501–AD48

Refinement of Income and Rent Determination Requirements in Public and Assisted Housing Programs: Implementation of Enterprise Income Verification

AGENCY: Office of the Secretary, HUD.

ACTION: Proposed rule.

SUMMARY: On January 27, 2009, HUD issued a final rule that revised the regulations for HUD's public and assisted housing programs to require the use of HUD's Enterprise Income Verification system by public housing agencies and multifamily housing owners and management agents when verifying the employment and income of program participants. Consistent with Administration policy to review rules issued during the transition from one Administration to another, HUD re-opened the January 27, 2009, final rule for public comment, and specifically solicited public comment on extending the effective date of the rule. While HUD remains committed to full implementation of the Enterprise Income Verification system, the public comments submitted on the January 27, 2009, final rule highlighted for HUD certain regulatory provisions that require further clarification, and ones that were extraneous to the purpose of the rule, which is full implementation of the Enterprise Income Verification system.

By final rule published on August 28, 2009, HUD delayed the effective date of the January 27, 2009, final rule to January 31, 2010. During this period before the final rule takes effect, HUD submits for public comment, through this proposed rule, regulatory revisions designed to make certain provisions in the January 27, 2009, final rule more clear, and return other regulatory provisions to their pre-January 2009 final rule content.

DATES: *Comment Due Date:* November 16, 2009.

ADDRESSES: Interested persons are invited to submit comments regarding this proposed rule to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 10276, Washington, DC 20410–0500. Communications must refer to the above docket number and title. There are two methods for submitting public comments. All submissions must refer to the above docket number and title.

1. *Submission of Comments by Mail.* Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 10276, Washington, DC 20410–0500.

2. *Electronic Submission of Comments.* Interested persons may submit comments electronically through the Federal eRulemaking Portal at *www.regulations.gov.* HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the *www.regulations.gov* Web site can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

Note: To receive consideration as public comments, comments must be submitted through one of the two methods specified above. Again, all submissions must refer to the docket number and title of the rule.

No Facsimile Comments. Facsimile (FAX) comments are not acceptable.

Public Inspection of Public Comments. All properly submitted comments and communications submitted to HUD will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters building, an appointment to review the public comments must be scheduled in advance by calling the Regulations Division at 202–708–3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Information Relay Service at 800–877–8339. Copies of all comments submitted are available for inspection and downloading at *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: For Office of Public and Indian Housing programs, contact Nicole Faison, Program Advisor for the Office of Public Housing and Voucher Programs, Department of Housing and Urban Development, 451 7th Street, SW., Room 4214, Washington, DC 20410, telephone number 202–402–4267. For Office of Housing Programs, contact Gail Williamson, Director of the Housing Assistance Policy Division, Department of Housing and Urban Development, 451 7th Street, SW., Room 6138, Washington, DC 20410, telephone number 202–402–2473. (These are not toll-free numbers.) Persons with hearing or speech impairments may access these numbers through TTY by calling the toll-free Federal Information Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Background

On January 27, 2009 (74 FR 4832), HUD published a final rule, entitled ''Refinement of Income and Rent Determination Requirements in Public and Assisted Housing Programs'' (Final Rule). The Final Rule revised HUD's public and assisted housing program regulations to implement the upfront income verification process for program participants and to require the use of HUD's Enterprise Income Verification (EIV) system by public housing agencies (PHAs) and owners and management agents. The Final Rule followed publication of a June 19, 2007 (72 FR 33844) proposed rule, and took into consideration the public comments received on the June 2007 proposed rule.

The Final Rule was originally scheduled to become effective on March 30, 2009. On February 11, 2009 (74 FR 6839), HUD published a notice in the **Federal Register** seeking public comment on whether to delay the effective date of the Final Rule. The February 11, 2009, notice was issued in accordance with the memorandum of January 20, 2009, from the assistant to the President and Chief of Staff, entitled ''Regulatory Review'' and subsequently published in the **Federal Register** on January 26, 2009 (74 FR 4435). The notice explained that HUD was considering a temporary 60-day delay in the effective date to allow the Department an opportunity for further review and consideration of new regulations, consistent with the Chief of Staff memorandum. In addition to soliciting comments specifically delaying the effective date, the February 11, 2009, notice also requested comment generally on the Final Rule.

The comment period on the February 11, 2009, notice closed on March 13, 2009. HUD received 50 public comments. Comments were submitted by a variety of organizations including PHAs, property owners, management agents, legal aid organizations, community development organizations, and public interest organizations. The majority of comments were supportive of a delayed effective date. The commenters not only supported a delay but sought clarification or changes by HUD of certain aspects of the Final Rule, about which questions and comments were raised. Among other issues, commenters requested that HUD address the need to revise the definition of ''annual income,'' and clarify the verification procedures applicable to noncitizens and participants who may experience difficulty obtaining social security numbers for their children.

Following publication of the February 11, 2009, **Federal Register** notice, HUD issued a final rule on March 27, 2009 (74 FR 13339), that extended the effective date of the Final Rule to September 30, 2009. The purpose of this extension was to provide HUD with time to review the public comments received in response to the February 11, 2009, notice. On August 28, 2009 (74 FR 44285), HUD published a final rule that further extended the effective date of the Final Rule to January 31, 2010. The further extension was undertaken to allow the two HUD Assistant Secretaries, who have responsibility for the programs affected by the rule, and only recently confirmed, sufficient time to review the subject matter of the Final Rule, and to review and consider the public comments received on HUD's February 11, 2009, **Federal Register** notice.

II. This Proposed Rule

As noted in the Summary to this proposed rule, the Department remains committed to the full and effective implementation of the EIV system. The use of upfront income verification will help identify and cure inaccuracies in public and assisted housing subsidy determinations, which benefits public and assisted housing providers, tenants, and taxpayers. Following a thorough review of the subject matter of the Final Rule and the issues raised by the comments on the February 11, 2009, notice, HUD is proposing, through this rule, to make certain changes to the Final Rule, which HUD believes will address the issues and concerns raised by the public commenters, and defer other issues, to subsequent rulemaking.

To provide stakeholders, residents, and other interested members of the public with the opportunity to offer feedback on the proposed regulatory changes, HUD is undertaking additional rulemaking and soliciting comments on the proposed amendments for a period of 30 days. The regulatory changes proposed by this rule are few and focused, and HUD believes that, in light of the prior public comment on the Final Rule, a 30-day period presents sufficient time to review and comment on the changes.

HUD welcomes public comment on all aspects of the proposed rule; however given the privacy concerns surrounding the disclosure of social security numbers (SSNs), the Department specifically requests comments on those proposed regulatory requirements pertaining to SSN disclosure. All public comments will be considered by HUD in the development of a final rule that will, depending upon public comments received in response to this proposed rule, and further consideration of issues by HUD, supersede provisions of the Final Rule that would otherwise take effect on January 31, 2010.

The following presents a summary of the key changes made to the Final Rule, and these changes are directed to: deferring changes to the definition of annual income to separate rulemaking that may address broader rent and income reforms; deferring any changes to HUD's noncitizen regulations, which, given the importance of this issue, should be addressed by separate rulemaking; and simplifying SSN disclosure and verification processes, to the extent feasible, and consistent with

maintaining confidentiality of these processes.

A. Proposed Amendments to 24 CFR Part 5, Subpart B—Disclosure and Verification of Social Security Numbers and Employer Identification Numbers; Procedures for Obtaining Income Information

1. *Applicability of the Social Security Number disclosure requirements.* HUD's regulations at 24 CFR 5.216 establish requirements regarding SSN disclosure and verification. This proposed rule would clarify that the SSN disclosure requirements apply to applicants and participants in HUD's public and assisted housing programs subject to the requirements of 24 CFR part 5, subpart B; however, the disclosure requirements are inapplicable to individuals who do not contend eligible immigration status under HUD's noncitizens regulations at 24 CFR part 5, subpart E. The disclosure requirements for such individuals continue to be found at 24 CFR 5.508 of the noncitizens regulations. As noted above in this preamble, the Final Rule was not directed to addressing the noncitizens requirements. Given the significance of the issues involved, HUD believes that any changes deemed necessary to the noncitizens requirements would more appropriately be the subject of a separate rulemaking.

2. *Participant SSN disclosure requirements—''grandfathering'' of participants 62 years of age or older and exemption for individuals who have already disclosed a valid SSN.* This proposed rule would also streamline the SSN disclosure requirements for current participants in HUD rental assistance programs. Specifically, the proposed rule would exempt current participants 62 years of age or older as of January 31, 2010, from having to disclose an SSN. The Department is sympathetic to the burden that such a disclosure requirement might impose on elderly residents, many of whom have been residing in their units for many years and are otherwise in compliance with all program requirements. The proposed rule would also reduce administrative burden by exempting those participants who have previously disclosed a valid SSN from having to re-provide their SSN for duplicative verification. Under proposed § 5.216(e)(1), only those individuals who have not previously disclosed a valid SSN or who have been issued a new SSN would be subject to the SSN disclosure and verification procedures. The proposed changes would reduce administrative burden, and enhance privacy protections for individuals and households who have already disclosed valid SSNs, as well as reduce the administrative burden for the covered housing providers that must collect this information.

3. *Required documentation.* Proposed § 5.216(g)(1) would permit compliance with the SSN disclosure requirements through submission of a valid SSN card issued by the Social Security Administration or an original document issued by a federal or state government agency that provides the SSN of the individual along with other identifying information. In addition, the proposed rule provides for HUD to prescribe other acceptable evidence of a SSN through administrative instructions. The public comments received in response to the February 2009, notice noted the possible unforeseen circumstances that might delay issuance of a SSN card, even where the individual has a valid SSN number. The proposed changes would address such concerns and reduce administrative burden by authorizing reliance on the SSN documentation provided by another government agency. However, HUD notes that such SSN data provided by participants would still be subject to verification by PHAs and owners and management agents through use of the EIV system.

4. *Addition of new household members under the age of six.* The proposed rule would also revise and clarify the applicability of the SSN disclosure requirements for households adding new household members under the age of six. Public comments on the February 2009, notice made HUD cognizant that there may be unforeseen circumstances outside the control of a household that may delay the issuance of a SSN for such children under the age of six. To address these concerns, proposed § 5.216(e)(2)(ii) would provide participants with 90 days to provide a SSN for new household members under the age of six. The processing entity shall grant an extension of one additional 90-day period if the processing entity, in its discretion, determines that the participant's failure to provide documentation of a SSN for the child under six was due to circumstances that could not have reasonably been foreseen and were outside the control of the participant. During the period that the processing entity is awaiting documentation of a SSN, the child is entitled to all the benefits of being a member of the household. Failure of the participant to provide documentation of a SSN for the child under six by the deadline, will result in applicable penalties as described in § 5.218.

5. *Disclosure requirements upon assignment of new SSN.* The proposed rule would provide processing entities with additional flexibility to determine the timing of disclosure of a newly assigned SSN, by providing that if a participant has been assigned a new SSN, the participant must disclose the SSN at either the time of receipt of the new SSN; at the next interim or regularly scheduled reexamination or recertification of family composition or income, or other reexamination or recertification; or at such earlier time specified by the processing entity. Under the regulations currently in effect the participant is not required to disclose a newly assigned SSN until a reexamination or recertification of family composition and income.

6. *Exception to required termination of assistance or tenancy due to unforeseen circumstances.* Under the current regulations in effect, a processing entity must terminate the assistance or tenancy, or both, of a participant who does not meet the SSN disclosure requirements (see § 5.218(c)). As noted above in this preamble, HUD is aware that unforeseen circumstances may sometimes delay the issuance of a SSN. Accordingly, the proposed rule would revise § 5.218(c) to allow the processing entity to defer termination and provide the participant with an additional 90 days to disclose a valid SSN, but only if the processing entity determines that: (1) failure to comply with the SSN requirements was due to circumstances that could not have reasonably been foreseen and were outside the control of the household; and (2) there is a reasonable likelihood that the participant will be able to disclose a SSN by the deadline. Failure of the participant to disclose a SSN by the deadline will result in termination.

7. *Required use of EIV—no deferred implementation date for multifamily owners and management agents.* Consistent with the Final Rule, this proposed rule would continue the required use of the EIV system by PHAs and multifamily owners and management agents (see § 5.233 of the Final Rule). However, the proposed rule would no longer provide for deferred EIV implementation for owners and management agents. Although PHAs have long had experience with EIV, the system was relatively new for owners and management agents at the time the Final Rule was originally published. Accordingly, HUD provided multifamily owners and management agents with an additional six months from the rule's effective date to comply with EIV use. The deferral was intended to provide owners and management agents with the necessary time to become familiar with the EIV system. Given the extension of time for implementation

that is now provided by extending the effective date of the use of EIV to January 31, 2010, HUD determined that a deferral is no longer necessary.

8. *Required use of EIV in its entirety.* Several commenters on the February 11, 2009, notice questioned whether the use of the EIV system was required only for income verification or in its entirety. As previously noted, HUD is committed to the full and effective implementation of the EIV system, and continues to believe that the use of upfront income verification will help identify and cure inaccuracies in public and assisted housing subsidy determinations, which benefits public and assisted housing providers, tenants, and taxpayers. In response to the comments, this proposed rule would clarify that processing entities must use the EIV system in its entirety as a third-party source to verify tenant employment and income information during mandatory reexaminations or recertifications of family composition and income and also to reduce administrative and subsidy payment errors in accordance with HUD administrative guidance.

9. *Technical and conforming amendments.* The proposed rule would also make several technical, non-substantive changes, to the regulations at 24 CFR part 5, subpart B. These changes include updating cross-references to other regulatory provisions that would be revised by the proposed rule, and removing outdated references to HUD programs no longer in existence (for example, the obsolete reference to the Section 215 program at § 5.216(b)(3)(i)(A)). HUD believes that these changes, although technical and conforming in nature, will help eliminate confusion, and contribute to clarity.

B. Withdrawal of Amendments to 24 CFR Part 5, Subpart E—Restrictions on Assistance to Noncitizens

The Final Rule would have made several revisions to the documentation requirements in HUD's noncitizens regulations, primarily to conform to the other amendments pertaining to use of the EIV system. As noted elsewhere in this preamble, the intent of the Final Rule was not directed to revising or updating the noncitizens requirements. Many of the comments submitted in response to the February 11, 2009, notice requested clarification regarding the verification procedures applicable to noncitizens and posed questions concerning the intent of the regulatory changes contained in the Final Rule. Given the sensitivity and significance of the issues involved, HUD has decided that should any future changes to the noncitizens requirements be deemed necessary, they would more appropriately be the subject of a separate rulemaking focused exclusively on these policies and procedures and providing the public with additional opportunity to comment. Accordingly, through this rule, HUD proposes to withdraw the January 27, 2009, amendments to the noncitizens regulations, and leaves in place the requirements codified in 24 CFR part 5, subpart E, prior to revision by the Final Rule.

C. Withdrawal of Amendments to 24 CFR Part 5, Subpart F (Family Income and Payment Requirements) and 24 CFR Part 92 (HOME Investment Partnerships Program)

The Final Rule would have revised the definition of annual income for HUD's public and assisted housing programs codified at § 5.609. Specifically, the Final Rule would have added new provisions regarding the use of historical income amounts for purposes of determining annual income, and made other technical changes to the determination of annual income. The Final Rule would also have made a conforming change to the annual income provisions of the HOME Investment Partnership program at 24 CFR 92.203.

Many of the comments on HUD's February 11, 2009, notice questioned the annual income provisions of the Final Rule, and requested additional clarification and revisions. Given the comments received on the issue expressing uncertainty about the changes to annual income in the Final Rule, the possibility of legislation that would make, within the near future, statutory changes to annual income provisions, and the fact that such changes are not necessary to implementation of the EIV system, the Department has decided to maintain the definition of annual income currently in effect; that is, this proposed rule leaves the content of § 5.609 as it was prior to amendment by the January 27, 2009, final rule. Should HUD determine that additional rulemaking on the subject of annual income is necessary or appropriate, HUD will provide the public with the opportunity to comment on any proposed changes to the regulations.

III. Findings and Certifications

Executive Order 12866, Regulatory Planning and Review

The Office of Management and Budget (OMB) reviewed this proposed rule under Executive Order 12866 (entitled ''Regulatory Planning and Review''). OMB determined that this proposed rule is a ''significant regulatory action,'' as defined in section 3(f) of the Order (although not economically significant, as provided in section 3(f)(1) of the Order).

The January 27, 2009, final rule was determined an economically significant rule based on full implementation of EIV, which the January 27, 2009, final rule would achieve by mandating its use by all HUD housing providers. The rulemaking initiated by this proposed rule does not propose to alter full use of EIV. As stated earlier in this preamble, HUD is committed to full implementation of EIV. This proposed rule is limited to address certain regulatory amendments in the January 27, 2009, final rule that caused confusion and which amendments were not central or necessary to full implementation of EIV. The clarifications made by this rule do not result in an impact on the economy of $100 million or more.

The docket file is available for public inspection in the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 10276, Washington, DC 20410–0500. Due to security measures at the HUD Headquarters building, please schedule an appointment to review the docket file by calling the Regulations Division at (202) 402–3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Information Relay Service at 800–877–8339.

Paperwork Reduction Act

The information collection requirements in this proposed rule have been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) and assigned OMB Control Numbers 2577–0220 and 2502–0204. In accordance with the Paperwork Reduction Act, HUD may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless the collection displays a currently valid OMB Control Number.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial

number of small entities. Implementation of HUD's EIV system, which the Refinement of Income and Rent Determination rulemaking addresses is concerned with those entities that are responsible for making eligibility determinations and income reexaminations or recertifications under sections 3 and 5 of the United States Housing Act of 1937, and tenant-based and project-based housing assistance under section 8 of the United States Housing Act of 1937. The purpose of this proposed rule is not to interfere with full implementation of HUD's EIV system, now scheduled to take effect on January 31, 2010, but is limited to clarifying certain regulatory amendments of the January 27, 2009, final rule that required further clarification, and proposing to remove other regulatory amendments that were determined not necessary for implementation of EIV. Accordingly, this proposed rule does not alter the small entity impact analysis made in the January 27, 2009, final rule nor does this proposed rule, which makes certain clarifying amendments, result in a significant economic impact on a substantial number of small entities.

Notwithstanding HUD's determination that this rule does not have a significant economic impact on a substantial number of small entities, HUD invites comments from all entities, including small entities, regarding less burdensome alternatives to this rule that will meet HUD's objectives as described in this preamble.

Environmental Impact

This proposed rule involves statutorily required and/or discretionary establishment and review of interest rates, loan limits, building cost estimates, prototype costs, fair market rent schedules, HUD-determined prevailing wage rates, income limits and exclusions with regard to eligibility for or calculation of HUD housing assistance or rental assistance, and similar rate and cost determinations and related external administrative or fiscal requirements or procedures that do not constitute a development decision affecting the physical condition of specific project areas or building sites. Accordingly, under 24 CFR 50.19(c)(6), this proposed rule is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*)

Executive Order 13132, Federalism

Executive Order 13132 (entitled ''Federalism'') prohibits, to the extent practicable and permitted by law, an agency from promulgating a regulation that has federalism implications and either imposes substantial direct compliance costs on state and local governments and is not required by statute, or preempts state law, unless the relevant requirements of section 6 of the Executive Order are met. This rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) (UMRA) establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments, and on the private sector. This proposed rule would not impose any Federal mandate on any State, local, or tribal government, or on the private sector, within the meaning of the UMRA.

List of Subjects

24 CFR Part 5

Administrative practice and procedure, Aged, Claims, Crime, Government contracts, Grant programs—housing and community development, Individuals with disabilities, Intergovernmental relations, Loan programs—housing and community development, Low and moderate income housing, Mortgage insurance, Penalties, Pets, Public housing, Rent subsidies, Reporting and recordkeeping requirements, Social Security, Unemployment compensation, Wages.

24 CFR Part 908

Computer technology, Grant programs—housing and community development, Rent subsidies, Reporting and recordkeeping requirements.

Accordingly, for the reasons described in the preamble, HUD proposes to amend 24 CFR parts 5 and 908, as amended in the final rule published on January 27, 2009, at 74 FR 4832, as follows:

PART 5—GENERAL HUD PROGRAM REQUIREMENTS; WAIVERS

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

Authority: 42 U.S.C. 1437a, 1437c, 1437d, 1437f, 1437n, 3535(d), and Sec. 327, Pub. L. 109–115, 119 Stat. 2936.

2. Revise § 5.216 to read as follows:

§ 5.216 Disclosure and verification of Social Security and Employer Identification Numbers.

(a) *General.* The requirements of this section apply to applicants and participants as described in this section, except this section is inapplicable to individuals who do not contend eligible immigration status under subpart E of this part (see § 5.508).

(b) *Disclosure required of assistance applicants.* Each assistance applicant must submit the following information to the processing entity when the assistance applicant's eligibility under the program involved is being determined.

(1) The complete and accurate SSN assigned to the assistance applicant and to each member of the assistance applicant's household; and

(2) The documentation referred to in paragraph (g)(1) of this section to verify each such SSN.

(c) *Disclosure required of individual owner applicants.* Each individual owner applicant must submit the following information to the processing entity when the individual owner applicant's eligibility under the program involved is being determined:

(1) The complete and accurate SSN assigned to the individual owner applicant and to each member of the individual owner applicant's household who will be obligated to pay the debt evidenced by the mortgage or loan documents; and

(2) The documentation referred to in paragraph (g)(1) of this section to verify each such SSN.

(d) *Disclosure required of certain officials of entity applicants.* Each officer, director, principal stockholder, or other official of an entity applicant must submit the following information to the processing entity when the entity applicant's eligibility under the program involved is being determined:

(1) The complete and accurate SSN assigned to each such individual; and

(2) The documentation referred to in paragraph (g)(1) of this section to verify each SSN.

(e) *Disclosure required of participants.* (1) *Initial disclosure.* (i) Each participant, except those age 62 or older as of January 31, 2010, whose initial determination of eligibility under the program involved was begun before January 31, 2010, must submit the information described in paragraph (e)(1)(ii) of this section, if the participant has:

(A) Not previously disclosed a SSN;

(B) Previously disclosed a SSN that HUD or the SSA determined was invalid; or

(C) Been issued a new SSN.

(ii) Each participant subject to the disclosure requirements under paragraph (e)(1)(i) of this section must submit the following information to the processing entity at the next interim or regularly scheduled reexamination or recertification of family composition or income, or other reexamination or recertification for the program involved:

(A) The complete and accurate SSN assigned to the participant and to each member of the participant's household; and

(B) The documentation referred to in paragraph (g)(1) of this section to verify each such SSN.

(2) *Subsequent disclosure.* Once a participant has disclosed and the processing entity has verified each SSN, the following rules apply:

(i) *Addition of new household who is at least six years of age.* When the participant requests to add a new household member who is at least six years of age, the participant must provide the following to the processing entity at the time of the request, or at the time of processing the interim reexamination or recertification of family composition that includes the new member(s):

(A) The complete and accurate SSN assigned to each new member; and

(B) The documentation referred to in paragraph (g)(1) of this section to verify the SSN for each new member.

(ii) *Addition of household member who is under the age of six.* (A) When a participant seeks to include or add a household member who is under the age of six and who has no SSN, the participant shall be required to provide the complete and accurate SSN assigned to each new child and the documentation referred to in paragraph (g)(1) of this section to verify the SSN for each new child within 90 calendar days of the child being added to the household.

(B) The processing entity shall grant an extension of one additional 90-day period if the processing entity, in its discretion, determines that the participant's failure to comply was due to circumstances that could not have reasonably been foreseen and were outside the control of the participant. During the period that the processing entity is awaiting documentation of a SSN, the processing entity shall include the child as part of the assisted household and the child shall be entitled to all the benefits of being a household member. If upon expiration of the provided time period, the participant fails to produce a SSN, the processing entity shall follow the provisions of § 5.218.

(iii) *Assignment of new SSN.* If the participant or any member of the participant's household has been assigned a new SSN, the participant must submit the following to the processing entity at either the time of receipt of the new SSN; at the next interim or regularly scheduled reexamination or recertification of family composition or income, or other reexamination or recertification; or at such earlier time specified by the processing entity:

(A) The complete and accurate SSN assigned to the participant or household member involved; and

(B) The documentation referred to in paragraph (g)(1) of this section to verify the SSN of each individual.

(f) *Disclosure required of entity applicants.* Each entity applicant must submit the following information to the processing entity when the entity applicant's eligibility under the program involved is being determined:

(1) Any complete and accurate EIN assigned to the entity applicant; and

(2) The documentation referred to in paragraph (g)(2) of this section to verify the EIN.

(g) *Required documentation.* (1) *SSN.* The documentation necessary to verify the SSN of an individual who is required to disclose his or her SSN under paragraphs (a) through (e) of this section is:

(i) A valid SSN card issued by the SSA;

(ii) An original document issued by a federal or state government agency, which contains the name of the individual and the SSN of the individual, along with other identifying information of the individual; or

(ii) Such other evidence of the SSN as HUD may prescribe in administrative instructions.

(2) *EIN.* The documentation necessary to verify an EIN of an entity applicant that is required to disclose its EIN under paragraph (f) of this section is the official, written communication from the Internal Revenue Service (IRS) assigning the EIN to the entity applicant, or such other evidence of the EIN as HUD may prescribe in administrative instructions.

(h) *Effect on assistance applicants.* (1) Except as provided in paragraph (h)(2) of this section, if the processing entity determines that the assistance applicant is otherwise eligible to participate in a program, the assistance applicant may retain its place on the waiting list for the program, but cannot become a participant until it can provide:

(i) The complete and accurate SSN assigned to each member of the household; and

(ii) The documentation referred to in paragraph (g)(1) of this section to verify the SSN of each such member.

(2) For applicants to the Section 8 Moderate Rehabilitation Single Room Occupancy (SRO) Program for Homeless Individuals under 24 CFR part 882, subpart H, the documentation required in paragraph (h)(1) of this section must be provided to the processing entity within 90 days from the date of admission into the program. The processing entity shall grant an extension of one additional 90-day period if the processing entity, in its discretion, determines that the applicant's failure to comply was due to circumstances that could not have reasonably been foreseen and were outside the control of the applicant. If upon expiration of the provided time period, the individual fails to produce a SSN, the processing entity shall follow the provisions of § 5.218.

(i) *Rejection of documentation.* The processing entity must not reject documentation referred to in paragraph (g) of this section, except as HUD may otherwise prescribe through publicly issued notice.

3. Amend § 5.218 by revising paragraphs (a), (b) and (c) to read as follows:

§ 5.218 Penalties for failing to disclose and verify Social Security and Employer Identification Numbers.

(a) *Denial of eligibility of assistance applicants and individual owner applicants.* The processing entity must deny the eligibility of an assistance applicant or individual owner applicant in accordance with the provisions governing the program involved, if the assistance or individual owner applicant does not meet the applicable SSN disclosure, documentation, and verification requirements as specified in § 5.216.

(b) *Denial of eligibility of entity applicants.* The processing entity must deny the eligibility of an entity applicant in accordance with the provisions governing the program involved; if:

(1) The entity applicant does not meet the EIN disclosure, documentation, and verification requirements specified in § 5.216; or

(2) Any of the officials of the entity applicant referred to in § 5.216(d) does not meet the applicable SSN disclosure, and documentation and verification requirements specified in § 5.216.

(c) *Termination of assistance or termination of tenancy of participants.* (1) The processing entity must terminate the assistance or terminate the tenancy, or both, of a participant, in accordance

with the provisions governing the program involved, if the participant does not meet the applicable SSN disclosure, documentation, and verification requirements specified in § 5.216.

(2) The processing entity may defer termination and provide the participant with an additional 90 days to disclose a SSN, but only if unless the processing entity, in its discretion, determines that:

(i) The failure to meet these requirements was due to circumstances that could not have reasonably been foreseen and were outside the control of the participant; and

(ii) There is a reasonable likelihood that the participant will be able to disclose a SSN by the deadline.

(3) Failure of the participant to disclose a SSN by the deadline specified in paragraph (c)(2) of this section will result in termination of the assistance or tenancy, or both, of the participant.

* * * * *

4. Add a new § 5.233 to read as follows:

§ 5.233 Mandated use of HUD's Enterprise Income Verification (EIV) System.

(a) *Programs subject to this section and requirements.* (1) The requirements of this section apply to entities administering assistance under the:

(i) Public Housing program under 24 CFR part 960;

(ii) Section 8 Housing Choice Voucher (HCV) program under 24 CFR part 982;

(iii) Moderate Rehabilitation program under 24 CFR part 882;

(iv) Project-based Voucher program under 24 CFR part 983;

(v) Project-based Section 8 programs under 24 CFR parts 880, 881, 883, 884, 886, and 891;

(vi) Section 202 of the Housing Act of 1959 (12 U.S.C. 1701q);

(vii) Section 811 of the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. 8013);

(viii) Sections 221(d)(3) and 236 of the National Housing Act (12 U.S.C. 1715l(d)(3) and 1715z–1); and

(ix) Rent Supplement program under section 101 of the Housing and Urban Development Act of 1965 (12 U.S.C. 1701s).

(2) Processing entities must use HUD's EIV system in its entirety:

(i) As a third-party source to verify tenant employment and income information during mandatory reexaminations or recertifications of family composition and income, in accordance with § 5.236 and administrative guidance issued by HUD; and

(ii) To reduce administrative and subsidy payment errors in accordance with HUD administrative guidance.

(b) *Penalties for noncompliance.* Failure to use the EIV system in its entirety may result in the imposition of sanctions and/or the assessment of disallowed costs associated with any resulting incorrect subsidy or tenant rent calculations, or both.

§ 5.236 [Amended]

5. In § 5.236(b)(3)(i)(A), remove ''215''.

PART 908—ELECTRONIC TRANSMISSION OF REQUIRED FAMILY DATA FOR PUBLIC HOUSING, INDIAN HOUSING, AND THE SECTION 8 RENTAL CERTIFICATE, RENTAL VOUCHER, AND MODERATE REHABILITATION PROGRAMS

6. The authority citation for part 908 continues to read as follows:

Authority: 42 U.S.C. 1437f, 3535d, 3543, 3544, and 3608a.

7. Revise § 908.101 to read as follows:

§ 908.101 Purpose.

The purpose of this part is to require Public Housing Agencies (PHAs), including Moving to Work (MTW) PHAs, that operate Public Housing, Indian Housing, or Section 8 Rental Certificate, Housing Choice Voucher (HCV), Rental Voucher, and Moderate Rehabilitation programs to electronically submit certain data to HUD for those programs. These electronically submitted data are required for HUD forms: HUD–50058, including the Family Self-Sufficiency (FSS) Addendum. Applicable program entities must retain at a minimum, the last three years of the form HUD–50058, and supporting documentation, during the term of each assisted lease, and for a period of at least 3 years from the end of participation (EOP) date, to support billings to HUD and to permit an effective audit. Electronic retention of form HUD–50058 and HUD–50058–FSS and supporting documentation fulfills the retention requirement under this section.

Dated: September 23, 2009.

Shaun Donovan,

Secretary.

[FR Doc. E9–24809 Filed 10–14–09; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE TREASURY

Alcohol and Tobacco Tax and Trade Bureau

27 CFR Parts 28 and 44

[Docket No. TTB–2009–0005; Notice No. 100]

RIN 1513–AB77

Drawback of Internal Revenue Taxes

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

ACTION: Notice of proposed rulemaking.

SUMMARY: The Alcohol and Tobacco Tax and Trade Bureau proposes to amend its regulations to clarify the relationship between tax payment under the Internal Revenue Code of 1986 and drawback of tax under the Tariff Act of 1930. The proposal provides conforming amendments to reflect proposed Customs and Border Protection regulations stating that domestic merchandise on which no tax is paid under the Internal Revenue Code may not be substituted for imported merchandise for purposes of claims for drawback of tax under the customs laws and regulations.

DATES: We must receive your written comments on or before December 14, 2009.

ADDRESSES: You may send comments on this notice to one of the following addresses:

- *http://www.regulations.gov*: Use the comment form for this notice on the Federal e-rulemaking portal, Regulations.gov, to submit comments via the Internet;
- *Mail*: Director, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, P.O. Box 14412, Washington, DC 20044–4412.
- *Hand Delivery/Courier in Lieu of Mail*: Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street, NW., Suite 200–E, Washington, DC 20005.

See the Public Participation section of this notice for specific instructions and requirements for submitting comments, and for information on how to request a public hearing.

You may view copies of this notice, selected supporting materials, and the comments we receive about this proposal within Docket No. TTB–2009–0005 at *http://www.regulations.gov*. A direct link to this docket is posted on the TTB Web site at *http://www.ttb.gov/regulations_laws/all_rulemaking.shtml* under Notice No. 100. You also may view copies of this notice, all supporting materials, and the comments we receive about this proposal by

appointment at the TTB Information Resource Center, 1310 G Street, NW., Washington, DC 20220. Please call 202–453–2270 to make an appointment.

FOR FURTHER INFORMATION CONTACT: Gerry Isenberg, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street, NW., Suite 200–E, Washington, DC 20220; telephone 202–453–2097.

SUPPLEMENTARY INFORMATION:

Background

Taxation of Distilled Spirits, Wines, Beer, and Tobacco Products Under the Internal Revenue Code of 1986

Chapter 51 of the Internal Revenue Code of 1986 (IRC) sets forth excise tax collection and related provisions applicable to distilled spirits, wines, and beer. Chapter 52 of the IRC contains similar provisions applicable to tobacco products and cigarette papers and tubes.

Under Chapter 51, a Federal excise tax is imposed on all wines and distilled spirits produced in or imported into the United States. 26 U.S.C. 5001, 5041. A Federal excise tax also is imposed on beer brewed or produced, and removed for consumption or sale within the United States, or imported into the United States. 26 U.S.C. 5051. For domestically-produced wine, the tax is imposed at the conclusion of fermentation or removal from the fermenter (see 27 CFR 24.176). For domestically-produced distilled spirits, the tax is imposed at the time that the product comes into existence. 26 U.S.C. 5001(b). For domestically-produced beer, the tax is imposed when the product is removed for consumption or sale. 26 U.S.C. 5051. For imported wine, distilled spirits, and beer, the tax is imposed when the product is imported into the United States.

However, Federal excise taxes on imported and domestically-produced wine, distilled spirits, and beer are generally not paid or determined until the products are removed from bonded premises or from customs custody for consumption or sale. 26 U.S.C. 5041, 5061, 5006, 5007, 5054. Domestically-produced wine, distilled spirits, and beer may be exported without payment of the Federal excise tax. 26 U.S.C. 5362(c), 5214(a), 5053. In addition, on the exportation of domestically-produced wine, distilled spirits, or beer that was removed from bonded premises with payment of tax, drawback is allowed in an amount equal to the tax paid. 26 U.S.C. 5062, 5055.

Under Chapter 52, a Federal excise tax is imposed on all tobacco products and cigarette papers and tubes manufactured in or imported into the United States. 26 U.S.C. 5701. The tax on domestically-produced tobacco products and cigarette papers and tubes is imposed at the time that the product comes into existence, that is, when a product meets one of the definitions under the IRC. The Federal excise tax on imported and domestically-produced tobacco products and cigarette papers and tubes is generally not paid or determined until the products are released from customs custody or removed from bonded premises. 26 U.S.C. 5702, 5703. Tobacco products and cigarette papers and tubes may be removed from bonded premises, without the payment of Federal excise tax, for export. 26 U.S.C. 5704.

Regulations implementing the provisions of Chapters 51 and 52 of the IRC are contained in 27 CFR chapter 1. The Alcohol and Tobacco Tax and Trade Bureau (TTB) within the Department of the Treasury is responsible for the administration of Chapters 51 and 52 and the regulations promulgated thereunder.

Drawback Under the Tariff Act of 1930

Section 313 of the Tariff Act of 1930, as amended (19 U.S.C. 1313), provides for the drawback or refund of duties, taxes, and fees paid on imported merchandise if that merchandise is subsequently exported or destroyed under customs supervision. Paragraph (2) of subsection (j), hereafter referred to as ''(j)(2) drawback,'' permits the substitution of other merchandise for the imported merchandise for purposes of the exportation or destruction requirement.

Specifically, the (j)(2) drawback provision allows the payment of drawback, not to exceed 99 percent of the duties, taxes, and fees paid on the imported merchandise, based on the exportation or destruction of ''any other merchandise (whether imported or domestic)'' that: (1) Is commercially interchangeable with the imported merchandise on which duties, taxes, and fees were paid, (2) is exported or destroyed within 3 years of the date of importation of the imported merchandise, and (3) before such exportation or destruction, is not used within the United States and is in the possession of the party claiming drawback, that is, either the importer of the imported merchandise or a person who receives from the importer a certificate of delivery transferring to that person the imported merchandise or commercially interchangeable merchandise or any combination of the two (and with the transferred merchandise being treated as the imported merchandise). The (j)(2) drawback provision also includes a standard for commercial interchangeability for wine, that is, ''wine of the same color having a price variation not to exceed 50 percent between the imported wine and the exported wine.''

Regulations implementing section 313 are set forth in 19 CFR part 191. Subpart C of part 191 concerns unused merchandise drawback and includes, in § 191.32, standards applicable to (j)(2) drawback claims. The Bureau of Customs and Border Protection (CBP) is responsible for the administration of section 313 and the regulations promulgated thereunder.

Proposed CBP and TTB Regulatory Changes

In recent years CBP has received and approved a number of (j)(2) drawback claims involving imported bottled and bulk wine and domestically-produced wine. A hypothetical example of how such a transaction could work is as follows: A domestic winery imports 100 cases of bottled wine, pays Federal excise tax on the wine, and sells the imported wine in the United States; the domestic winery then exports 100 cases of its domestic wine without payment of Federal excise tax; the domestic winery then files a (j)(2) drawback claim with CBP, on the basis that the 100 cases of domestically-produced wine are commercially interchangeable with the 100 cases of imported wine; and, finally, the domestic winery receives a refund of 99 percent of the Federal excise taxes that it paid on the 100 cases of imported wine.

In the scenario described above, only 1 percent of the Federal excise tax on the imported wine is ultimately received into the U.S. Treasury. Thus, (j)(2) drawback in effect allows imported wine to be introduced into the U.S. market 99 percent free of Federal excise tax. Although the (j)(2) drawback claims involving the drawback or refund of IRC tax that CBP has processed have been limited to wine, under the present statutory and regulatory framework, other products that are subject to excise tax under IRC Chapters 51 and 52 could be the subject of claims for (j)(2) drawback.

Based on a review of the applicable statutory provisions, the Department of the Treasury has concluded that the practice of allowing (j)(2) drawback claims in circumstances in which internal revenue taxes have not been paid on the substituted domestic product is incompatible with the intent of Congress in levying excise taxes under the IRC and extends beyond the intent of Congress for administering

drawback under the comprehensive framework of section 313. In order to address these concerns, CBP in a document published in this issue of the **Federal Register** is proposing to amend its regulations to preclude the filing of a claim covering drawback of tax under subsection (j)(2) if no tax was paid on the substituted domestically-produced merchandise.

In view of the relationship between (j)(2) drawback claims and excise tax liability under Chapters 51 and 52 of the IRC as discussed above and as reflected in the proposed new CBP regulatory texts, TTB believes that it would be appropriate to add to the TTB regulations conforming amendments that alert the reader to the effect of the new CBP regulatory provision as regards alcohol and tobacco products exported without payment of tax or with drawback of tax. TTB notes in this regard that the IRC vests broad authority in the Secretary of the Treasury to promulgate regulations governing the removal of alcohol and tobacco products for export without payment of tax in order to ensure protection of the revenue. See 26 U.S.C. 5053 for beer, 5214(a) for distilled spirits, 5362(c) for wine, and 5704 for tobacco products. Furthermore, the IRC vests broad authority in the Secretary of the Treasury to promulgate regulations needed for the enforcement of the IRC. See 26 U.S.C. 7805(a). TTB believes that the proposed conforming amendments are needed to contribute to the enforcement and integrity of the excise tax system.

Accordingly, this document proposes six amendments to part 28 of the TTB regulations (27 CFR part 28), which contains rules regarding the exportation of distilled spirits, wine, and beer without payment of tax and with drawback of tax. Similarly, this document proposes two amendments to part 44 of the TTB regulations (27 CFR part 44), which contains rules regarding the exportation of tobacco products and cigarette papers and tubes without payment of tax and with drawback of tax. Although the only substantive text change in each affected section involves the addition of a reference to the new CBP rule, in several cases the entire section is revised in order to eliminate the use of undesignated introductory and concluding text and thus facilitate addition of the new provision.

Public Participation

Comments Invited

We invite comments from interested members of the public on this proposed rulemaking. Please submit your comments by the closing date shown above in this notice. Your comments must reference Notice No. 100 and include your name and mailing address. Your comments also must be made in English, be legible, and be written in language acceptable for public disclosure. We do not acknowledge receipt of comments, and we consider all comments as originals.

Submitting Comments

You may submit comments on this notice by using one of the following three methods:

- *Federal e-Rulemaking Portal:* You may send comments via the online comment form associated with this notice in Docket No. TTB–2009–0005 on ''Regulations.gov,'' the Federal e-rulemaking portal, at *http://www.regulations.gov*. A link to that docket is available under Notice No. 100 on the TTB Web site at *http://www.ttb.gov/regulations_laws/all_rulemaking.shtml*. Supplemental files may be attached to comments submitted via Regulations.gov. For information on how to use Regulations.gov, click on the site's Help or FAQ tabs.
- *U.S. Mail:* You may send comments via postal mail to the Director, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, P.O. Box 14412, Washington, DC 20044–4412.
- *Hand Delivery/Courier:* You may hand-carry your comments or have them hand-carried to the Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street, NW., Suite 200–E, Washington, DC 20005.

If you are commenting on behalf of an association, business, or other entity, your comment must include the entity's name as well as your name and position title. If you comment via Regulations.gov, please include the entity's name in the ''Organization'' blank of the comment form. If you comment via postal mail, please submit your entity's comment on letterhead.

You may also write to the Administrator before the comment closing date to ask for a public hearing. The Administrator reserves the right to determine whether to hold a public hearing.

Confidentiality

All submitted comments and attachments are part of the public record and subject to disclosure. Do not enclose any material in your comments that you consider to be confidential or that is inappropriate for public disclosure.

Public Disclosure

On the Federal e-rulemaking portal, Regulations.gov, we will post, and the public may view, copies of this notice, selected supporting materials, and any electronic or mailed comments we receive about this proposal. A direct link to the Regulations.gov docket containing this notice and the posted comments received on it is available on the TTB Web site at *http://www.ttb.gov/regulations_laws/all_rulemaking.shtml* under Notice No. 100. You may also reach the docket containing this notice and the posted comments received on it through the Regulations.gov search page at *http://www.regulations.gov*.

All posted comments will display the commenter's name, organization (if any), city, and State, and, in the case of mailed comments, all address information, including e-mail addresses. We may omit voluminous attachments or material that we consider unsuitable for posting.

You and other members of the public may view copies of this notice, any supporting materials, and any electronic or mailed comments we receive about this proposal by appointment at the TTB Information Resource Center, 1310 G Street, NW., Washington, DC 20220. You may also obtain copies at 20 cents per 8.5 x 11-inch page. Contact our information specialist at the above address or by telephone at 202–453–2270 to schedule an appointment or to request copies of comments or other materials.

Regulatory Analysis and Notices

Executive Order 12866

This proposed rule is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required.

Regulatory Flexibility Act

Pursuant to the requirements of the Regulatory Flexibility Act (5 U.S.C. chapter 6), we certify that this notice of proposed rulemaking will not have a significant economic impact on a substantial number of small entities. The proposed rule imposes no substantive requirements and therefore will not impose, or otherwise cause, a significant increase in reporting, recordkeeping, or other compliance burdens on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not required.

Drafting Information

Francis W. Foote of the Regulations and Rulings Division drafted this document.

List of Subjects

27 CFR Part 28

Aircraft, Alcohol and alcoholic beverages, Armed forces, Beer, Claims, Excise taxes, Exports, Foreign trade zones, Labeling, Liquors, Packaging and containers, Reporting and recordkeeping requirements, Surety bonds, Vessels, Warehouses, Wine.

27 CFR Part 44

Aircraft, Armed forces, Cigars and cigarettes, Claims, Customs duties and inspection, Excise taxes, Exports, Foreign trade zones, Labeling, Packaging and containers, Reporting and recordkeeping requirements, Surety bonds, Tobacco, Vessels, Warehouses.

Authority and Issuance

For the reasons explained in the preamble, TTB proposes to amend chapter I of title 27 of the Code of Federal Regulations as follows:

PART 28—EXPORTATION OF ALCOHOL

1. The authority citation for part 28 is revised to read as follows:

Authority: 5 U.S.C. 552(a); 19 U.S.C. 81c, 1202; 26 U.S.C. 5001, 5007, 5008, 5041, 5051, 5053, 5054, 5061, 5111, 5112, 5114, 5121, 5122, 5124, 5201, 5205, 5207, 5214, 5232, 5273, 5301, 5313, 5362, 5555, 6302, 7805; 27 U.S.C. 203, 205; 44 U.S.C. 3504(h).

2. Section 28.91 is amended by adding a new paragraph (c) to read as follows:

§ 28.91 General.

* * * * *

(c) Distilled spirits withdrawn without payment of tax under this subpart may not be substituted for imported merchandise for purposes of drawback of tax under section 313(j)(2) of the Tariff Act of 1930, as amended (19 U.S.C. 1313(j)(2)). See 19 CFR 191.32(b)(4).

3. Section 28.121 is revised to read as follows:

§ 28.121 General.

(a) Wine may, subject to this part, be withdrawn from a bonded wine cellar, without payment of tax, for:

(1) Exportation;

(2) Use on the vessels and aircraft described in § 28.21;

(3) Transfer to and deposit in a foreign-trade zone for exportation or for storage pending exportation;

(4) Transfer to and deposit in a customs bonded warehouse as provided in § 28.27; or

(5) Transportation to and deposit in a manufacturing bonded warehouse.

(b) All such withdrawals shall be made under the applicable bond prescribed in subpart D.

(c) Wine withdrawn without payment of tax under this subpart may not be substituted for imported merchandise for purposes of drawback of tax under section 313(j)(2) of the Tariff Act of 1930, as amended (19 U.S.C. 1313(j)(2)). See 19 CFR 191.32(b)(4).

4. Section 28.141 is amended by adding a new paragraph (d) to read as follows:

§ 28.141 General.

* * * * *

(d) *Customs drawback claims.* Beer removed without payment of tax under this subpart may not be substituted for imported merchandise for purposes of drawback of tax under section 313(j)(2) of the Tariff Act of 1930, as amended (19 U.S.C. 1313(j)(2)). See 19 CFR 191.32(b)(4).

5. Section 28.171 is revised to read as follows:

§ 28.171 General.

(a) Distilled spirits manufactured, produced, bottled in bottles, packed in containers, or packaged in casks or other bulk containers in the United States on which an internal revenue tax has been paid or determined, and which have been marked under the provisions of 27 CFR part 19 and of this part, as applicable, especially for export with benefit of drawback may be:

(1) Exported;

(2) Laden for use on the vessels or aircraft described in § 28.21;

(3) Transferred to and deposited in a foreign-trade zone for exportation or for storage pending exportation; or

(4) Transferred to and deposited in a customs bonded warehouse as provided for in § 28.26(b).

(b) On receipt by the appropriate TTB officer of required evidence of exportation, lading for use, or transfer, there shall be allowed to the bottler (or packager) of the spirits, drawback equal in amount to the tax found to have been paid or determined on the spirits.

(c) Distilled spirits on which drawback is paid under this subpart may not be substituted for imported merchandise for purposes of drawback of tax under section 313(j)(2) of the Tariff Act of 1930, as amended (19 U.S.C. 1313(j)(2)). See 19 CFR 191.32(b)(4).

6. Section 28.211 is revised to read as follows:

§ 28.211 General.

(a) Wines manufactured, produced, bottled in bottles packed in containers, or packaged in casks or other bulk containers in the United States on which an internal revenue tax has been paid or determined, and which are filled on premises qualified under this chapter to package or bottle wines, may, subject to this part, be:

(1) Exported;

(2) Laden for use on the vessels or aircraft described in § 28.21; or

(3) Transferred to and deposited in a foreign-trade zone for exportation or for storage pending exportation.

(b) On receipt by the appropriate TTB officer of required evidence of exportation, lading for use, or transfer, there shall be allowed a drawback equal in amount to the tax found to have been paid or determined on the wines.

(c) Wines on which drawback is paid under this subpart may not be substituted for imported merchandise for purposes of drawback of tax under section 313(j)(2) of the Tariff Act of 1930, as amended (19 U.S.C. 1313(j)(2)). See 19 CFR 191.32(b)(4).

7. Section 28.221 is revised to read as follows:

§ 28.221 General.

(a) Beer brewed or produced in the United States and on which the internal revenue tax has been paid may, subject to this part, be:

(1) Exported;

(2) Delivered for use as supplies on the vessels and aircraft described in § 28.21; or

(3) Transferred to and deposited in a foreign-trade zone for exportation or for storage pending exportation.

(b) A claim for drawback of taxes found to have been paid may be filed only by the producing brewer or his duly authorized agent. On receipt by the appropriate TTB officer of required evidence of such exportation, delivery for use, or transfer, there shall be allowed a drawback equal in amount to the tax found to have been paid on such beer.

(c) Beer on which drawback is paid under this subpart may not be substituted for imported merchandise for purposes of drawback of tax under section 313(j)(2) of the Tariff Act of 1930, as amended (19 U.S.C. 1313(j)(2)). See 19 CFR 191.32(b)(4).

PART 44—EXPORTATION OF TOBACCO PRODUCTS AND CIGARETTE PAPERS AND TUBES, WITHOUT PAYMENT OF TAX, OR WITH DRAWBACK OF TAX

8. The authority citation for part 44 continues to read as follows:

Authority: 26 U.S.C. 5142, 5143, 5146, 5701, 5703–5705, 5711–5713, 5721–5723, 5731, 5741, 5751, 5754, 6061, 6065, 6151,

6402, 6404, 6806, 7011, 7212, 7342, 7606, 7805; 31 U.S.C. 9301, 9303, 9304, 9306.

9. Section 44.61 is amended by adding a new paragraph (c) to read as follows:

§ 44.61 Removals, withdrawals, and shipments authorized.

* * * * *

(c) Tobacco products and cigarette papers and tubes removed from a factory or an export warehouse, and cigars withdrawn from a customs bonded warehouse, without payment of tax under this subpart may not be substituted for imported merchandise for purposes of drawback of tax under section 313(j)(2) of the Tariff Act of 1930, as amended (19 U.S.C. 1313(j)(2)). See 19 CFR 191.32(b)(4).

10. Section 44.221 is amended by designating the existing text as paragraph (a) and adding a new paragraph (b) to read as follows:

§ 44.221 Application of drawback of tax.

* * * * *

(b) Tobacco products and cigarette papers and tubes on which drawback is allowed under this subpart may not be substituted for imported merchandise for purposes of drawback of tax under section 313(j)(2) of the Tariff Act of 1930, as amended (19 U.S.C. 1313(j)(2)). See 19 CFR 191.32(b)(4).

* * * * *

Signed: September 3, 2009.

John J. Manfreda,

Administrator.

Approved: September 17, 2009.

Timothy E. Skud,

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

[FR Doc. E9–24791 Filed 10–14–09; 8:45 am]

BILLING CODE 4810–31–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 151

46 CFR Part 162

[USCG–2001–10486]

RIN 1625–AA32

Standards for Living Organisms in Ships' Ballast Water Discharged in U.S. Waters

AGENCY: Coast Guard, DHS.

ACTION: Notice; extension of comment periods.

SUMMARY: The Coast Guard is extending the periods for public comment on the notice of proposed rulemaking (NPRM) and the Draft Programmatic Environmental Impact Statement (DPEIS) for the rulemaking entitled ''Standards for Living Organisms in Ships' Ballast Water'' (Docket No. USCG–2001–10486).

DATES: Comments and related material for the NPRM and the DPEIS must either be submitted to our online docket via *http://www.regulations.gov* on or before the new date for the close of the comment period, December 4, 2009, or reach the Docket Management Facility by that date.

ADDRESSES: You may submit comments identified by Coast Guard docket number USCG–2001–10486 to the Docket Management Facility at the U.S. Department of Transportation. To avoid duplication, please use only one of the following methods:

(1) *Federal eRulemaking Portal: http://www.regulations.gov.*

(2) *Mail:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

(3) *Hand delivery:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

(4) *Fax:* 202–493–2251.

To avoid duplication, please use only one of these four methods. *See* the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions on this proposed rulemaking, call or e-mail Mr. John Morris, Project Manager, Environmental Standards Division, U.S. Coast Guard Headquarters, telephone 202–372–1433, e-mail *John.C.Morris@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Ms. Renee Wright, Chief, Dockets, Department of Transportation, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

We encourage you to participate in this aspect of the rulemaking by submitting comments and related materials. All comments received will be posted, without change, to *http://www.regulations.gov* and will include any personal information you have provided.

Submitting Comments

If you submit a comment, please include the docket number for this rulemaking (USCG–2001–10486), indicate the specific section of the document to which each comment applies, and provide a reason for each suggestion or recommendation. You may comment on either the NPRM or the DPEIS or both. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. We recommend that you include your name and a mailing address, an e-mail address, or a phone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov* and click on the ''submit a comment'' box, which will then become highlighted in blue. Insert ''USCG–2001–10486'' in the Keyword box, click ''Search'', and then click on the balloon shape in the Actions column. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope.

We will consider all comments and material received during the comment period and may change this proposed rule or the DPEIS based on your comments.

Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov* at any time. Enter the docket number for this rulemaking (USCG–2001–10486) in the Keyword box, and click ''Search''. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. We have an agreement with the Department of Transportation to use the Docket Management Facility.

Privacy Act

Anyone can search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or

signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review a Privacy Act notice regarding our public dockets in the January 17, 2008, issue of the **Federal Register** (73 FR 3316).

Background and Purpose

On August 28, 2009, the Coast Guard published an NPRM entitled ''Standards for Living Organisms in Ships' Ballast Water Discharged in U.S. Waters'' in the **Federal Register** (74 FR 44632). The comment period for the NPRM was to close on November 27, 2009. On the same day, the Coast Guard also published a Notice of Availability in the **Federal Register** informing the public that the DPEIS for the ''Standards for Living Organisms in Ships' Ballast Water Discharged in U.S. Waters'' rulemaking had been added to the docket and was available for public comment (74 FR 44673). The August 28, 2009 Notice of Availability for the DPEIS stated that the public comment period for the DPEIS would close on November 27, 2009.

Council on Environmental Quality regulations at 40 CFR part 1506.10 state that ''(a) The Environmental Protection Agency shall publish a notice in the **Federal Register** each week of the environmental impact statements filed during the preceding week. The minimum time periods set forth in this section shall be calculated from the date of publication of this notice. (b) No decision on the proposed action shall be made or recorded under Sec. 1505.2 by a Federal agency until the later of the following dates: (1) Ninety days after publication of the notice described above in paragraph (a) of this section for a draft environmental impact statement.'' The Environmental Protection Agency did not publish their notice of availability for the DPEIS until September 4, 2009. Accordingly, the Coast Guard has decided to extend the comment periods for both the NPRM and the DPEIS in order to ensure that the public has adequate time to submit comments regarding these important proposals. The comment period for the NPRM and the DPEIS will now close on December 4, 2009.

Additionally, you are reminded that you may comment on any aspect of the rulemaking, including on any comments placed in the docket. We may change the proposed rule or the DPEIS in response to the comments received.

Dated: October 8, 2009.

J.G. Lantz,

Director of Commercial Regulations and Standards, U.S. Coast Guard.

[FR Doc. E9–24745 Filed 10–14–09; 8:45 am]

BILLING CODE 4910–15–P

POSTAL REGULATORY COMMISSION

39 CFR Part 3050

[Docket No. RM2010–1; Order No. 311]

Periodic Reporting Rules

AGENCY: Postal Regulatory Commission.

ACTION: Proposed rulemaking; availability of rulemaking petition.

SUMMARY: This document announces a proposed rulemaking in response to a recent Postal Service petition involving periodic reporting rules. It concerns a new Postal Service special study updating the density factors that are used to distribute certain attributable transportation costs in two cost segments (Nos. 8 and 14). The public is invited to comment.

DATES: Comments are due October 28, 2009.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http:www.prc.gov.*

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, at 202–789–6824 or *stephen.sharfman@prc.gov.*

SUPPLEMENTARY INFORMATION: On October 6, 2009, the Postal Service filed a petition to initiate an informal rulemaking proceeding to consider changes in the analytical methods approved for use in periodic reporting.[1] The Petition explains that the Postal Service has conducted a new special study for the purpose of updating density factors used to distribute vehicle service drive attributable costs in Cost Segment 8 and attributable transportation costs in Cost Segment 14. The data-collection method is similar to the previous special study described in Library Reference USPS–LR–K–33 in Docket No. R2001–1. *See id.,* Proposal 20 at 1.

The attachment to the Postal Service's Petition explains its proposal in more detail, including the background, objective, rationale, and estimated impact. For illustrative purposes, the Postal Service provides a table showing the impact of distributing FY 2008 highway, rail, and vehicle service driver costs based on the new and existing density factors. *See id.,* Proposal 20 at 3.

It is ordered:

1. The Petition of the United States Postal Service Requesting Initiation of a Proceeding to Consider a Proposed Change in Analytic Principles (Proposal Twenty), filed October 6, 2009, is granted.
2. The Commission establishes Docket No. RM2010–1 to consider the matters raised by the Postal Service's Petition.
3. Interested persons may submit comments on or before October 28, 2009.
4. The Commission will determine the need for reply comments after review of the initial comments.
5. Cassie D'Souza is designated to serve as the Public Representative representing the interests of the general public in this proceeding.
6. The Secretary shall arrange for publication of this notice in the **Federal Register.**

By the Commission.

Shoshana M. Grove,

Secretary.

[FR Doc. E9–24860 Filed 10–14–09; 8:45 am]

BILLING CODE 7710–FW–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2009–0120; FRL–8968–2]

Approval and Promulgation of Air Quality Implementation Plans; Indiana; Carbon Monoxide Maintenance Plan Updates; Limited Maintenance Plan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve a request submitted by the Indiana Department of Environmental Management (IDEM) on January 12, 2009, for a State Implementation Plan (SIP) revision of the carbon monoxide (CO) ''Limited Maintenance Plan'' update for Lake and Marion Counties, Indiana. These Limited Maintenance Plans demonstrate continued attainment of the CO National Ambient Air Quality Standard for Lake and Marion counties for an additional ten years.

DATES: Comments must be received on or before November 16, 2009.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R05–

[1] Petition of the United States Postal Service Requesting Initiation of a Proceeding to Consider a Proposed Change in Analytic Principles (Proposal Twenty), October 6, 2009 (Petition).

OAR–2009–0120, by one of the following methods:

1. *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
2. *E-mail: mooney.john@epa.gov.*
3. *Fax:* (312) 692–2551.
4. *Mail:* John M. Mooney, Chief, Criteria Pollutant Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604.
5. *Hand Delivery:* John M. Mooney, Chief, Criteria Pollutant Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604. Such deliveries are only accepted during the Regional Office normal hours of operation, and special arrangements should be made for deliveries of boxed information. The Regional Office official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

Please see the direct final rule which is located in the Rules section of this **Federal Register** for detailed instructions on how to submit comments.

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

SUPPLEMENTARY INFORMATION: In the Rules section of this **Federal Register**, EPA is approving the State's SIP submittal as a direct final rule without prior proposal because EPA views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this rule, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment. For additional information, see the direct final rule which is located in the Rules section of this **Federal Register**.

Dated: September 29, 2009.

Walter W. Kovalick Jr.,

Acting Regional Administrator, Region 5.

[FR Doc. E9–24698 Filed 10–14–09; 8:45 am]

BILLING CODE 6560–50–P

Notices

Federal Register

Vol. 74, No. 198

Thursday, October 15, 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.

COMMISSION ON CIVIL RIGHTS

Agenda and Notice of Public Meeting of the Missouri Advisory Committee

Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission), and the Federal Advisory Committee Act (FACA), that a planning meeting of the Missouri Advisory Committee to the Commission will convene by conference call at 2 p.m. and adjourn at approximately 3 p.m. on Tuesday, November 10, 2009. The purpose of this meeting is to plan activities for a public meeting entitled ''Civil Rights Implications of Educational Opportunities in Urban Public School Settings and Education Reform in Missouri . . . Kansas City School District.''

This meeting is available to the public through the following toll-free call-in number: (866) 364–7584, conference call access code number 33206302. Any interested member of the public may call this number and listen to the meeting. Callers can expect to incur charges for calls they initiate over wireless lines, and the Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Persons with hearing impairments may also follow the proceedings by first calling the Federal Relay Service at 1–800–977–8339 and providing the Service with the conference call number and contact name Farella E. Robinson.

To ensure that the Commission secures an appropriate number of lines for the public, persons are asked to register by contacting Corrine Sanders of the Central Regional Office and TTY/TDD telephone number, by 4 p.m. on November 3, 2009.

Members of the public are entitled to submit written comments. The comments must be received in the regional office by November 23, 2009. The address is U.S. Commission on Civil Rights, 400 State Avenue, Suite 908, Kansas City, Kansas 66101. Comments may be e-mailed to *frobinson@usccr.gov*. Records generated by this meeting may be inspected and reproduced at the Central Regional Office, as they become available, both before and after the meeting. Persons interested in the work of this advisory committee are advised to go to the Commission's Web site, *www.usccr.gov*, or to contact the Central Regional Office at the above e-mail or street address.

The meeting will be conducted pursuant to the provisions of the rules and regulations of the Commission and FACA.

Peter Minarik,

Acting Chief, Regional Programs Coordination Unit.

[FR Doc. E9–24829 Filed 10–14–09; 8:45 am]

BILLING CODE 6335–01–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Agency: U.S. Census Bureau.

Title: Annual Social and Economic Supplement to the Current Population Survey.

Form Number(s): CPS–580 (ASEC), CPS–580 (ASEC)SP, CPS–676, CPS–676(SP).

OMB Control Number: 0607–0354.

Type of Request: Revision of a currently approved collection.

Burden Hours: 32,500.

Number of Respondents: 78,000.

Average Hours per Response: 25 minutes.

Needs and Uses: The purpose of this request for review is to obtain clearance for the Annual Social and Economic Supplement (ASEC), which we will conduct in conjunction with the February, March, and April Current Population Survey (CPS). The U.S. Census Bureau has conducted this supplement annually for over 60 years. The Census Bureau, the Bureau of Labor Statistics (BLS), and the Department of Health and Human Services (HHS) sponsor this supplement.

The proposed supplement contains the same items that were in the 2009 ASEC instrument, with the exceptions described here:

(1) Additional questions are added concerning presence of mortgage, medical expenditures, child support paid, and child care paid.

(2) Questions on welfare reform (SWR1—SWR18) are no longer included.

On June 17, 2009, Congressman McDermott introduced the Measuring American Poverty Act of 2009. Under this legislation, the Census Bureau will be asked to produce estimates under a modernized poverty measure that includes several threshold and resource components that are not included in the ASEC. The new items in the ASEC for 2010 help to implement this modernized poverty measure.

Affected Public: Individuals or households.

Frequency: Annually.

Respondent's Obligation: Voluntary.

Legal Authority: Title 13, United States Code, section 182, and Title 29, United States Code, sections 1–9.

OMB Desk Officer: Brian Harris-Kojetin, (202) 395–7314.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 7845, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dhynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to Brian Harris-Kojetin, OMB Desk Officer either by fax (202–395–7245) or e-mail (*bharrisk@omb.eop.gov*).

Dated: October 9, 2009.

Glenna Mickelson,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E9–24747 Filed 10–14–09; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

International Trade Administration

(C–570–957)

Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China: Initiation of Countervailing Duty Investigation

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

EFFECTIVE DATE: October 15, 2009.

FOR FURTHER INFORMATION CONTACT: Yasmin Nair and Joseph Shuler, AD/CVD Operations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–3813 and (202) 482–1293, respectively.

SUPPLEMENTARY INFORMATION:

The Petition

On September 16, 2009, the Department of Commerce (''Department'') received a countervailing duty (''CVD'') petition concerning imports of certain seamless pipe (''seamless pipe'') from the People's Republic of China (''PRC'') filed in proper form by United States Steel Corporation and V&M Star L.P. (collectively, ''Petitioners'').[1] On September 25, 2009, the Petition was amended to add TMK IPSCO and The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Worker International Union as additional Petitioners. On September 21 and 22, 2009, the Department issued requests to Petitioners for additional information and for clarification of certain areas of the Petition. Based on the Department's requests, Petitioners filed a supplement to the Petition, regarding general issues, on September 25, 2009 (''Supplement to the AD/CVD Petitions''). On September 25, 2009, the Department requested further information from Petitioners, including suggested refinements to the scope. On September 28, 2009, Petitioners filed a supplement to the Petition, regarding the CVD allegations. On September 29, 2009, Petitioners filed an additional supplement to the Petition in response to the Department's September 25, 2009 request (''Second Supplement to the AD/CVD Petitions''). Also, on September 29, 2009, the Department issued a further request to Petitioners for information and clarification of certain aspects of the Petition. In response to the Department's request, Petitioners filed a supplement to the Petition regarding general issues, on October 1, 2009.

In accordance with section 702(b)(1) of the Tariff Act of 1930, as amended (''Act''), Petitioners allege that producers/exporters of seamless pipe from the PRC received countervailable subsidies within the meaning of sections 701 and 771(5) of the Act, and that imports from these producers/exporters materially injure, and threaten further material injury to, an industry in the United States.

The Department finds that Petitioners filed the Petition on behalf of the domestic industry because Petitioners are interested parties, as defined in section 771(9)(C) of the Act, and have demonstrated sufficient industry support with respect to the investigation that they request the Department to initiate (*see* ''Determination of Industry Support for the Petition'' below).

Period of Investigation

The period of investigation is January 1, 2008, through December 31, 2008.

Scope of Investigation

The products covered by this investigation are seamless pipe from the PRC. For a full description of the scope of the investigation, please see the ''Scope of the Investigation'' in Appendix I of this notice.

Comments on the Scope of Investigation

During our review of the Petition, we discussed the scope of the investigation with Petitioners and suggested a number of revisions to the scope language, including the removal from the scope of all language that relies on end–use to define covered merchandise. While Petitioners made a number of the suggested revisions to the scope, they did not remove end–use language from the scope. *See* Supplement Regarding General Issues to the AD/CVD Petition at 4; Second Supplement Regarding General Issues to the AD/CVD Petition, Item 3; and memorandum to the file from Drew Jackson regarding ''Initiation of the Antidumping Duty Investigation of Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China''. The Department has inherent authority to define the scope of the investigation and may depart from the scope as proposed by a petition. *NTN Bearing Corp. v. U.S.*, 747 F. Supp. 726, 731 (CIT 1990). In this case, consistent with the position taken in circular welded carbon quality steel pipe from the PRC, we have revised the scope by removing all end–use language from it. *See Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances: Circular Welded Carbon Quality Steel Pipe from the People's Republic of China*, 73 FR 31970 (June 5, 2008) (''*Circular Welded Pipe*'') at Comment 1 ('' the Department prefers to define product coverage by the physical characteristics of the merchandise subject to investigation.''). As noted in *Circular Welded Pipe*, excluding end–use language from the scope provides certainty with respect to product coverage and will enable any potential future orders to be effectively administered by the Department and enforced by U.S. Customs and Border Protection (''CBP''). Further, clarity with respect to scope will ensure that respondents in the investigation will know precisely what is included in the definition of subject merchandise.

As discussed in the preamble to the Department's regulations (*Antidumping Duties; Countervailing Duties; Final Rule*, 62 FR 27296, 27323 (May 19, 1997)), we are setting aside a period for interested parties to raise issues regarding the product coverage of the scope. The Department encourages all interested parties to submit such comments by October 26, 2009, which is twenty calendar days from the signature date of this notice. Comments should be addressed to Import Administration's APO/Dockets Unit, Room 1870, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230. The period for scope consultations is intended to provide the Department with ample opportunity to consider all comments and to consult with parties prior to the issuance of the preliminary determination in this investigation.

Consultations

Pursuant to section 702(b)(4)(A)(ii) of the Act, on September 22, 2009, the Department invited representatives of the Government of the PRC for consultations with respect to the Petition. The Government of the PRC did not request such consultations.

Determination of Industry Support for the Petition

Section 702(b)(1) of the Act requires that a petition be filed on behalf of the domestic industry. Section 702(c)(4)(A) of the Act provides that a petition meets this requirement if the domestic producers or workers who support the

[1] *See* Petition for the Imposition of Antidumping and Countervailing Duties Pursuant to Sections 701 and 731 of the Tariff Act of 1930, as Amended: Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China, dated September 16, 2009 (''Petition'').

petition account for: (i) at least 25 percent of the total production of the domestic like product; and (ii) more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the petition. Moreover, section 702(c)(4)(D) of the Act provides that, if the petition does not establish support of domestic producers or workers accounting for more than 50 percent of the total production of the domestic like product, the Department shall: (i) poll the industry or rely on other information in order to determine if there is support for the petition, as required by subparagraph (A); or (ii) determine industry support using a statistically valid sampling method to poll the industry.

Section 771(4)(A) of the Act defines the ''industry'' as the producers as a whole of a domestic like product. Thus, to determine whether a petition has the requisite industry support, the statute directs the Department to look to producers and workers who produce the domestic like product. The International Trade Commission (''ITC''), which is responsible for determining whether ''the domestic industry'' has been injured, must also determine what constitutes a domestic like product in order to define the industry. While both the Department and the ITC must apply the same statutory definition regarding the domestic like product (*see* section 771(10) of the Act), they do so for different purposes and pursuant to a separate and distinct authority. In addition, the Department's determination is subject to limitations of time and information. Although this may result in different definitions of the like product, such differences do not render the decision of either agency contrary to law.[2]

Section 771(10) of the Act defines the domestic like product as ''a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation under this title.'' Thus, the reference point from which the domestic like product analysis begins is ''the article subject to an investigation,'' (*i.e.*, the class or kind of merchandise to be investigated, which normally will be the scope as defined in the petition). With regard to the domestic like product, Petitioners did not offer a definition of domestic like product distinct from the scope of the investigation requested in the Petition. As noted, the Department has changed the definition of the class or kind of merchandise to be investigated from that which was initially requested by Petitioners. The reference point from which the domestic like product is defined is the class or kind of merchandise that is the basis for the Department's initiation of this investigation. Based on our analysis of the information submitted on the record, we have determined that seamless pipe constitutes a single domestic like product and we have analyzed industry support in terms of that domestic like product.[3]

In determining whether Petitioners have standing under section 702(c)(4)(A) of the Act, we considered the industry support data contained in the Petition with reference to the domestic like product as defined in the ''Scope of the Investigation'' in Appendix I of this notice. To establish industry support, Petitioners provided their own 2008 production of the domestic like product, and compared this to the estimated total production of the domestic like product for the entire domestic industry.[4] To estimate 2008 production of the domestic like product, Petitioners used data from an industry publication, published by the American Iron and Steel Institute (''AISI''), which compiles data on domestic producers' shipments of seamless standard, line and pressure pipe. Petitioners approximated domestic production of seamless pipe by inflating the volume of domestic shipments reported by AISI by the ratio of the difference between Petitioners' own production and shipments in the applicable calendar year.[5]

Our review of the data provided in the Petition, supplemental submissions, and other information readily available to the Department, including a search of the Internet, indicates that Petitioners have established industry support. First, the Petition established support from domestic producers (or workers) accounting for more than 50 percent of the total production of the domestic like product and, as such, the Department is not required to take further action in order to evaluate industry support (*e.g.*, polling).[6] Second, the domestic producers (or workers) have met the statutory criteria for industry support under section 702(c)(4)(A)(i) of the Act because the domestic producers (or workers) who support the Petition account for at least 25 percent of the total production of the domestic like product.[7] Finally, the domestic producers (or workers) have met the statutory criteria for industry support under section 702(c)(4)(A)(ii) of the Act because the domestic producers (or workers) who support the Petition account for more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the Petition. Accordingly, the Department determines that the Petition was filed on behalf of the domestic industry within the meaning of section 702(b)(1) of the Act.[8]

The Department finds that Petitioners filed the Petition on behalf of the domestic industry because Petitioners are interested parties (*e.g.*, domestic producers) as defined in section 771(9)(C) of the Act and have demonstrated sufficient industry support with respect to the CVD investigation that they are requesting that the Department initiate.[9]

Injury Test

Because the PRC is a ''Subsidies Agreement Country'' within the meaning of section 701(b) of the Act, section 701(a)(2) of the Act applies to this investigation. Accordingly, the ITC must determine whether imports of the subject merchandise from the PRC materially injure, or threaten material injury to, a U.S. industry.

Allegations and Evidence of Material Injury and Causation

Petitioners allege imports of seamless pipe from the PRC are benefitting from countervailable subsidies and that such imports are causing, or threaten to cause material injury to the domestic industry producing seamless pipe. In addition, Petitioners alleged that subject imports exceed the negligibility threshold provided for under section 771(24)(A) of the Act.

Petitioners contended that the industry's injured condition is illustrated by reduced market share, increased import penetration, underselling and price depressing and suppressing effects, lost sales and

[2] *See USEC, Inc. v. United States*, 132 F. Supp. 2d 1, 8 (CIT 2001), *citing Algoma Steel Corp. Ltd. v. United States*, 688 F. Supp. 639, 644 (CIT 1988), *aff'd* 865 F.2d 240 (Fed. Cir. 1989), *cert. denied* 492 U.S. 919 (1989).

[3] For a discussion of the domestic like product analysis in this case, see Countervailing Duty Investigation Initiation Checklist: Certain Seamless Pipe from the PRC (''Initiation Checklist'') at Attachment II (''Industry Support''), dated concurrently with this notice and on file in the Central Records Unit (≥CRU≥), Room 1117 of the main Department of Commerce building.

[4] *See* Initiation Checklist at Attachment II.

[5] *See id.*

[6] *See* Section 702(c)(4)(D) of the Act, and Initiation Checklist at Attachment II.

[7] *See* Initiation Checklist at Attachment II.

[8] *See id.*

[9] *See id.*

revenue, reduced production, reduced shipments, increased inventory overhang, reduced employment and wages, and an overall decline in financial performance.[10] We have assessed the allegations and supporting evidence regarding material injury, threat of material injury, and causation, and have determined that these allegations are properly supported by adequate evidence and meet the statutory requirements for initiation.[11]

Initiation of Countervailing Duty Investigation

Section 702(b)(1) of the Act requires the Department to initiate a CVD proceeding whenever an interested party files a petition on behalf of an industry that: (1) alleges the elements necessary for an imposition of a duty under section 701(a) of the Act; and (2) is accompanied by information reasonably available to the petitioner(s) supporting the allegations.

The Department has examined the Petition on seamless pipe from the PRC and finds that it complies with the requirements of section 702(b) of the Act. Therefore, in accordance with section 702(b) of the Act, we are initiating a CVD investigation to determine whether manufacturers, producers, or exporters of seamless pipe in the PRC receive countervailable subsidies. For a discussion of evidence supporting our initiation determination, *see* Initiation Checklist.

We are including in our investigation the following programs alleged in the Petition to have provided countervailable subsidies to producers and exporters of the subject merchandise in the PRC:

A. Preferential Loans
1. Policy Loans to the Seamless Pipe Industry
2. Export Loans
3. Treasury Bond Loans
4. Preferential Loans for State–Owned Enterprises (''SOEs'')
5. Preferential Loans for Key Projects and Technologies
6. Preferential Lending to Seamless Pipe Producers and Exporters Classified as ''Honorable Enterprises
7. Loans and Interest Subsidies Provided Pursuant to the Northeast Revitalization Program

B. Equity Programs
1. Debt–to-Equity Swaps
2. Equity Infusions
3. Exemptions for SOEs From Distributing Dividends to the State
4. Loan and Interest Forgiveness for SOEs

C. Tax Benefit Programs
1. Income Tax Credits for Domestically Owned Companies Purchasing Domestically Produced Equipment
2. Preferential Income Tax Policy for Enterprises in the Northeast Region
3. Forgiveness of Tax Arrears for Enterprises in the Old Industrial Bases of Northeast China
4. Reduction in or Exemption from Fixed Assets Investment Orientation Regulatory Tax

D. Subsidies for Foreign Invested Enterprises (''FIEs'')
1. ''Two Free, Three Half'' Program
2. Local Income Tax Exemption and Reduction Programs for ''Productive'' FIEs
3. Preferential Tax Programs for FIEs Recognized as High or New Technology Enterprises
4. Income Tax Reductions for Export–Oriented FIEs

E. Tariff and Indirect Tax Programs
1. Stamp Exemption on Share Transfers Under Non–Tradable Share Reform
2. Value Added Tax (''VAT'') and Tariff Exemptions for Purchases of Fixed Assets Under the Foreign Trade Development Fund Program
3. Import Tariff and VAT Exemptions for FIEs and Certain Domestic Enterprises Using Imported Equipment in Encouraged Industries
4. Deed Tax Exemption For SOEs Undergoing Mergers or Restructuring
5. Export Incentive Payments Characterized as ''VAT rebates''

F. Government Provision of Goods and Services for Less Than Adequate Remuneration
1. Provision of Land to SOEs for Less Than Adequate Remuneration
2. Provision of Land Use Rights for Less Than Adequate Remuneration
3. Provision of Steel Rounds for Less Than Adequate Remuneration
4. Provision of Electricity for Less Than Adequate Remuneration
5. Provision of Electricity and Water for Less Than Adequate Remuneration to Seamless Pipe Producers Located in Jiangsu Province
6. Export Restrictions on Coke
7. Provision of Coking Coal for Less Than Adequate Remuneration

G. Grant Programs
1. The State Key Technology Project Fund
2. Foreign Trade Development Fund (Northeast Revitalization Program)
3. Export Assistance Grants
4. Program to Rebate Antidumping Duties
5. Subsidies for Development of Famous Export Brands and China World Top Brands
6. Sub–central Government Programs to Promote Famous Export Brands and China World Top Brands
7. Grants to Loss–Making SOEs
8. Export Interest Subsidies

H. Other Regional Programs
1. Subsidies Provided in the Tianjin Binhai New Area and the Tianjin Economic and Technological Development Area
2. High–Tech Industrial Development Zones

For further information explaining why the Department is investigating these programs, see Initiation Checklist.

We are not including in our investigation the following programs alleged to benefit producers and exporters of the subject merchandise in the PRC:

A. Tax Benefit Programs

Income Tax Benefits for Domestically–Owned Enterprises Engaging in Research and Development

Petitioners allege that according to the PRC's World Trade Organization subsidies notification, domestic industrial enterprises whose research and development expenses increased by 10 percent from the previous year may offset 150 percent of the research expenditures from their income tax obligations. Petitioners have not sufficiently established that this tax reduction program is specific. Consequently, we do not plan to investigate this program.

B. Provision of Inputs for Less than Adequate Remuneration

Export Restrictions on Steel Rounds

Petitioners allege that effective January 1, 2008, the Government of the PRC increased the export tax on steel billets, including steel rounds, from 15 to 25 percent. The result, according to Petitioners, was a decline in exports of this product from the PRC. Specifically, Petitioners provide information indicating that exports of steel rounds fell by 92.6 percent on an annual basis for the first two months of the year, and were zero in the month of February 2008. The further result of the export tax, according to Petitioners, was a sharp divergence in domestic PRC and world prices of steel rounds. While Petitioners have provided reasonably available information showing that domestic PRC prices are less than world prices, the information does not show a connection between the export

[10] *See* Initiation Checklist at Attachment III for details.

[11] *See id.*

restraints and this price difference. Consequently, we do not plan to investigate this program.

Respondent Selection

For this investigation, the Department expects to select respondents based on CBP data for U.S. imports during the period of investigation. We intend to make our decision regarding respondent selection within 20 days of publication of this **Federal Register** notice. The Department invites comments regarding the CBP data and respondent selection within seven calendar days of publication of this **Federal Register** notice.

Distribution of Copies of the Petition

In accordance with section 702(b)(4)(A)(i) of the Act and 19 CFR 351.202(f), a copy of the public version of the Petition has been provided to the representatives of the Government of the PRC. Because of the particularly large number of producers/exporters identified in the Petition, the Department considers the service of the public version of the Petition to the foreign producers/exporters satisfied by the delivery of the public version to the Government of the PRC, consistent with 19 CFR 351.203(c)(2).

ITC Notification

We have notified the ITC of our initiation, as required by section 702(d) of the Act.

Preliminary Determination by the ITC

The ITC will preliminarily determine, within 45 days after the date on which the Petition is filed, whether there is a reasonable indication that imports of subsidized seamless pipe from the PRC are causing material injury, or threatening to cause material injury, to a U.S. industry. See section 703(a)(2) of the Act. A negative ITC determination will result in the investigation being terminated; otherwise, the investigation will proceed according to statutory and regulatory time limits.

This notice is issued and published pursuant to section 777(i) of the Act.

Dated: October 6, 2009.

Ronald K. Lorentzen,

Acting Assistant Secretary for Import Administration.

Appendix I

Scope of the Investigation

Attachment I

The merchandise covered by this investigation is certain seamless carbon and alloy steel (other than stainless steel) pipes and redraw hollows, less than or equal to 16 inches (406.4 mm) in outside diameter, regardless of wall–thickness, manufacturing process (e.g., hot–finished or cold–drawn), end finish (e.g., plain end, beveled end, upset end, threaded, or threaded and coupled), or surface finish (e.g., bare, lacquered or coated). Redraw hollows are any unfinished carbon or alloy steel (other than stainless steel) pipe or ''hollow profiles'' suitable for cold finishing operations, such as cold drawing, to meet the American Society for Testing and Materials (''ASTM'') or American Petroleum Institute (''API'') specifications referenced below, or comparable specifications. Specifically included within the scope are seamless carbon and alloy steel (other than stainless steel) standard, line, and pressure pipes produced to the ASTM A–53, ASTM A–106, ASTM A–333, ASTM A–334, ASTM A–335, ASTM A–589, ASTM A–795, ASTM A–1024, and the API 5L specifications, or comparable specifications, and meeting the physical parameters described above, regardless of application, with the exception of the exclusion discussed below.

Specifically excluded from the scope of the investigation are unattached couplings.

The merchandise covered by the investigation is currently classified in the Harmonized Tariff Schedule of the United States (''HTSUS'') under item numbers: 7304.19.1020, 7304.19.1030, 7304.19.1045, 7304.19.1060, 7304.19.5020, 7304.19.5050, 7304.31.6050, 7304.39.0016, 7304.39.0020, 7304.39.0024, 7304.39.0028, 7304.39.0032, 7304.39.0036, 7304.39.0040, 7304.39.0044, 7304.39.0048, 7304.39.0052, 7304.39.0056, 7304.39.0062, 7304.39.0068, 7304.39.0072, 7304.51.5005, 7304.51.5060, 7304.59.6000, 7304.59.8010, 7304.59.8015, 7304.59.8020, 7304.59.8025, 7304.59.8030, 7304.59.8035, 7304.59.8040, 7304.59.8045, 7304.59.8050, 7304.59.8055, 7304.59.8060, 7304.59.8065, and 7304.59.8070.

Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the merchandise subject to this scope is dispositive.

[FR Doc. E9–24834 Filed 10–14–09; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–601]

Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China; Extension of Time Limit for the Final Results of the 2007–2008 Administrative Review of the Antidumping Duty Order

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

FOR FURTHER INFORMATION CONTACT: Frances Veith or Brendan Quinn, AD/CVD Operations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230, telephone: (202) 482–4295 or (202) 482–5848, respectively.

SUPPLEMENTARY INFORMATION:

Background

On July 30, 2008, the Department of Commerce (''Department'') initiated the administrative review of the antidumping duty order on tapered roller bearings and parts thereof, finished or unfinished (''TRBs''), from the People's Republic of China (''PRC'') for the period June 1, 2007 through May 31, 2008. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews, Request for Revocation in Part, and Deferral of Administrative Review*, 73 FR 44220 (July 30, 2008). On July 8, 2009, the Department published its preliminary results on TRBs from the PRC. *See Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, from the People's Republic of China: Preliminary Results of the 2007 2008 Administrative Review of the Antidumping Duty Order*, 74 FR 32539 (July 8, 2009). The final results of this administrative review are currently due no later than November 5, 2009.

Extension of Time Limit for Final Results

Section 751(a)(3)(A) of the Tariff Act of 1930, as amended (''the Act''), requires the Department to issue the final results in an administrative review within 120 days after the date on which the preliminary results are published. However, if it is not practicable to complete the review within this time period, section 751(a)(3)(A) of the Act allows the Department to extend the time period to a maximum of 180 days.

We determine that it is not practicable to complete the final results of this review within the original time limit

because the Department requires additional time to analyze issues raised in parties' briefs and rebuttal briefs which were also discussed in meetings with counsel for the parties, such as, surrogate values and third–country processing. Therefore, given the complexity of issues in this case, we are extending the time limit for completion of the final results by 30 days.

An extension of 30 days from the current deadline of November 5, 2009, would result in a new deadline of December 5, 2009. However, since December 5, 2009, falls on a Saturday, a non–business day, the final results will now be due no later than December 7, 2009, the next business day.

This notice is published pursuant to sections 751(a) and 777(i) of the Act.

Dated: October 8, 2009.

John M. Andersen,

Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. E9–24833 Filed 10–14–09; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XS27

Marine Mammals; File No. 14676

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

ACTION: Notice; receipt of application.

SUMMARY: Notice is hereby given that Paul Ponganis, Ph.D., University of California at San Diego, La Jolla, CA, 92093, has applied in due form for a permit to conduct research on California sea lions (*Zalophus californianus*).

DATES: Written, telefaxed, or e-mail comments must be received on or before November 16, 2009.

ADDRESSES: The application and related documents are available for review by selecting ''Records Open for Public Comment'' from the Features box on the Applications and Permits for Protected Species (APPS) home page, *https://apps.nmfs.noaa.gov*, and then selecting File No. 14676 from the list of available applications.

These documents are also available upon written request or by appointment in the following office(s):

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301)713–2289; fax (301)713–0376; and Southwest Region, NMFS, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802–4213; phone (562)980–4001; fax (562)980–4018.

Written comments or requests for a public hearing on this application should be mailed to the Chief, Permits, Conservation and Education Division, F/PR1, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910. Those individuals requesting a hearing should set forth the specific reasons why a hearing on this particular request would be appropriate.

Comments may also be submitted by facsimile at (301)713–0376, provided the facsimile is confirmed by hard copy submitted by mail and postmarked no later than the closing date of the comment period.

Comments may also be submitted by e-mail. The mailbox address for providing e-mail comments is *NMFS.Pr1Comments@noaa.gov*. Include in the subject line of the e-mail comment the following document identifier: File No. 14676.

FOR FURTHER INFORMATION CONTACT: Kate Swails or Tammy Adams, (301)713–2289.

SUPPLEMENTARY INFORMATION: The subject permit is requested under the authority of the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 *et seq.*), and the regulations governing the taking and importing of marine mammals (50 CFR part 216).The purpose of this research is to determine the role of blood oxygen store depletion in the dive behavior and foraging ecology of California sea lions. This research would help determine the ability of these animals to adapt to environmental change. Over the course of five years, up to twenty animals would be captured, flipper tagged, anesthetized, and equipped with a backpack blood oxygen recorder during foraging trips to sea. Animals would be recaptured after the foraging trip to remove the recorders. Research would occur on San Nicolas Island off the coast of California. Annually, up to 6000 California sea lions, 500 harbor seals (*Phoca vitulina*), 1000 northern elephant seals (*Mirounga angustirostris*), and 150 northern fur seals (*Callorhinus ursinus*) may be incidentally harassed during research. The permit would be valid for five years.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), an initial determination has been made that the activity proposed is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

Concurrent with the publication of this notice in the **Federal Register**, NMFS is forwarding copies of this application to the Marine Mammal Commission and its Committee of Scientific Advisors.

Dated: October 8, 2009.

P. Michael Payne,

Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. E9–24839 Filed 10–14–09; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN: 0648–XS09

North 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 North Pacific Fishery Management Council (Council) Salmon Bycatch Workgroup will meet in Anchorage, AK.

DATES: The meeting will be held on October 29, 2009, 9 a.m. to 5 p.m.

ADDRESSES: The meeting will be held at the Clarion Suites Downtown (formally Hawthorn Suites), 1110 West 8th Avenue, Ballroom B, Anchorage, AK.

Council address: North Pacific Fishery Management Council, 605 W. 4th Ave., Suite 306, Anchorage, AK 99501–2252.

FOR FURTHER INFORMATION CONTACT: Diana Stram, Council staff; telephone: (907) 271–2809.

SUPPLEMENTARY INFORMATION: The agenda for this meeting will include: review and provide comments on the staff discussion paper of alternative chum management measure options, overview of chum stock status in western AK, discussion of current knowledge of chum stock of origin in Bering Sea pollock fishery bycatch.

Although non-emergency issues not contained in this agenda may come before this group for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), those issues may not be the subject of 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 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. Requests for sign language interpretation or other auxiliary aids should be directed to Gail Bendixen at (907) 271–2809 at least 7 working days prior to the meeting date.

Dated: October 8, 2009.

William D. Chappell,

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

[FR Doc. E9–24736 Filed 10–14–09; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN: 0648–XS31

Mid-Atlantic 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 Mid-Atlantic Fishery Management Council's (Council) Spiny Dogfish Monitoring Committee will hold a public meeting.

DATES: The meeting will be held on Thursday, October 29, 2009, from 10 a.m. to 4 p.m.

ADDRESSES: The meeting will be held at the Radisson Airport Hotel Providence, 2081 Post Rd, Warwick, RI 02886, telephone: (401) 739–3000.

Council address: Mid-Atlantic Fishery Management Council, 300 S. New Street, Room 2115, Dover, DE 19904; telephone: (302) 674–2331.

FOR FURTHER INFORMATION CONTACT: Daniel T. Furlong, Executive Director, Mid-Atlantic Fishery Management Council, 300 S. New Street, Room 2115, Dover, DE 19904; telephone: (302) 674–2331, extension 19.

SUPPLEMENTARY INFORMATION: The purpose of this meeting is to review the update to the status of the spiny dogfish stock and develop management measures for the 2010 fishing year. The Monitoring Committee will take into consideration the Council's Scientific and Statistical Committee's recommendations for specification of Acceptable Biological Catch (ABC) for spiny dogfish for the upcoming fishing year(s). Management measures that will be discussed may include, but not necessarily be limited to, quotas and daily landings limits. Multiple-year management measures for fishing years 2011 through 2012 may also be addressed. The Atlantic States Marine Fisheries Commission's Spiny Dogfish Technical Committee will also be present and will develop recommendations for management measures in state jurisdictional waters.

Although non-emergency issues not contained in this agenda may come before this group for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), those issues may not be the subject of 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 Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to M. Jan Bryan at the Mid-Atlantic Council Office, (302) 674–2331 extension 18, at least 5 days prior to the meeting date.

Dated: October 9, 2009.

Tracey L. Thompson,

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

[FR Doc. E9–24739 Filed 10–14–09; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN: 0648–XS33

Pacific Fishery Management Council; Public Meeting

AGENCY: National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Commerce.

ACTION: Notice of public meetings.

SUMMARY: The Pacific Council and its advisory entities will hold public meetings.

DATES: The Pacific Council and its advisory entities will meet October 30–November 5, 2009. The Council meeting will begin on Saturday, October 31, 2009 at 11 a.m., reconvening each day through Thursday, November 5, 2009. All meetings are open to the public, except a closed session will be held from 11 a.m. until 1 p.m. on Saturday, October 31 to address litigation and personnel matters. The Council will meet as late as necessary each day to complete its scheduled business.

ADDRESSES: The Pacific Council and advisory body meetings will be held at the Hilton Orange County/Costa Mesa, 3050 Bristol Street, Costa Mesa, CA 92626; telephone: (714) 540–7000.

Council address: Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220.

FOR FURTHER INFORMATION CONTACT: Dr. Donald O. McIsaac, Executive Director, telephone: (866) 806–7204 or (503) 820–2280; or access the Pacific Council website, *www.pcouncil.org* for the current meeting location, proposed agenda, and meeting briefing materials.

SUPPLEMENTARY INFORMATION: The following items are on the Pacific Council agenda, but not necessarily in this order:

A. Call to Order

1. Opening Remarks
2. Roll Call
3. Report of the Executive Director
4. Adopt Meeting Agenda

B. Open Comment Period

1. Comments on Non-Agenda Items

C. Pacific Halibut Management

1. 2010 Pacific Halibut Fishery Regulations

D. Ecosystem Management

1. Ecosystem Based Fishery Management Plan

E. Habitat

1. Current Habitat Issues

F. Highly Migratory Species Management

1. National Marine Fisheries Service (NMFS) Report
2. Recommendations to the Western and Central Pacific Fisheries Commission
3. Fishery Management Plan Amendment 2: Annual Catch Limits and Accountability Measures

G. Groundfish Management

1. NMFS Report
2. Stock Assessments and Rebuilding Plans for 2011–12 Groundfish Fisheries
3. Council Recommendations for Exempted Fishing Permits
4. Part 1 - Inseason Adjustments to 2009 and 2010 Groundfish Fisheries

5. Part 1 - Management Recommendations for 2011–12 Groundfish Fisheries

6. Fishery Management Plan Amendment 23 - Annual Catch Limits and Accountability Measures

7. National Catch Share Task Force Report

8. Fishery Management Plan Amendment 20 - Trawl Rationalization

9. Part 2 - Management Recommendations for 2011–12 Fisheries

10. Part 2 - Inseason Adjustments to 2009 and 2010 Groundfish Fisheries

H. Salmon Management

1. 2009 Salmon Methodology Review

I. Coastal Pelagic Species Management

1. Sardine Stock Assessment and Management Measures

2. Amendment 13: Annual Catch Limits and Accountability Measures

J. Administrative Matters

1. Fiscal Matters

2. Approval of Council Meeting Minutes

3. Membership Appointments and Council Operating Procedures

4. Future Council Meeting Agenda and Workload Planning

SCHEDULE OF ANCILLARY AND ADVISORY BODY MEETINGS

Friday, October 30, 2009	.
Scientific and Statistical Committee	8 a.m..
Habitat Committee	8:30 a.m..
Highly Migratory Species Advisory Subpanel	1 p.m..
Highly Migratory Species Management Team	1 p.m..
Pacific Council Office	1 p.m..
Saturday, October 31, 2009	.
Pacific Council Office	7 a.m..
California State Delegation	7 a.m..
Oregon State Delegation	7 a.m..
Washington State Delegation	7 a.m..
Groundfish Advisory Subpanel	8 a.m..
Groundfish Management Team	8 a.m..
Highly Migratory Species Advisory Subpanel	8 a.m..
Highly Migratory Species Management Team	8 a.m..
Scientific and Statistical Committee	8 a.m..
Habitat Committee	8:30 a.m..
Enforcement Consultants	10 a.m..
Sunday, November 1, 2009	.
Pacific Council Office	8 a.m..
California State Delegation	8 a.m..
Oregon State Delegation	8 a.m..
Washington State Delegation	8 a.m..
Highly Migratory Species Advisory Subpanel	8 a.m..
Highly Migratory Species Management Team	8 a.m..
Scientific and Statistical Committee	8 a.m..
Enforcement Consultants	9:30 a.m..
Groundfish Advisory Subpanel	9:30 a.m..
Groundfish Management Team	9:30 a.m..
Coastal Pelagic Species Advisory Subpanel and Management in Joint Session	1 p.m..
Annual Awards Banquet	6 p.m..
Monday, November 2, 2009	.
Pacific Council Office	7 a.m..
California State Delegation	7 a.m..
Oregon State Delegation	7 a.m..
Washington State Delegation	7 a.m..
Coastal Pelagic Species Advisory Subpanel	8 a.m..
Coastal Pelagic Species Management Team	8 a.m..
Enforcement Consultants	8 a.m..
Groundfish Advisory Subpanel	8 a.m..
Groundfish Management Team	8 a.m..
Tuesday, November 3, 2009	.
Pacific Council Office	7 a.m..
California State Delegation	7 a.m..
Oregon State Delegation	7 a.m..
Washington State Delegation	7 a.m..
Coastal Pelagic Species Management Team	8 a.m..
Enforcement Consultants	8 a.m..
Groundfish Advisory Subpanel	8 a.m..
Groundfish Management Team	8 a.m..
Wednesday, November 4, 2009	.
Pacific Council Office	7 a.m..
California State Delegation	7 a.m..
Oregon State Delegation	7 a.m..
Washington State Delegation	7 a.m..
Enforcement Consultants	8 a.m..
Groundfish Advisory Subpanel	8 a.m..
Groundfish Management Team	8 a.m..
Thursday, November 5, 2009	.
Pacific Council Office	7 a.m..
California State Delegation	7 a.m..

SCHEDULE OF ANCILLARY AND ADVISORY BODY MEETINGS—Continued

Oregon State Delegation	7 a.m..
Washington State Delegation	7 a.m..

Although non-emergency issues not contained in this agenda may come before the Pacific Council for discussion, those issues may not be the subject of formal Council action during this meeting. Council 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 Council's intent to take final action to address the emergency.

Special Accommodations

These meetings are 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: October 9, 2009.

Tracey L. Thompson,

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

[FR Doc. E9–24741 Filed 10–14–09; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN: 0648–XS37

New England 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 New England Fishery Management Council (Council) is scheduling a public meeting of its Scallop Committee in November, 2009 to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

DATES: This meeting will be held on Tuesday, November 3, 2009, at 9 a.m.

ADDRESSES: This meeting will be held at the Hilton Providence, 21 Atwells Avenue, Providence, RI 02903; telephone: (401) 831–3900; fax: (401) 751–0007.

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Paul J. Howard, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION: The Committee will review Scallop Framework 21 alternatives and analyses. Framework 21 is considering measures for the 2010 fishing year including compliance with the first reasonable and prudent measure required in the recent turtle biological opinion, fishery specifications for both the limited access and general category fleets, area rotation adjustments including consideration of a new scallop access area on Georges Bank, and other measures including minor adjustments to the observer set-aside program. The Council is scheduled to make final decision on this action at the November Council meeting and the Scallop Committee may identify preferred alternatives for the Council to consider. The committee may discuss other topics at their discretion.

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 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 Council's 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 Paul J. Howard, Executive Director, at (978) 465–0492, at least 5 days prior to the meeting date.

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

Dated: October 9, 2009.

Tracey L. Thompson,

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

[FR Doc. E9–24826 Filed 10–14–09; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN: 0648–XS38

Gulf of Mexico 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 Gulf of Mexico Fishery Management Council will convene a public meeting of the Outreach and Education Advisory Panel (AP).

DATES: The Outreach and Education AP meeting is scheduled to begin at 1 p.m. on Wednesday, November 4, 2009 and end by 5 p.m. on Thursday, November 5, 2009.

ADDRESSES: The meeting will be held at the Hilton, 2225 N. Lois Ave. Tampa, FL 33607.

Council address: Gulf of Mexico Fishery Management Council, 2203 N. Lois Avenue, Suite 1100, Tampa, FL 33607.

FOR FURTHER INFORMATION CONTACT: Charlene Ponce, Public Information Officer; telephone: (813) 348–1630.

SUPPLEMENTARY INFORMATION: During this Advisory Panel meeting, the Outreach and Education AP will receive updates on past recommendations. In addition, the panel will discuss strategic planning for priority recommendations, the redesign of the Council web site, educational meetings regarding potential management changes for gag grouper, and opportunities for outreach.

Although other non-emergency issues not on the agenda may come before the Outreach and Education AP for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), those issues may not be the subject of formal action during these meetings. Actions of the Outreach and Education AP will be restricted to those issues specifically identified in the agenda and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take action to address the emergency.

Copies of the agenda can be obtained by calling (813) 348–1630.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Tina O'Hern at the Council (see **ADDRESSES**) at least 5 working days prior to the meeting.

Dated: October 9, 2009.

Tracey L. Thompson,

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

[FR Doc. E9–24827 Filed 10–14–09; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XS10

Fisheries of the South Atlantic and Gulf of Mexico; South Atlantic Fishery Management Council (SAFMC); Public Meetings

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

ACTION: Notice of South Atlantic Fishery Management Council's (Council) joint Scientific and Statistical Committee and SSC Selection Committee meeting.

SUMMARY: The SAFMC will hold a joint meeting of its SSC and SSC Selection Committee to discuss SSC responsibilities and procedures under the Magnuson-Stevens Reauthorized Act. The meeting will be held in Charleston, SC. See **SUPPLEMENTARY INFORMATION**.

DATES: The meeting will be held October 29, 2009, from 9 a.m. until 4 p.m.

ADDRESSES: The meeting will be held at the Charleston Marriott, 170 Lockwood Boulevard, Charleston, SC 29403; telephone: (843) 723–3000.

FOR FURTHER INFORMATION CONTACT: Kim Iverson, Public Information Officer, 4055 Faber Place Drive, Suite 201, North Charleston, SC 29405; telephone: (843) 571–4366; e-mail: *Kim.Iverson@safmc.net*.

SUPPLEMENTARY INFORMATION: Under the Magnuson-Stevens Reauthorized Act, the SSC is the body responsible for reviewing the Council's scientific materials. The Act places additional responsibilities on the SSC which have led to increased interest in SSC meetings and deliberations. The SSC and the Selection Committee will meet jointly to develop recommendations for policies and procedures to promote the SSC fulfilling its mandates effectively and efficiently, to provide a clear policy for submission and consideration of technical information and critiques to the Council and SSC, and to ensure the Council receives the scientific advice necessary to support its management recommendations.

Although non-emergency issues not contained in this agenda may come before this group for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), those issues may not be the subject of 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 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. Requests for sign language interpretation or other auxiliary aids should be directed to the Council office (see **ADDRESSES**) at least 3 business days prior to the meeting.

Dated: October 9, 2009.

William D. Chappell,

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

[FR Doc. E9–24775 Filed 10–14–09; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN: 0648–XS32

Gulf of Mexico 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 Gulf of Mexico Fishery Management Council will convene a web based meeting of the ABC Control Rule Working Group.

DATES: The webinar meeting will convene at 10 a.m. Eastern Time on Friday, October 30, 2009 and is expected to end at 1 p.m.

ADDRESSES: The webinar will be accessible via internet. Please go to the Gulf of Mexico Fishery Management Council's website at *www.gulfcouncil.org* for instructions.

Council address: Gulf of Mexico Fishery Management Council, 2203 N. Lois Avenue, Suite 1100, Tampa, FL 33607.

FOR FURTHER INFORMATION CONTACT: Steven Atran, Population Dynamics Statistician; Gulf of Mexico Fishery Management Council; telephone: (813) 348–1630.

SUPPLEMENTARY INFORMATION: The ABC Control Rule Working Group is an ad hoc group composed of members of the Standing Scientific and Statistical Committee (SSC), Council members and Council staff that has been tasked with developing a framework, or control rule, for setting acceptable biological catch (ABC) levels for stocks and stock complexes managed by the Council. The Working Group will meet to discuss a draft of the ABC control rule being developed. The discussion will include a review of Council recommendations to the group on acceptable levels of risk and a discussion of productivity-susceptibility analyses (PSA) methods for adoption into the control rule. The Working Group will also develop an outline for a presentation of its draft control rule by an SSC representative at the National SSC Workshop in November.

Copies of the agenda and other related materials can be obtained by calling (813) 348–1630.

Although other non-emergency issues not on the agenda may come before the ABC Control Rule Working Group for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), those issues may not be the subject of formal action during this meeting. Actions of the Working Group will be restricted to those issues specifically identified in the agenda and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take action to address the emergency.

Special Accommodations

This webinar is accessible to people with disabilities. For assistance with any of our webinars contact Tina O'Hern at the Council (see **ADDRESSES**) at least 5 working days prior to the webinar.

Dated: October 9, 2009.

Tracey L. Thompson,

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

[FR Doc. E9–24740 Filed 10–14–09; 8:45 am]

BILLING CODE 3510–22–S

COMMODITY FUTURES TRADING COMMISSION

Notice; Agricultural Advisory Committee Meeting

The Commodity Futures Trading Commission's Agricultural Advisory Committee will conduct a public meeting on Thursday, October 29, 2009. The meeting will take place in the first floor hearing room of the Commission's Washington, DC headquarters, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581 from 9 a.m. to 1 p.m. At this meeting, the committee will discuss convergence issues relating to the Chicago Board of Trade's wheat contract.

The meeting is open to the public. The meeting will be Web cast on the Commission's Web site, *http://www.cftc.gov*. Members of the public also can listen to the meeting by telephone. The public access call-in numbers are (866) 811–0403 (U.S.) and (404) 537–3349 (International). When calling in, please request Conference No. 34979957. Any member of the public who wishes to file a written statement with the committee should mail a copy of the statement to the attention of: Agricultural Advisory Committee, c/o Chairman Michael V. Dunn, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581, before the meeting. Members of the public who wish to make oral statements should inform Chairman Dunn in writing at the foregoing address at least three business days before the meeting. Reasonable provision will be made, if time permits, for oral presentations of no more than five minutes each in duration.

For further information concerning this meeting, please contact Nicole McNair at (202) 418–5070.

Issued by the Commission in Washington, DC on October 8, 2009.

David A. Stawick,

Secretary of the Commission.

[FR Doc. E9–24728 Filed 10–14–09; 8:45 am]

BILLING CODE P

DEPARTMENT OF ENERGY

Advanced Scientific Computing Advisory Committee

AGENCY: Department of Energy, Office of Science.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Advanced Scientific Computing Advisory Committee (ASCAC). The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of these meetings be announced in the **Federal Register**.

DATES: Tuesday, November 3, 2009, 9 a.m. to 5 p.m.; Wednesday, November 4, 2009, 9 a.m. to 12 p.m.

ADDRESSES: Oak Ridge National Laboratory, 1 Bethel Valley Road, Oak Ridge, TN 37831.

FOR FURTHER INFORMATION CONTACT: Melea Baker, Office of Advanced Scientific Computing Research; SC–21/Germantown Building; U.S. Department of Energy; 1000 Independence Avenue, SW., Washington, DC 20585–1290; Telephone 301–903–7486 (E-mail: *Melea.Baker@science.doe.gov*).

SUPPLEMENTARY INFORMATION:

Purpose of the Meeting: The purpose of this meeting is to provide advice and guidance with respect to the advanced scientific computing research program.

Tentative Agenda: Agenda will include discussions of the following:

Tuesday, November 3, 2009: View from Washington. Office of Science Update. ASCR Update. Scaling Computational Biology. Tour of Oak Ridge National Laboratory and Leadership Computing Facility. Public Comment. Committee Dinner—Open to the Public.

Wednesday, November 4, 2009: ASCR Annual Performance Metric—Code Improvements. New Charge to ASCAC. Recovery Act Update. Public Comment.

Public Participation: The meeting is open to the public. 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, or participate in the tour or committee dinner, you should contact Melea Baker via FAX at 301–903–4846 or via e-mail (*Melea.Baker@science.doe.gov*). You must make your request for an oral statement at least 5 business days prior to the meeting. Reasonable provision will be made to include the scheduled oral statements on the agenda. The Chairperson of the Committee will conduct the meeting to facilitate the orderly conduct of business. Public comment will follow the 10-minute rule.

Minutes: The minutes of this meeting will be available for public review and copying within 30 days at the Freedom of Information Public Reading Room; 1E–190, Forrestal Building; 1000 Independence Avenue, SW.; Washington, DC 20585; between 9 a.m. and 4 p.m., Monday through Friday, except holidays.

Issued in Washington, DC on October 8, 2009.

Rachel Samuel,

Deputy Committee Management Officer.

[FR Doc. E9–24796 Filed 10–14–09; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Hydrogen and Fuel Cell Technical Advisory Committee (HTAC)

AGENCY: Department of Energy, Office of Energy Efficiency and Renewable Energy.

ACTION: Notice of open meeting.

SUMMARY: The Hydrogen and Fuel Cell Technical Advisory Committee (HTAC) was established under section 807 of the Energy Policy Act of 2005 (EPACT), Public Law No. 109–58; 119 Stat. 849. The Federal Advisory Committee Act, Public Law No. 92–463, 86 Stat. 770, requires that agencies publish notice of an advisory committee meeting in the **Federal Register**. To attend the meeting and/or to make oral statements during the public comment period, please e-mail *HTAC@nrel.gov* at least 5 business days before the meeting. Please indicate if you will be attending the meeting, whether you want to make an oral statement on November 4, 2009, and what organization you represent.

DATES: Wednesday, November 4, 2009, from 8:30 a.m.–5:30 p.m and Thursday, November 5, 2009 from 8:30 a.m.–3 p.m.

ADDRESSES: Radisson Reagan National, 2020 Jefferson Davis Highway, Arlington, VA.

FOR FURTHER INFORMATION CONTACT: *HTAC@nrel.gov.*

SUPPLEMENTARY INFORMATION:

Purpose of the Meeting: To provide advice, information, and recommendations to the Secretary on the program authorized by title VIII of EPACT.

Tentative Agenda (Subject to change; updates will be posted on *http://hydrogen.energy.gov* and copies of the final agenda will available the date of the meeting).

The following items will be covered on the agenda:

- DOE Program Update
- U.S. and Global Update on Hydrogen Fuel Cell Vehicle Industry
- International Status of Fuel Cells and Hydrogen Technologies
- Role of Fuel Cells in Smart Gris Programs
- Update on Battery Technology for Vehicles
- 2009 HTAC Report Development
- Open Discussion

Public Participation: In keeping with procedures, members of the public are welcome to observe the business of the meeting of HTAC and to make oral statements during the specified period for public comment. The public comment period will take place between 8:30 a.m. and 9:30 a.m. on November 4, 2009. To attend the meeting and/or to make oral statements regarding any of the items on the agenda, e-mail *HTAC@nrel.gov* at least 5 business days before the meeting. Please indicate if you will be attending the meeting, whether you want to make an oral statement, and what organization you represent. Members of the public will be heard in the order in which they sign up for the public comment period. Oral comments should be limited to two minutes in length. Reasonable provision will be made to include the scheduled oral statements on the agenda. The chair of the committee will make every effort to hear the views of all interested parties and to facilitate the orderly conduct of business. If you would like to file a written statement with the committee, you may do so either by submitting a hard copy at the meeting or by submitting an electronic copy to *HTAC@nrel.gov.*

Minutes: The minutes of the meeting will be available for public review at *http://hydrogen.energy.gov.*

Issued at Washington, DC on October 8, 2009.

Rachel Samuel,

Deputy Committee Management Officer.

[FR Doc. E9–24776 Filed 10–14–09; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Energy Information Administration

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Energy Information Administration (EIA), Department of Energy (DOE).

ACTION: Agency information collection activities: Proposed collection; Comment request.

SUMMARY: The EIA is soliciting comments on the proposed revisions and three-year extension to the Forms:

EIA–411, ''Coordinated Bulk Power Supply Program Report,''

EIA–826, ''Monthly Electric Sales and Revenue with State Distributions Report,''

EIA–860, ''Annual Electric Generator Report,''

EIA–860M, ''Monthly Update to the Annual Electric Generator Report,''

EIA–861, ''Annual Electric Power Industry Report,'' and

EIA–923, ''Power Plant Operations Report.''

DATES: Comments must be filed by December 14, 2009. If you anticipate difficulty in submitting comments within that period, contact the person listed below as soon as possible.

ADDRESSES: Send comments to Ms. Elizabeth Panarelli. To ensure receipt of the comments by the due date, submission by FAX (202–287–1938) or an e-mail to Ms. Panarelli at *electricity2011@eia.doe.gov* is recommended. The mailing address is Energy Information Administration, Electric Power Division, EI–53, Forrestal Building, U.S. Department of Energy, Washington, DC 20585. Alternatively, Ms. Panarelli may be contacted by telephone at 202–586–2234.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of any forms and instructions should be directed to Ms. Elizabeth Panarelli at the address listed above. To review the proposed forms and instructions, please visit: *http://www.eia.doe.gov/cneaf/electricity/page/fednotice/elect_2011.html.*

SUPPLEMENTARY INFORMATION:

I. Background
II. Current Actions
III. Request for Comments

I. Background

The Federal Energy Administration Act of 1974, specifically 15 U.S.C. 790a, and the DOE Organization Act, specifically 42 U.S.C. 7135, require the EIA to carry out a centralized, comprehensive, and unified energy information program. This program collects, evaluates, assembles, analyzes, and disseminates information on energy resource reserves, production, demand, technology, and related economic and statistical information. This information is used to assess the adequacy of energy resources to meet near and longer term domestic demands.

The EIA, as part of its effort to comply with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*), provides the general public and other Federal agencies with opportunities to comment on collections of energy information conducted by or in conjunction with the EIA. Also, the EIA will later seek approval for this collection by the Office of Management and Budget (OMB) under Section 3507(a) of the Paperwork Reduction Act of 1995.

The EIA collects information about the electric power industry for use by government and private sector analysts. The survey information is disseminated in a variety of electronic products and files. For details on the EIA electric power information program, please visit the electricity page of the EIA Internet site at *http://www.eia.doe.gov/fuelelectric.html.*

The EIA has completed an extensive review and update of the electric power survey collection instruments. The result of the update reflects input from the electric power industry, other industry users of the data, government agencies, consumer groups, and private sector analysts. The form changes are explained below.

Please refer to the proposed forms and instructions for more information about the purpose, who must report, when to report, where to submit, the elements to be reported, detailed instructions, provisions for confidentiality, and uses (including possible non-statistical uses) of the information. For instructions on obtaining materials, see the **FOR FURTHER INFORMATION CONTACT** section.

II. Current Actions

Specifically, the EIA is soliciting comments on the following revisions to and extension of existing forms, including:

Form EIA–411, ''Coordinated Bulk Power Supply Program Report''

Change form name to ''Coordinated Bulk Power Supply & Demand Program Report;'' return to collecting projected reliability data on a 10-year basis as opposed to 5 years; change ''Council'' to ''Regional Entity;'' and add submission of Sub-regional level breakout of data.

Adopt the current NERC 2009 Schedule 3 for summer and winter aggregated demand and supply information. Changes are as follows: Demand category additions include ''Demand Response,'' ''Critical Peak-Pricing with Control,'' and ''Load as a Capacity Resource;'' supply category additions include ''Existing-Certain,'' ''Existing-Other,'' ''Existing-Inoperable,'' ''Future-Planned,'' ''Future-Other,'' and ''Conceptual'' categories; break out

capacity categories of Wind, Solar, Hydro, and Biomass to cover both expected on-peak and derated values; and expand coverage of types of reserve margin calculations. Delete Schedule 4—Regional Imports and Export detail. (Transaction summaries are added to Schedule 3). For Schedule 5, permit the submission of Computer-Aided Design and/or Computer-Aided Design and Drafting (CAD/CADD) file types. Schedule 6 changes include: Part A will now collect the following Existing Transmission Circuit Miles values: AC (kV)—115, 138, 161, 230, 345, 500, 765; DC (kV) 100–299, 300, 400, 450, 500; Part B will now collect Projected Transmission Additions starting at 100kV and information on the reasons why Projected Transmission Additions are being added; and change reporting of selected transmission outage data to a mandatory basis on Schedule 7.

Form EIA–826, ''Monthly Electric Sales and Revenue With State Distributions Report''

Schedule 2 Part B. Sales to Ultimate Customers—Energy-Only Service: Collect the names of the companies that deliver electricity on behalf of power marketers and retail service providers. Schedule 3 Part A. Green Pricing: Collect, by State and sector, the number of green pricing customers, green pricing sales and revenue as well as green pricing sales and revenue from Renewable Energy Certificates (REC).

Schedule 3 Part B. Net Metering: Collect, by State and sector, the number of net metering customers, net metering capacity and technology type, as well as energy displaced by net metered generating facilities. Schedule 3 Part C. Advanced Metering: Collect, by State and sector, the number of Advanced Meter Reading (AMR) and Advanced Metering Infrastructure (AMI) meters installed, as well as the energy served through AMI meters.

Form EIA–860, ''Annual Electric Generator Report''

Change the collection of planning horizon from 5 years to 10 years. Schedule 3 Generator Information: Make revisions (prime movers and energy sources) to distinguish the reporting of energy storage technologies; make revisions (prime movers and energy sources) to distinguish the reporting of hydrokinetic technologies and related information; add geothermal to the technologies for which tested heat rate data are required; add the data element, ''Annual Average Operating Efficiency,'' for solar photovoltaic, wind, and hydroelectric generators to the data collection; and replace the questions on reactive power output (MVAR) with new questions related to reactive power output. Schedule 6 Part F. Cooling System Information: Add new codes to capture additional cooling system types, source of cooling water and type of cooling water; add a question to collect the percentage of cooling load served by dry cooling components (for hybrid cooling systems); and expand the survey frame for cooling system data collection to include all thermoelectric plants greater than or equal to 100 MW in size.

Form EIA–860M, ''Monthly Update to the Annual Electric Generator Report''

Schedule 2 (Updates To Proposed New Generators) and Schedule 3 (Updates To Proposed Changes To Existing Generators): Make revisions (prime movers and energy sources) to distinguish the reporting of energy storage technologies; and make revisions (prime movers and energy sources) to distinguish the reporting of hydrokinetic technologies and related information.

Form EIA–861, ''Annual Electric Power Industry Report''

Schedule 2 Part C. Green Pricing: Add, by State and sector, the green pricing sales and revenue from Renewable Energy Certificates (REC). Schedule 2 Part D. Net Metering: By State and sector, add the capacity and technology type for net metering generating facilities. Schedule 6 Demand-Side Management Information: Collect Demand-Side Management (DSM) information from all respondents, regardless of size; and expand collection of DSM data to include State- and sector-level breakdown of costs, energy efficiency, and load management effects. Schedule 7 Distributed and Dispersed Generation: Collect the capacity for distributed and dispersed generating technologies by State (replaces the percentage for each technology); and add ''Photovoltaic (PV)'' and ''Storage'' as choices for reporting distributed and dispersed generation types.

Form EIA–923, ''Power Plant Operations Report''

Schedule 2. Cost and Quality of Fuel Receipts, Plant-Level: Collect receipts of uranium ownership transfers and enrichment services. Schedule 7. Total Plant Efficiency for Combined Heat and Power Plants (CHP): Add the annual average total CHP efficiency (*i.e.,* the energy output's percentage of the energy input) from CHP plants only. Schedule 8D. Cooling System Information, Annual Operations: Add a column to collect amount of water diverted; and expand directions to include definitions of diversion, withdrawal, consumption, and discharge. Expand respondent pool to include any thermoelectric power plant greater than or equal to 100 MW.

III. Request for Comments

Prospective respondents and other interested parties should comment on the actions discussed in Item II. The following guidelines are provided to assist in the preparation of comments. Please indicate to which form(s) your comments apply.

As a Potential Respondent to the Request for Information

A. Is the proposed collection of information necessary for the proper performance of the functions of the agency and does the information have practical utility?

B. What actions could be taken to help ensure and maximize the quality, objectivity, utility, and integrity of the information collected?

C. Are the instructions and definitions clear and sufficient? If not, which instructions need clarification?

D. Can the information be submitted by the due dates?

E. *Public reporting burden for this collection is estimated to average:* Form EIA–411, ''Bulk Power Supply Program Report,'' 15.9 hours per response (Annual); Form EIA–826, ''Monthly Electric Sales and Revenue with State Distributions Report,'' 1.6 hours per response; Form EIA–860, ''Annual Electric Generator Report,'' 6.75 hours per response for respondents without environmental information and 12.5 hours per response for respondents with environmental information; Form EIA–860M, ''Monthly Update to the Annual Electric Generator Report,'' 0.3 hours per response; Form EIA–861, ''Annual Electric Power Industry Report,'' 9.0 hours per response; Form EIA–923, ''Power Plant Operations Report,'' 3.2 hours per response (Monthly for a sample, Annually for plants not in the sample). The estimated burden includes the total time necessary to provide the requested information. In your opinion, how accurate are these estimates?

F. The agency estimates that the only cost to a respondent is for the time it will take to complete the collection. Will a respondent incur any start-up costs for reporting, or any recurring annual costs for operation, maintenance, and purchase of services associated with the information collection?

G. What additional actions could be taken to minimize the burden of this collection of information? Such actions may involve the use of automated, electronic, mechanical, or other

technological collection techniques or other forms of information technology.

H. Does any other Federal, State, or local agency collect similar information? If so, specify the agency, the data element(s), and the methods of collection.

As a Potential User of the Information To Be Collected

A. Is the proposed collection of information necessary for the proper performance of the functions of the Agency and does the information have practical utility?

B. What actions could be taken to help ensure and maximize the quality, objectivity, utility, and integrity of the information disseminated?

C. Is the information useful at the levels of detail to be collected?

D. For what purpose(s) would the information be used? Be specific.

E. Are there alternate sources for the information and are they useful? If so, what are their weaknesses and/or strengths?

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of the form. They also will become a matter of public record.

Statutory Authority: Section 13(b) of the Federal Energy Administration Act of 1974, P.L. 93–275, codified at 15 U.S.C. 772(b).

Issued in Washington, DC on October 8, 2009.

Renee Miller,

Director, Forms Clearance and Information, Quality Division, Statistics and Methods Group, Energy Information Administration.

[FR Doc. E9–24777 Filed 10–14–09; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13470–000]

Swalley Irrigation District; Notice of Application Accepted for Filing and Soliciting Comments, Motions To Intervene, Protests, Recommendations, and Terms and Conditions

October 7, 2009.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Conduit Exemption.

b. *Project No.:* 13470–000.

c. *Date filed:* May 21, 2009.

d. *Applicant:* Swalley Irrigation District.

e. *Name of Project:* Swalley Irrigation District Project.

f. *Location:* The proposed Swalley Irrigation District Project would be located on the Swalley Main Canal in Deschutes County, Oregon. The land in which all the project structures are located is owned by the applicant.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791a–825r.

h. *Applicant Contact:* Mr. Gary Blake, Chairmen, Swalley Irrigation District, 64672 Cook Avenue, Suite 1, Bend, OR 97701, phone (541) 388–0658.

i. *FERC Contact:* Robert Bell, (202) 502–6062, *Robert.bell@ferc.gov.*

j. *Status of Environmental Analysis:* This application is ready for environmental analysis at this time, and the Commission is requesting comments, reply comments, recommendations, terms and conditions, and prescriptions.

k. *Deadline for filing responsive documents:* The Commission directs, pursuant to section 4.34(b) of the Regulations (see Order No. 533, issued May 8, 1991, 56 FR 23,108 (May 20, 1991)) that all comments, motions to intervene, protests, recommendations, terms and conditions, and prescriptions concerning the application be filed with the Commission: 60 days from the issuance of this notice. All reply comments must be filed with the Commission: 105 days from the issuance of this notice.

Comments, protests, and interventions may be filed electronically via the Internet in lieu of paper; see 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages electronic filings.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person in the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

l. *Description of Project:* The proposed Swalley Irrigation District Project consists of: (1) A proposed powerhouse containing one generating unit having an installed capacity of 750 kilowatts, and (2) appurtenant facilities. The Swalley Irrigation District, estimates the project would have an average annual generation of 2.7 gigawatt-hours that would be sold to a local utility.

m. This filing is available for review and reproduction at the Commission in the Public Reference Room, Room 2A, 888 First Street, NE., Washington, DC 20426. The filing may also be viewed on the Web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number, P–13470, in the docket number field to access the document. For assistance, call toll-free 1–866–208–3676 or e-mail *FERCOnlineSupport@ferc.gov.* For TTY, call (202) 502–8659. A copy is also available for review and reproduction at the address in item h above.

n. Development Application—Any qualified applicant desiring to file a competing application must submit to the Commission, on or before the specified deadline date for the particular application, a competing development application, or a notice of intent to file such an application. Submission of a timely notice of intent allows an interested person to file the competing development application no later than 120 days after the specified deadline date for the particular application. Applications for preliminary permits will not be accepted in response to this notice.

o. Notice of Intent—A notice of intent must specify the exact name, business address, and telephone number of the prospective applicant, and must include an unequivocal statement of intent to submit a competing development application. A notice of intent must be served on the applicant(s) named in this public notice.

p. Protests or Motions to Intervene—Anyone may submit a protest or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, 385.211, and 385.214. In determining the appropriate action to take, the Commission will consider all protests filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any protests or motions to intervene must be received on or before the specified deadline date for the particular application.

q. All filings must (1) Bear in all capital letters the title ''PROTEST'', ''MOTION TO INTERVENE'', ''NOTICE OF INTENT TO FILE COMPETING APPLICATION'', ''COMPETING APPLICATION'', ''COMMENTS'', ''REPLY COMMENTS,'' ''RECOMMENDATIONS,'' ''TERMS AND CONDITIONS,'' or ''PRESCRIPTIONS;'' (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply

with the requirements of 18 CFR 385.2001 through 385.2005. All comments, recommendations, terms and conditions or prescriptions must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). Agencies may obtain copies of the application directly from the applicant. Any of these documents must be filed by providing the original and eight copies to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. An additional copy must be sent to Director, Division of Hydropower Administration and Compliance, Office of Energy Projects, Federal Energy Regulatory Commission, at the above address. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–24800 Filed 10–14–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP09–469–000]

Atmos Pipeline and Storage, LLC and Fort Necessity Gas Storage, LLC; Notice of Application

October 7, 2009.

Take notice that on September 28, 2009, Atmos Pipeline and Storage, LLC (Atmos) and Fort Necessity Gas Storage, LLC (Fort Necessity), Three Lincoln Centre, Suite 1800, 5430 LBJ Freeway, Dallas, Texas 75240, filed a joint application in Docket No. CP09–469–000 pursuant to sections 7(b) and 7(c) of the Natural Gas Act (NGA) and Part 157 of the Commission's regulations for permission and approval to abandon by transfer to Fort Necessity: (1) The section 7(c) certificate authorization granted to Atmos in Docket No. CP09–22–000 [1] to construct and operate the Fort Necessity Storage Project facilities in Franklin Parish, Louisiana; (2) the Part 157, Subpart F, and Part 284, Subpart G, blanket certificates also granted to Atmos in Docket No. CP09–22–000; (3) the exemption orders authorizing Atmos to conduct temporary acts and operations issued in Docket Nos. CP09–34–000,[2] CP09–34–001,[3] and the extension of time granted in Docket No. CP09–34–001 on September 9, 2009; and (4) Fort Necessity seeks section 7(c) authorization to assume full ownership and operational control of the Fort Necessity Storage Project, all as more fully set forth in the application which is on file with the Commission and open to public inspection. The filing may also be viewed on the Web 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 at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TTY, (202) 502–8659.

Atmos states that the purpose of the authorization requested herein is to facilitate the transfer of the facilities, certificate authorizations, and exemption authority from Atmos to Fort Necessity, a new wholly owned subsidiary formed for the purpose of owning and operating the Fort Necessity Storage Project.

Any questions regarding this application should be directed to James H. Jeffries, IV, Moore & Van Allen PLLC, Bank of America Corporate Center, 100 North Tryon Street, Suite 4700, Charlotte, North Carolina 28202–4003, telephone (704) 331–1000, or via e-mail: *jimjeffries@mvalaw.com*.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below, file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 14 copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenters will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commenters will not be required to serve copies of filed documents on all other parties. However, the non-party commenters will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link.

Comment Date: October 28, 2009.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–24802 Filed 10–14–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

October 7, 2009.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER09–1049–002.

Applicants: Midwest Independent Transmission System Operator, Inc.

[1] 127 FERC ¶ 61,260 (2009).

[2] 122 FERC ¶ 61,100 (2008).

[3] 125 FERC ¶ 61,148 (2008).

Description: Midwest Independent Transmission System Operator, Inc submits revisions to the Open Access Transmission, Energy and Operating Reserve Markets Tariff.

Filed Date: 10/02/2009.

Accession Number: 20091005–0084.

Comment Date: 5 p.m. Eastern Time on Friday, October 23, 2009.

Docket Numbers: ER09–1462–000.

Applicants: Lake Benton Power Partners II, LLC.

Description: NextEra Energy Resources, LLC Submits Lake Benton Power Partners II, LLC Amendment to Request for Authorization to Sell Energy and Capacity at Market-based Rates and Waiver of the 60-day Requirement.

Filed Date: 10/07/2009.

Accession Number: 20091007–5036.

Comment Date: 5 p.m. Eastern Time on Wednesday, October 28, 2009.

Docket Numbers: ER09–1473–002.

Applicants: NorthWestern Corporation.

Description: Northwestern Corporation submits replacement page to the Large Generator Interconnection Agreement showing the amended Section 30.4 in the context of the unchanged Section 30.2 etc.

Filed Date: 10/06/2009.

Accession Number: 20091007–0084.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 27, 2009.

Docket Numbers: ER10–1–000.

Applicants: High Majestic Wind Energy Center, LLC.

Description: High Majestic Wind Energy Center, LLC submits request for authorization to sell energy and capacity at market based rates.

Filed Date: 10/06/2009.

Accession Number: 20091007–0153.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 27, 2009.

Docket Numbers: ER10–2–000.

Applicants: Butler Ridge Wind Energy Center, LLC.

Description: Butler Ridge Wind Energy Center, LLC submits application for authorization to make market-based sales of energy, capacity and certain ancillary services under a market-based rate tariff.

Filed Date: 10/06/2009.

Accession Number: 20091007–0152.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 27, 2009.

Docket Numbers: ER10–3–000.

Applicants: Wessington Wind Energy Center, LLC.

Description: Wessington Wind Energy Center, LLC submits application for authorization to make market-based sales of energy, capacity and certain ancillary services under a market-based rate tariff.

Filed Date: 10/06/2009.

Accession Number: 20091007–0151.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 27, 2009.

Docket Numbers: ER10–35–000.

Applicants: Xcel Energy Services Inc.

Description: Public Service Company of Colorado et al submits the PSC0 Electric Coordination Service Tariff FERC Electric, Original Volume 2 etc.

Filed Date: 10/06/2009.

Accession Number: 20091007–0083.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 27, 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. E9–24795 Filed 10–14–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL10–1–000]

Notice of Filing; Southern California Edison Company

October 7, 2009.

Take notice that on October 1, 2009, Southern California Edison Company, pursuant to Rule 207 of the Commission's Rules of Practice and Procedure 18 CFR 385.207, filed a Petition for Declaratory Order for Incentive Rate Treatment, requesting the Commission to issue a declaratory order approving specific incentive rate treatments for the proposed Eldorado-Ivanpah Transmission Project (EITP) they are proposing to construct that will facilitate the development of roughly 1,400 MW of solar generation. SCE also request the Commission to declare that the facilities will be network facilities eligible for rolled-in rate treatment.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public

Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on November 2, 2009.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E9–24797 Filed 10–14–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP09–1–001]

Collbran Valley Gas Gathering, LLC; Notice of Filing

October 7, 2009.

Take notice that on September 24, 2009, Collbran Valley Gas Gathering, LLC (Collbran), 370 17th Street, Suite 2775, Denver, Colorado 80202, filed in Docket No. CP09–1–001, a request, pursuant to section 7(b) of the Natural Gas Act (NGA) and Part 157 of the Commission's regulations, for authorization to abandon its 9.2-mile long, 16-inch diameter Anderson Gulch Residue Line located in Mesa County, Colorado and to vacate the order issued on August 25, 2009 in Docket No. CP09–1–000 which granted Colbran a certificate to transport gas through the line, all as more fully set forth in the application which is on file with the Commission and open to public inspection. This filing may also 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, call (866) 208–3676 or TTY, (202) 502–8659.

Any questions regarding this application should be directed to Katie Rice, Director, Regulatory Affairs, Collbran Valley Gas Gathering, LLC, 370 17th Street, Suite 2500, Denver, Colorado, or by calling (303) 605–2166 (telephone) or (303) 605–2226 (fax), *kerice@dcpmidstream.com*.

Pursuant to section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice the Commission staff will either: Complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding, or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below, file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 14 copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenters will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commenters will not be required to serve copies of filed documents on all other parties. However, the non-party commenters will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

Motions to intervene, protests and comments may be filed electronically via the internet in lieu of paper; *see*, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages electronic filings.

Comment Date: October 22, 2009.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–24804 Filed 10–14–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Florida Gas Transmission Company, LLC, et al.; Notice of Onsite Environmental Review

October 7, 2009.

Florida Gas Transmission Company, LLC	Docket No. CP09–455–000.
Florida Gas Transmission Company, LLC and Transcontinental Gas Pipe Line Company, LLC	Docket No. CP09–456–000.

On October 21, 2009, the Office of Energy Projects staff will be in Jackson County, Mississippi and Mobile County, Alabama to gather data related to the environmental analysis of the proposed Mobile Bay Lateral Extension Project and the Pascagoula Expansion Project. Staff will examine locations along the proposed pipeline routes filed by

Florida Gas Transmission Company, LLC and Transcontinental Gas Pipe Line Company, LLC focusing on where the pipelines would cross residential areas in Jackson County, Mississippi; Mobile County, Alabama; and a residence on Rainbow Lake Road, Grand Bay, Alabama. This will assist staff in completing its evaluation of environmental impacts of the two projects.

All interested parties planning to attend must provide their own transportation. Those attending should meet at the following location:

Wednesday October 21, 2009 at 1 p.m. (CST):

Holiday Inn Express Moss Point parking lot, 4800 Amoco Drive, Moss Point, MS 39563.

Please use the FERC's free eSubscription service to keep track of all formal issuances and submittals in these dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. To register for this service, go to *http://www.ferc.gov/esubscribenow.htm*.

Information about specific onsite environmental reviews is posted on the Commission's calendar at *http://www.ferc.gov/EventCalendar/EventsList.aspx*. For additional information contact Office of External Affairs at 1–866–208–FERC (3372).

Kimberly D. Bose,

Secretary.

[FR Doc. E9–24803 Filed 10–14–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PR09–33–000]

Kinder Morgan Border Pipeline LLC; Notice of Petition for Rate Approval

October 7, 2009.

Take notice that on September 29, 2009, Kinder Morgan Border Pipeline LLC (KM Border) filed a petition for rate approval pursuant to section 284.123(b)(2) of the Commission's regulation. KM Border requests the Commission to approve the continuation of its existing rates, which are: (1) A two part maximum firm transportation rate for service on its Import/Export Facility consisting of a demand charge of $2.2381 per MMBtu of reserved Maximum Daily Transportation Quantity, and a commodity charge of $0.00 per MMBtu of gas transported; (2) a maximum interruptible rate of $0.0736 per MMBtu of gas transported on its Import/Export Facility; (3) a two-part maximum firm transportation rate for service on capacity leased from other intrastate pipelines consisting of a demand a charge $1.5208 per MMBtu of reserved Maximum Daily Transportation Quantity and a commodity charge of $0.00 per MMBtu of gas transported; and (4) a maximum interruptible rate of $0.05 per MMBtu of gas transported on such leased capacity.

KM Border further proposes to continue to retain as reimbursement for compressor fuel varying amounts ranging from 0.57 percent to 1.55 percent, depending on the Points of Redelivery used. KM Border states that the foregoing existing zone rates will, if approved by the Commission, be applicable to firm and interruptible transportation services provided by KM Border pursuant to section 311(a)(2) of the Natural Gas Policy Act through the pipeline owned and operated by KM Border (The Import/Export Facility), and through pipeline capacity leased by KM Border (The Leased Capacity).

The Import/Export Facility consist of approximately 97 mile of 24-inch pipeline that extends from a point of interconnection in Hidalgo County, Texas, with the pipeline facilities of PEMEX Gas and Petroquimica Basica at the International Border between the United States and Mexico to a point of interconnection with the intrastate pipeline facilities of Kinder Morgan Tejas Pipeline LLC (KM Tejas) located on the King Ranch, Kleberg County, Texas. The Leased Capacity is capacity leased on the intrastate pipeline facilities of KM Tejas.

Any person desiring to participate in this rate proceeding must file a motion 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 and 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 date as indicated below. Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on Friday, October 16, 2009.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–24798 Filed 10–14–09; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–RCRA–2008–0912, FRL–8969–3]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; Notification of Regulated Waste Activity and 2009 Hazardous Waste Report (Renewal); EPA ICR Number 0976.14; OMB Control Number 2050–0024

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. The ICR, which is abstracted below, describes the nature of the information collection and its estimated burden and cost.

DATES: Additional comments may be submitted on or before November 16, 2009.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA–HQ–

RCRA–2008–0912, to (1) EPA, either online using *http://www.regulations.gov* (our preferred method), or by e-mail to *rcra-docket@epa.gov,* or by mail to: RCRA Docket (28221T), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; and (2) OMB, by mail to: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Peggy Vyas, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: 703–308–5477; fax number: 703–308–8433; e-mail address: *vyas.peggy@epa.gov.*

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On May 15, 2009 (74 FR 22922), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments. Any additional comments on this ICR should be submitted to EPA and OMB within 30 days of this notice.

EPA has established a public docket for this ICR under Docket ID No. EPA–HQ–RCRA–2008–0912, which is available for online viewing at *http://www.regulations.gov,* or in person viewing at the Resource Conservation and Recovery Act (RCRA) Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for the RCRA Docket is (202) 566–0270.

Use EPA's electronic docket and comment system at *http://www.regulations.gov,* to submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the docket that are available electronically. Once in the system, select ''docket search,'' then key in the docket ID number identified above. Please note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing at *http://www.regulations.gov* as EPA receives them and without change, unless the comment contains copyrighted material, confidential business information (CBI), or other information whose public disclosure is restricted by statute. For further information about the electronic docket, go to *http://www.regulations.gov.*

Title: Notification of Regulated Waste Activity and 2009 Hazardous Waste Report.

ICR Numbers: EPA ICR No. 0976.14, OMB Control No. 2050–0024.

ICR Status: This ICR is scheduled to expire on November 30, 2009. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, 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: This ICR combines two separate ICRs into one: The biennial ''Hazardous Waste Report'' ICR and the ''Notification of Regulated Waste Activities'' ICR.

Both sections 3002 and 3004 of RCRA require EPA to establish standards for recordkeeping and reporting of hazardous waste generation and management. Section 3002 applies to hazardous waste generators, and section 3004 applies to hazardous waste treatment, storage, and disposal facilities. The implementing regulations are found at 40 CFR 262.40(b) and (d); 262.41(a)(1)–(5), (a)(8), and (b); 264.75(a)–(e) and (j); 265.75(a)–(e) and (j); and 270.30(l)(9). This is mandatory reporting by the respondents. This collection is done on a two-year cycle as required by Sections 3002 and 3004 of RCRA. The information is collected via a mechanism known as the Hazardous Waste Report for the required reporting year (EPA Form 8700–13 A/B). This form is also known as the Biennial Report form.

The beginning part of the Hazardous Waste Report form is the RCRA subtitle C Site Identification Form (EPA Form 8700–12). This form is also a stand alone form which is used to comply with section 3010 of RCRA, which requires any person who generates or transports regulated waste or who owns or operates a facility for the treatment, storage, or disposal of regulated waste to notify EPA of their activities, including the location and general description of activities and the regulated wastes handled. This form is also known as the Notification form.

EPA has revised the Hazardous Waste Report form this cycle, particularly the RCRA subtitle C Site Identification portion, because of recent promulgated rules affecting the RCRA universe, as well as ongoing efforts by the Agency and States to improve the forms and their instructions.

Burden Statement: The reporting burden for the 2009 Hazardous Waste Report is estimated to average 16.63 hours per respondent, and includes time for reviewing instructions, gathering data, completing and reviewing the forms, and submitting the report. The recordkeeping requirement is estimated to average 3.97 hours per response and includes the time for filing and storing the 2009 Hazardous Waste Report submission for three years.

The annual public reporting and recordkeeping burden for the Notification of Regulated Waste Activity is estimated to average 2 hours per response for the initial notification, and 1 hour per response for any subsequent notifications.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Respondents/Affected Entities: Entities potentially affected by this action are businesses or other for-profits as well as State, Local, or Tribal governments.

Estimated Number of Respondents: 56,763.

Frequency of Response: Biennially.

Estimated Total Annual Hour Burden: 422,133 hours.

Estimated Total Annual Cost: $16,510,025, includes $16,309,358 annualized labor costs and $200,667 annualized capital or O&M costs.

Changes in the Estimates: There is a decrease of 263,063 hours in the total estimated burden currently identified in the OMB Inventory of Approved ICR Burdens.

The decrease in respondent burden for Notification of Regulated Waste Activity has occurred for two primary reasons. First, there was a decrease in the estimated total number of notifications under RCRA section 3010; 40 CFR part 273, subpart C; and 40 CFR part 279. Second, the burden associated with the notification activities decreased because of adjustments made to the hourly burden estimates for the Site ID Form. In addition, adjustments were made to the hourly burden estimates for the Site ID Form to take into account the option given to respondents in the Site ID Form's instructions to use their most recently submitted form in making a subsequent notification. These optional procedures relieve them of the need to complete the form in its entirety. These adjustments do not reflect any change in requirements; they represent instead a more accurate representation of the burden that respondents will incur as a result of this information collection.

The decrease in respondent burden and State agency burden estimates for the Hazardous Waste Report occurred because there was a decrease in the projected number of respondents and Hazardous Waste Report forms.

Dated: October 8, 2009.

John Moses,

Director, Collection Strategies Division.

[FR Doc. E9–24814 Filed 10–14–09; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL ACCOUNTING STANDARDS ADVISORY BOARD

Renewal of FASAB Charter

AGENCY: Federal Accounting Standards Advisory Board.

ACTION: Notice.

Board Action: Pursuant to 31 U.S.C. 3511(d), the Federal Advisory Committee Act (Pub. L. 92–463), as amended, and the FASAB Rules of Procedure, as amended in April, 2004, notice is hereby given that under the authority and in furtherance of the objectives of 31 U.S.C. 3511(d), the Secretary of the Treasury, the Director of OMB, and the Comptroller General (the Sponsors) have established and agreed to continue an advisory committee to consider and recommend accounting standards and principles for the Federal government.

For Further Information, or to Obtain a Copy of the Charter, Contact: Wendy Payne, Executive Director, 441 G St., NW., Mail Stop 6K17V, Washington, DC 20548, or call (202) 512–7350.

Authority: Federal Advisory Committee Act, Public Law 92–463.

Dated: October 9, 2009.

Charles Jackson,

Federal Register Liaison Officer.

[FR Doc. E9–24794 Filed 10–14–09; 8:45 am]

BILLING CODE 1610–02–P

DEPARTMENT OF ENERGY

Hydrogen and Fuel Cell Technical Advisory Committee (HTAC)

AGENCY: Department of Energy, Office of Energy Efficiency and Renewable Energy.

ACTION: Notice of Open Meeting.

SUMMARY: The Hydrogen and Fuel Cell Technical Advisory Committee (HTAC) was established under section 807 of the Energy Policy Act of 2005 (EPACT), Public Law No. 109–58; 119 Stat. 849. The Federal Advisory Committee Act, Public Law No. 92–463, 86 Stat. 770, requires that agencies publish notice of an advisory committee meeting in the **Federal Register**. To attend the meeting and/or to make oral statements during the public comment period, please e-mail *HTAC@nrel.gov* at least 5 business days before the meeting. Please indicate if you will be attending the meeting, whether you want to make an oral statement on November 4, 2009, and what organization you represent.

DATES: Wednesday, November 4, 2009, from 8:30 a.m.–5:30 p.m and Thursday, November 5, 2009 from 8:30 a.m.–3 p.m.

ADDRESSES: Radisson Reagan National, 2020 Jefferson Davis Highway, Arlington, VA.

FOR FURTHER INFORMATION CONTACT: *HTAC@nrel.gov.*

SUPPLEMENTARY INFORMATION:

Purpose of the Meeting: To provide advice, information, and recommendations to the Secretary on the program authorized by title VIII of EPACT.

Tentative Agenda (Subject to change; updates will be posted on *http://hydrogen.energy.gov* and copies of the final agenda will available the date of the meeting). *The following items will be covered on the agenda:*

- DOE Program Update
- U.S. and Global Update on Hydrogen Fuel Cell Vehicle Industry
- International Status of Fuel Cells and Hydrogen Technologies
- Role of Fuel Cells in Smart Gris Programs
- Update on Battery Technology for Vehicles
- 2009 HTAC Report Development
- Open Discussion

Public Participation: In keeping with procedures, members of the public are welcome to observe the business of the meeting of HTAC and to make oral statements during the specified period for public comment. The public comment period will take place between 8:30 a.m. and 9:30 a.m. on November 4, 2009. To attend the meeting and/or to make oral statements regarding any of the items on the agenda, e-mail *HTAC@nrel.gov* at least 5 business days before the meeting. Please indicate if you will be attending the meeting, whether you want to make an oral statement, and what organization you represent. Members of the public will be heard in the order in which they sign up for the public comment period. Oral comments should be limited to two minutes in length. Reasonable provision will be made to include the scheduled oral statements on the agenda. The chair of the committee will make every effort to hear the views of all interested parties and to facilitate the orderly conduct of business. If you would like to file a written statement with the committee, you may do so either by submitting a hard copy at the meeting or by submitting an electronic copy to *HTAC@nrel.gov.*

Minutes: The minutes of the meeting will be available for public review at *http://hydrogen.energy.gov.*

Issued at Washington, DC, on October 8, 2009.

Rachel Samuel,

Deputy Committee Management Officer.

[FR Doc. E9–24776 Filed 10–14–09; 8:45 am]

BILLING CODE 6450–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Applicants

Notice is hereby given that the following applicants have filed with the Federal Maritime Commission an application for license as a Non-Vessel-Operating Common Carrier and Ocean Freight Forwarder—Ocean Transportation Intermediary pursuant to section 19 of the Shipping Act of 1984 as amended (46 U.S.C. Chapter 409 and 46 CFR 515).

Persons knowing of any reason why the following applicants should not receive a license are requested to contact the Office of Transportation Intermediaries, Federal Maritime Commission, Washington, DC 20573.

Non-Vessel-Operating Common Carrier and Ocean Freight Forwarder

Transportation Intermediary Applicants:

Interport Company, Inc. dba Interport Lines, 2300 E. Higgins Road, Ste. 312, Elk Grove Village, IL 60007. Officer: Antonio J. Alvaro, President (Qualifying Individual).

Consolidators International, Inc., dba Corrigan's Express Freight dba Backstage Cargo USA, 8900 Bellanca Avenue, Los Angeles, CA 90045. Officer: Ronen Donde, Vice President (Qualifying Individual).

Dated: October 9, 2009.

Tanga S. FitzGibbon,

Assistant Secretary.

[FR Doc. E9–24835 Filed 10–14–09; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL RESERVE SYSTEM

Notice of Proposals to Engage in Permissible Nonbanking Activities or to Acquire Companies that are Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y (12 CFR Part 225) to engage *de novo*, or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

Each notice is available for inspection at the Federal Reserve Bank indicated. The notice also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act. Additional information on all bank holding companies may be obtained from the National Information Center website at *www.ffiec.gov/nic/*.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than October 29, 2009.

A. Federal Reserve Bank of Chicago (Colette A. Fried, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690–1414:

1. Iowa Credit Union League, and Affiliates Management Company, both of Clive, Iowa; to acquire 100 percent of the voting shares of The Members Group, Inc., Clive, Iowa, and thereby engage in data procesing, real estate leasing, and asset management, servicing, and collection activities, pursuant to sections 225.28(2)(vi), (b)(3), and (b)(14)(i) of Regulation Y.

2. Iowa Credit Union League, and Affiliates Management Company, both of Clive, Iowa; to acquire 53 percent of the voting shares of Community Business Lenders, L.L.C., Clive, Iowa, and thereby engage in extending credit and servicing loans, pursuant to section 225.28(b)(1) of Regulation Y.

3. Iowa Credit Union League, and Affiliates Management Company, both of Clive, Iowa; to acquire 89 percent of the voting shares of TMG Financial Services,Inc., Clive, Iowa, and thereby engage in extending credit and servicing loans, pursuant to section 225.28(b)(1) of Regulation Y.

4. Iowa Credit Union League, and Affiliates Management Company, both of Clive, Iowa; to acquire 90 percent of the voting shares of Coopera Consulting, L.L.C., Clive, Iowa, and thereby engage in community development advisory activities, pursuant to section 225.28(b)(12)(ii) of Regulation Y.

Board of Governors of the Federal Reserve System, October 9, 2009.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. E9–24766 Filed 10–14–09; 8:45 am]

BILLING CODE 6210–01–S?≤

FEDERAL TRADE COMMISSION

Senior Executive Service Performance Review Board

AGENCY: Federal Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given of the appointment of members to the Federal Trade Commission's Performance Review Board.

FOR FURTHER INFORMATION CONTACT: Karen Leydon, Director of Human Resources, 600 Pennsylvania Avenue NW, Washington, DC 20580, (202) 326-3633.

SUPPLEMENTARY INFORMATION: Publication of the Performance Review Board (PRB) membership is required by 5 U.S.C. 4314 (c)(4). The PRB reviews and evaluates the initial appraisal of a senior executive's performance by the supervisor, and makes recommendations regarding performance ratings, performance awards, and pay-for-performance pay adjustments to the Chairman.

The following individuals have been designated to serve on the Commission's Performance Review Board:

- Charles H. Schneider, Executive Director, Chairman
- Willard K. Tom, General Counsel
- Pauline M. Ippolito, Deputy Director, Bureau of Economics

By direction of the Commission.

Donald S. Clark

Secretary

[FR Doc. E9–24731 Filed 10–14–09: 9:55 am]

BILLING CODE 6750–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of Inspector General; Notice for Potential Monitors for Quality-of-Care Corporate Integrity Agreements

AGENCY: Office of Inspector General (OIG), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Office of Inspector General (OIG) is seeking to identify potential organizations to monitor health care entities under quality-of-care Corporate Integrity Agreements (CIA) with OIG. OIG is interested in receiving information from organizations that believe they have the capability to be monitors for quality-of-care CIAs. This is not a request for proposals and does not commit OIG to select or consider a particular organization to be a monitor. Any information provided to OIG in response to this notice is strictly voluntary. The Government will not pay for information submitted in response to this notice.

DATES: Responses may be submitted on an ongoing basis.

ADDRESSES: Please mail or deliver any response to the following address: Office of Counsel to the Inspector General, Department of Health and Human Services, Room 5527, Cohen Building, 330 Independence Avenue, SW., Washington, DC 20201. Prominently identify the title of notice on the first page of any submitted response. Electronic responses may be sent to *imnotice@oig.hhs.gov.*

FOR FURTHER INFORMATION CONTACT: Katie A. Arnholt, Senior Counsel, Office of Counsel to the Inspector General, (202) 205–3203, or *katie.arnholt@oig.hhs.gov.*

SUPPLEMENTARY INFORMATION:

Background

OIG often negotiates compliance obligations with health care providers

and other entities as part of the settlement of Federal health care program fraud investigations arising under civil and administrative false claims statutes. These obligations are set forth in a CIA. A provider or an entity consents to a CIA in conjunction with a civil or administrative settlement and in exchange for OIG's agreement not to seek to exclude that health care provider or entity from participation in Medicare, Medicaid, and other Federal health care programs under 42 U.S.C. 1320a–7. False claims submitted in violation of the False Claims Act or Civil Monetary Penalties Law give rise to OIG's permissive exclusion authority under 42 U.S.C. 1320a–7(b)(7).

The typical term of a CIA is 5 years. CIAs seek to ensure the integrity of Federal health care program claims submitted by the provider. CIAs generally include requirements to, among other things: (1) Hire a compliance officer; (2) appoint a compliance committee; (3) develop written standards and policies; (4) implement a comprehensive employee training program; (5) establish a confidential disclosure program; (6) restrict employment of ineligible persons; (7) report overpayments, reportable events, and ongoing investigations/legal proceedings; and (8) provide an implementation report and annual reports to OIG on the status of the entity's compliance activities.

When resolving cases that involve quality-of-care allegations, OIG often requires health care providers to enter into quality-of-care CIAs. OIG may enter into quality-of-care CIAs with many different types of health care providers, including, but not limited to, skilled nursing facilities, assisted-living facilities, psychiatric facilities, intermediate care facilities for the mentally retarded, hospitals, physician practices, dental practices, and management companies. Under these quality-of-care CIAs, health care providers agree to compliance obligations that include quality assurance and improvement. One such obligation is to retain an appropriately qualified monitor, which is appointed by OIG after consultation with the health care provider. The monitor selected contracts directly with the provider. The monitor does not enter into any contractual relationship with OIG or act as an agent for OIG.

The monitor typically is responsible for assessing the effectiveness, reliability, and thoroughness of the provider's: (1) Internal quality control systems; (2) response to quality-of-care issues; (3) development and implementation of corrective action plans and the timeliness of such actions; (4) proactive steps to ensure that each patient receives care in accordance with basic care, treatment, and protection-from-harm standards; the governing regulations; and the policies and procedures required to be adopted under the CIA; and (5) in residential settings, compliance with staffing requirements. In making these assessments, the monitor conducts site visits, analyzes available data, observes facility and corporate-level committee meetings, and reviews relevant documents. The monitor submits regular written reports to the provider and OIG.

Responses to This Notice

OIG is interested in hearing from organizations that believe they have the capability to be a monitor for quality-of-care CIAs. Please include in any response to this notice the following:

1. The name of the organization;
2. The size and location(s) of the organization;
3. The qualifications of the organization to serve as a monitor for quality-of-care CIAs;
4. The organization's capacity to monitor large providers with locations in multiple States;
5. The organization's clinical experience and expertise;
6. The organization's experience with quality assessment, assurance, and improvement;
7. The organization's prior monitoring experience, including, but not limited to, systems reviews and auditing; and
8. An indication of whether the organization has any current or prior (within the last 5 years) Federal Government contracts or is on any General Services Administration or HHS list of approved contractors.

OIG will review each response submitted to this notice to assess whether the organization may be appropriate to serve as a monitor for quality-of-care CIAs. The assessment will not be for the purpose of making any definitive determination regarding whether a particular organization is qualified to be a monitor or creating a list of pre-approved monitors. Factors that OIG considers when assessing whether an organization may be an appropriate monitor for a particular CIA include, among other things, the organization's clinical expertise, capacity to handle a particular monitoring relationship, quality monitoring experience, geographic location, and independence and objectivity. Each provider and quality-of-care CIA is unique. Accordingly, the selection of an appropriate monitor for any given quality-of-care CIA requires consideration of unique and individualized factors. In order to select an appropriate monitor for any individual quality-of-care CIA, OIG may contact an organization that submitted information in response to this notice to request additional information. In selecting a monitor, OIG will not be limited to organizations that submitted information in response to this notice.

Any organization submitting information in response to this notice should identify any information that it believes is trade secret, or commercial or financial information, and privileged or confidential under exemption four of the Freedom of Information Act (FOIA). Consistent with the HHS FOIA regulations, set forth in 45 CFR Part 5, when OIG receives a request for such records and OIG determines that OIG may be required to disclose them, OIG will make reasonable efforts to notify the organization about these facts.

Daniel R. Levinson,

Inspector General.

[FR Doc. E9–24715 Filed 10–14–09; 8:45 am]

BILLING CODE 4152–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–N–0483]

Agency Information Collection Activities; Proposed Collection; Comment Request; Medical Device User Fee Cover Sheet; Form FDA 3601

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on Form FDA 3601 entitled ''Medical Device User Fee Cover Sheet,'' which must be submitted along with certain medical device product applications, supplements, and fee payment of those applications.

DATES: Submit written or electronic comments on the collection of information by December 14, 2009.

ADDRESSES: Submit electronic comments on the collection of information to *http://www.regulations.gov*. Submit written comments on the collection of information to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Denver Presley Jr., Office of Information Management (HFA–710), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–796–3793.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Medical Device User Fee Cover Sheet; Form FDA 3601 (OMB Control Number 0910–0511)–Extension

The Federal Food, Drug, and Cosmetic Act (the act), as amended by the Medical Device User Fee and Modernization Act of 2002 (Public Law 107–250), and the Medical Device User Fee Amendments of 2007 (Title II of the Food and Drug Administration Amendments Act of 2007), authorizes FDA to collect user fees for certain medical device applications. Under this authority, companies pay a fee for certain new medical device applications or supplements submitted to the agency for review. Because the submission of user fees concurrently with applications and supplements is required, the review of an application cannot begin until the fee is submitted. Form FDA 3601, the ''Medical Device User Fee Cover Sheet,'' is designed to provide the minimum necessary information to determine whether a fee is required for review of an application, to determine the amount of the fee required, and to account for and track user fees. The form provides a cross-reference between the fees submitted for an application with the actual submitted application by using a unique number tracking system. The information collected is used by FDA's Center for Devices and Radiological Health (CDRH) and the Center for Biologics Evaluation and Research (CBER) to initiate the administrative screening of new medical device applications and supplemental applications.

The total number of annual responses is based on the number of cover sheet submissions received by FDA in fiscal year (FY) 2008. CDRH received approximately 5,095 annual responses that included the following submissions: 16 premarket approval applications (PMA) (PMA, PDP, PMR, BLA),[1] 3,625 premarket notifications, 8 modular premarket applications, 9 panel track supplements, 201 real-time supplements, 173 one hundred eighty-day supplements, 633 thirty-day notices, ninety-three 513(g) requests, and 337 annual fees for periodic reporting.

CBER received approximately 97 annual responses that included the following submissions: 2 premarket approval applications (PMA, PDP, PMR, BLA), 1 BLA efficacy supplement, 50 premarket notifications, 3 one hundred eighty-day supplements, 2 real-time supplements, 20 thirty-day notices, 3hree 513(g) requests, and 16 annual fees for periodic reporting.

The number of received annual responses in FY 2008 included the cover sheets for applications that were qualified for small businesses and fee waivers or reductions. The estimated hours per response are based on past FDA experience with the various cover sheet submissions, and range from 5 to 30 minutes. The hours per response are based on the average of these estimates. FDA estimates the burden of this collection of information as follows:

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]

Form FDA No.	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Total Hours
3601	5,192	1	5,192	.30	1,557.6
Total Hours					1,557.6

[1]There are no capital costs or operating and maintenance costs associated with this collection of information.

[1] PDP means product development protocol; PMR means postmarketing requirements; and BLA means biologics license applications.

Dated: October 7, 2009.

David Horowitz,

Assistant Commissioner for Policy.

[FR Doc. E9–24825 Filed 10–14–09; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–N–0488]

Agency Information Collection Activities; Proposed Collection; Comment Request; Records and Reports Concerning Experience With Approved New Animal Drugs; Adverse Event Reports on Forms FDA 1932, 1932a, and 2301

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on requirements for recordkeeping and reports concerning experience with approved new animal drugs. The information contained in the reports required by the regulation enables FDA to monitor the use of new animal drugs after approval and to ensure their continued safety and efficacy.

DATES: Submit written or electronic comments on the collection of information by December 14, 2009.

ADDRESSES: Submit electronic comments on the collection of information to *http://www.regulations.gov*. Submit written comments on the collection of information to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Denver Presley Jr, Office of Information Management (HFA–710), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–796–3793.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Records and Reports Concerning Experience With Approved New Animal Drugs; Adverse Event Reports on Forms FDA 1932, 1932a, and 2301—21 CFR Section 514.80 (OMB No. 0910–0284)—Extension

Sections 512(l) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 360b(l)) and § 514.80 (21 CFR 514.80) of FDA regulations require applicants of approved new animal drug applications (NADAs) and abbreviated new animal drug applications (ANADAs) to report adverse drug experiences and product/manufacturing defects (see § 514.80(b)).

This continuous monitoring of approved NADAs and ANADAs affords the primary means by which FDA obtains information regarding potential problems with the safety and efficacy of marketed approved new animal drugs as well as potential product/manufacturing problems. Postapproval marketing surveillance is important because data previously submitted to FDA may not be adequate, as animal drug effects can change over time and less apparent effects may take years to manifest.

Under § 514.80(d), an applicant must report adverse drug experiences and product/manufacturing defects on Form FDA 1932, ''Veterinary Adverse Drug Reaction, Lack of Effectiveness, Product Defect Report.'' Periodic drug experience reports and special drug experience reports must be accompanied by a completed Form FDA 2301, ''Transmittal of Periodic Reports and Promotional Material for New Animal Drugs'' (see § 514.80(d)). Form FDA 1932a, ''Veterinary Adverse Drug Reaction, Lack of Effectiveness or Product Defect Report'' allows for voluntary reporting of adverse drug experiences or product/manufacturing defects.

The electronic versions of Forms FDA 1932 and 1932a have been incorporated into the agency-wide information collection (MedWatch^{Plus} Portal and Rational Questionnaire) that was announced for public comment in the **Federal Register** of October 23, 2008 (73 FR 63153). MedWatch^{Plus} Portal and Rational Questionnaire is part of a new electronic system for collecting, submitting, and processing adverse event reports and other safety information for all FDA-regulated products. In the **Federal Register** of May 20, 2009 (74 FR 23721), FDA announced the submission for OMB review and clearance of the electronic data collection using MedWatch^{Plus} Portal and Rational Questionnaire.

Burden hours for the electronic versions of these forms were included as part of the MedWatch^{Plus} Portal and Rationale Questionnaire information collection approved under OMB control number 0910–0645. It is estimated that, during the first 3 years that the MedWatch^{Plus} Portal is in use, half of the reports will be submitted in paper format and half will be submitted electronically. In order to avoid double counting, an estimated 50 percent of total annual responses for FDA Form 1932 (404) and FDA Form 1932a (81.5) are counted here as part of OMB control number 0910–0284 for the paper versions of Forms FDA 1932 and 1932a, and an estimated 50 percent of the total annual responses (404) and (81.5) for Form FDA 1932 and FDA Form 1932a respectively, are counted as part of OMB control number 0910–0645 for the electronic reporting of these adverse reports using the MedWatch^{Plus} Portal.

The paper versions of Forms FDA 1932 and 1932a, as well as Form FDA

2301, will continue to be counted as part of OMB control number 0910–0284.

The reporting and recordkeeping burden estimates, including the total number of annual responses, are based on the submission of reports to the Division of Surveillance, Center for Veterinary Medicine. The annual frequency of responses was calculated as the total annual responses divided by the number of respondents.

FDA estimates the burden of this collection of information as follows:

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]

21 CFR Section or Section of the Act	FDA Form No.	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Total Hours
514.80(b)(1), (b)(2)(i), (b)(2)(ii), and (b)(3)	1932[2]	404	44.26	17,882.5	1	17,882.5
Voluntary reporting FDA Form 1932a for the public	1932a[2]	81.5	1	81.5	1[3]	81.5
514.80(b)(4)	2301	84	17.0	1,428	16	22,848
514.80(b)(5)(i)	2301	84	0.31	26	2	52
514.80(b)(5)(ii)	2301	84	33.92	2,849	2	5,698
514.80(b)(5)(iii)	2301	646	0.08	49	2	98
Total Hours						46,660

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.
[2] Burden hours were determined as explained above.
[3] The hours per response for paper versions of Forms FDA 1932 and 1932a are assumed to be 1 hour. The hours per response for the electronic version of Form FDA 1932 is assumed to be 1 hour, while the electronic version of Form FDA 1932a is assumed to take .6 hours to complete the form and gather the required information as part of the MedWatch[Plus] Portal information collection (see 74 FR 23721 at 23727, May 20, 2009).

TABLE 2.—ESTIMATED ANNUAL RECORDKEEPING BURDEN[1]

21 CFR Section	No. of Recordkeepers	Annual Frequency per Recordkeeping	Total Annual Records	Hours per Record	Total Hours
514.80(e)[2]	646	7.20	4651	14	65,116.8
Total					1,541

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.
[2] Section 514.80(e) covers all recordkeeping hours for all adverse event reporting.

Dated: October 7, 2009.

David Horowitz,

Assistant Commissioner for Policy.

[FR Doc. E9–24734 Filed 10–14–09; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Health Disparities Subcommittee, Advisory Committee to the Director (ACD), Centers for Disease Control (CDC); Notice of Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announces the following meeting of the aforementioned subcommittee.

Time and Date: 2 p.m.–4:30 p.m., October 28, 2009.

Place: The meeting will be convened at the CDC, 1600 Clifton Road, NE., Atlanta, GA 30333, Building 19, Auditorium B1, Global Communications Center. Please see *Supplementary Information* for details on accessing the meeting location.

Status: Open to the public, limited only by the availability of space. The meeting room accommodates approximately 90 people.

Purpose: The Subcommittee will provide advice to the CDC Director through the Advisory Committee to the Director on strategic and other broad issues facing CDC.

Matters To Be Discussed: ACD Health Disparities Subcommittee 2009 Action Agenda; CDC Director's Health Disparity Indicator Project Update, Director's Priorities and Reorganization/Structure.

Agenda items are subject to change as priorities dictate.

Supplementary Information: To participate in the meeting, please plan to register with CDC Security Officials at the Visitor's Center at least one hour prior to the meeting. A government-issued picture ID will be required. All persons who do not have a CDC/Health and Human Services identification will have to be escorted to the meeting.

Contact Person for More Information: Walter W. Williams, M.D., M.P.H., Designated Federal Officer, Health Disparities Subcommittee, ACD, CDC, 1600 Clifton Road, NE., M/S E–67, Atlanta, Georgia 30333. Telephone 404/498–2310, E-mail: *http://www1@cdc.gov.*

The Director, Management Analysis and Services Office, has been delegated the authority to sign Federal Register notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Dated: October 8, 2009.

Andre Tyler,

Acting Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. E9–24859 Filed 10–14–09; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERIVCES

Food and Drug Administration

[Docket No. FDA–2009–N–0664]

Advancing Clinical Development of Molecular and Other Diagnostic Tests for Respiratory Tract Infections; Notice of Public Workshop

AGENCY: Food and Drug Administration.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing a public workshop, co-sponsored with the Infectious Diseases Society of America (IDSA), regarding scientific issues in the development of molecular and other tests for the diagnosis of respiratory infections, entitled ''Advancing Clinical Development of Molecular and Other Diagnostic Tests for Respiratory Tract Infections.'' The purpose of the public workshop is to provide an opportunity to share information and perspectives with health care providers, academia, and industry on various aspects of diagnostic test development for respiratory infections. Topics for discussion will include the role of emerging diagnostic tests in promoting appropriate use of antibiotics by physicians, the use of novel diagnostic tests in the study of new drugs for respiratory infections, and the possible contribution of biomarkers in the approach to treatment of respiratory infections.

Date and Time: The public workshop will be held on November 12, 2009, from 8 a.m. to 6 p.m. and on November 13, 2009, from 8 a.m. to 4:30 p.m.

Location: The public workshop will be held at the Hilton Washington DC North/Gaithersburg, The Ballrooms, 620 Perry Pkwy., Gaithersburg, MD 20877. Seating is limited and available only on a first-come, first-served basis.

Contact Person: Christine Kellerman, Center for Devices and Radiological Health, Food and Drug Administration, Office of In Vitro Diagnostic Devices, 10903 New Hampshire Ave., Building 66, rm. 5677, Silver Spring, MD 20993–0002, 301–796–5711.

Registration: To register electronically, e-mail registration information (including: Name, title, firm name, address, telephone, and fax numbers) to *Respdiagmtg@fda.hhs.gov* by November 8, 2009. Persons without access to the Internet can call 301–796–5711 to register. Registration is free for the public workshop. Interested parties are encouraged to register early because space is limited. Seating will be available on a first-come, first-served basis. Persons needing a sign language interpreter or other special accommodations should notify Christine Kellerman (see *Contact Person*) at least 7 days in advance. Additional information is also available at *http://www.fda.gov/MedicalDevices/NewsEvents/WorkshopsConferences/ucm181140.htm*.

SUPPLEMENTARY INFORMATION:

I. Background

New diagnostic technologies offer opportunities to guide the appropriate clinical use of anti-infective agents, facilitate the study of new anti-infective agents, and aid in tracking the spread of infectious diseases. To explore issues regarding the development and adoption of emerging diagnostic tests, FDA is announcing a public workshop, co-sponsored with IDSA to address scientific issues in the development of in vitro diagnostic tests for respiratory infections.

II. Topics for Discussion at the Public Workshop

Topics to be discussed at the workshop include:

- Principles of clinical trial design and their application to studies of new diagnostics, or studies where new diagnostics and new drugs are investigated simultaneously;
- Test characteristics for emerging tests that would promote clinical adoption and improve antibiotic stewardship;
- Principles for including specific viral or bacterial pathogens in multiplex diagnostic test panels;
- Discussion of approaches to developing a new molecular method when there is no ''gold standard'' reference method; and
- The use of biomarkers in respiratory infections.

The input from this public workshop will help in developing topics for further discussion. The agency encourages individuals, patient advocates, industry, consumer groups, health care professionals, researchers, and other interested persons to attend this public workshop.

Transcripts: Transcripts of the public workshop may be requested in writing from the Freedom of Information Office (HFI–35), Food and Drug Administration, 5600 Fishers Lane, rm. 6–30, Rockville, MD 20857, approximately 20 working days after the public workshop at a cost of 10 cents per page. A link to the transcripts will also be available on the Internet at *http://www.fda.gov/MedicalDevices/NewsEvents/WorkshopsConferences/default.htm* approximately 45 days after the workshop.

Dated: October 7, 2009.

Jeffrey Shuren,

Acting Director, Center for Devices and Radiological Health.

[FR Doc. E9–24828 Filed 10–14–09; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[USCG–2009–0362]

Collection of Information Under Review by Office of Management and Budget: OMB Control Numbers: 1625–0014, 1625–0038, and 1625–0069

AGENCY: Coast Guard, DHS.

ACTION: Thirty-day notice requesting comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, this request for comments announces that the U.S. Coast Guard is forwarding three Information Collection Requests (ICRs), abstracted below, to the Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget (OMB) requesting an extension of its approval for the following collections of information: (1) 1625–0014, Request for Designation and Exemption of Oceanographic Research Vessels; (2) 1625–0038, Plan Approval and Records for Tank, Passenger, Cargo and Miscellaneous Vessels, Mobile Offshore Drilling Units, Nautical School Vessels and Oceanographic Research Vessels—46 CFR Subchapters D, H, I, I–A, R and U; and (3) 1625–0069, Ballast Water Management for Vessels with Ballast Tanks Entering U.S. Waters. Review and comments by OIRA ensure we only impose paperwork burdens commensurate with our performance of duties.

DATES: Please submit comments on or before November 16, 2009.

ADDRESSES: You may submit comments identified by Coast Guard docket number [USCG–2009–0362] to the Docket Management Facility (DMF) at the U.S. Department of Transportation (DOT) or to OIRA. To avoid duplication, please submit your comments by only one of the following means:

(1) *Electronic submission.* (a) To Coast Guard docket at *http://www.regulation.gov*. (b) To OIRA by e-mail via: *oira_submission@omb.eop.gov.*

(2) *Mail or Hand delivery.* (a) DMF (M–30), DOT, West Building Ground Floor, Room W12–140, 1200 New Jersey

Avenue, SE., Washington, DC 20590–0001. Hand deliver between the hours of 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329. (b) To OIRA, 725 17th Street, NW., Washington, DC 20503, attention Desk Officer for the Coast Guard.

(3) *Fax.* (a) To DMF, 202–493–2251. (b) To OIRA at 202–395–5806. To ensure your comments are received in a timely manner, mark the fax, attention Desk Officer for the Coast Guard.

The DMF maintains the public docket for this Notice. Comments and material received from the public, as well as documents mentioned in this Notice as being available in the docket, will become part of the docket and will be available for inspection or copying at Room W12–140 on the West Building Ground Floor, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also find the docket on the Internet at *http://www.regulations.gov*.

Copies of the ICRs are available through the docket on the Internet at *http://www.regulations.gov*. Additionally, copies are available from: Commandant (CG–611), Attn: Paperwork Reduction Act Manager, U.S. Coast Guard, 2100 2nd St., SW., Stop 7101, Washington, DC 20593–7101.

FOR FURTHER INFORMATION: Contact Mr. Arthur Requina, Office of Information Management, telephone 202–475–3523 or fax 202–475–3929, for questions on these documents. Contact Ms. Renee V. Wright, Program Manager, Docket Operations, 202–366–9826, for questions on the docket.

SUPPLEMENTARY INFORMATION:

The Coast Guard invites comments on whether these ICRs should be granted based on it being necessary for the proper performance of Departmental functions. In particular, the Coast Guard would appreciate comments addressing: (1) The practical utility of the collections; (2) the accuracy of the estimated burden of the collections; (3) ways to enhance the quality, utility, and clarity of information subject to the collections; and (4) ways to minimize the burden of collections on respondents, including the use of automated collection techniques or other forms of information technology.

Comments to Coast Guard or OIRA must contain the OMB Control Number of the ICR. They must also contain the docket number of this request, [USCG 2009–0362]. For your comments to OIRA to be considered, it is best if they are received on or before November 16, 2009.

Public participation and request for comments: We encourage you to respond to this request by submitting comments and related materials. We will post all comments received, without change, to *http://www.regulations.gov*. They will include any personal information you provide. We have an agreement with DOT to use their DMF. Please see the ''Privacy Act'' paragraph below.

Submitting comments: If you submit a comment, please include the docket number [USCG–2009–0362], indicate the specific section of the document to which each comment applies, providing a reason for each comment. We recommend you include your name, mailing address, an e-mail address, or other contact information in the body of your document so that we can contact you if we have questions regarding your submission. You may submit comments and material by electronic means, mail, fax, or delivery to the DMF at the address under **ADDRESSES**; but please submit them by only one means. If you submit them by mail or delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit them by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. In response to your comments, we may revise the ICR or decide not to seek an extension of approval for this collection. The Coast Guard and OIRA will consider all comments and material received during the comment period.

Viewing comments and documents: Go to *http://www.regulations.gov* to view documents mentioned in this Notice as being available in the docket. Click on the ''read comments'' box, which will then become highlighted in blue. In the ''Keyword'' box insert ''USCG–2009–0362'' and click ''Search.'' Click the ''Open Docket Folder'' in the ''Actions'' column. You may also visit the DMF in room W12–140 on the West Building Ground Floor, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy Act: Anyone can search the electronic form of all comments received in dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, *etc.*). You may review the Privacy Act statement regarding our public dockets in the January 17, 2008 issue of the **Federal Register** (73 FR 3316).

Previous Request for Comments

This request provides a 30-day comment period required by OIRA. The Coast Guard has published the 60-day notice (74 FR 26875, June 4, 2009) required by 44 U.S.C. 3506(c)(2). That Notice elicited no comments.

Information Collection Request

1. *Title:* Request for Designation and Exemption of Oceanographic Research Vessels.

OMB Control Number: 1625–0014.

Type of Request: Revision of a currently approved collection.

Respondents: Owners/operators of vessels.

Abstract: This information is necessary to ensure a vessel qualifies for the designation.

Forms: None.

Burden Estimate: The estimated burden has decreased from 51 hours to 35 hours a year.

2. *Title:* Plan Approval and Records for Tank, Passenger, Cargo and Miscellaneous Vessels, Mobile Offshore Drilling Units, Nautical School Vessels and Oceanographic Research Vessels—46 CFR Subchapters D, H, I, I–A, R and U.

OMB Control Number: 1625–0038.

Type of Request: Revision of a currently approved collection.

Respondents: Shipyards, designers, and manufacturers of certain vessels.

Abstract: Under 46 U.S.C. 3301 and 3306, the Coast Guard is responsible for enforcing regulations promoting safety of life and property in marine transportation. The Coast Guard uses this information to ensure a vessel meets the applicable standards for construction, arrangement, and equipment.

Forms: None.

Burden Estimate: The estimated burden has decreased from 13,790 hours to 2,970 hours a year.

3. *Title:* Ballast Water Management for Vessels with Ballast Tanks Entering U.S. Waters.

OMB Control Number: 1625–0069.

Type of Request: Revision of a currently approved collection.

Respondents: Owners and operators of certain vessels.

Abstract: The information is needed to ensure compliance with requirements in 33 CFR Part 151, Subparts C and D. The information will also be used for research and periodic reporting to Congress.

Forms: CG–5662.

Burden Estimate: The estimated burden has decreased from 60,769 hours to 60,727 hours a year.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended.

Dated: October 7, 2009.

M.B. Lytle,

Captain, U.S. Coast Guard, Acting Assistant Commandant for Command, Control, Communications, Computers and Information Technology.

[FR Doc. E9–24742 Filed 10–14–09; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2009–0934]

National Boating Safety Advisory Council

AGENCY: Coast Guard, DHS.

ACTION: Committee management; notice of meeting.

SUMMARY: The National Boating Safety Advisory Council (NBSAC) and its subcommittees will meet on October 31 and November 1 and 2, 2009, in Arlington, VA. The meetings will be open to the public.

DATES: NBSAC will meet October 31, 2009, from 9 a.m. to 12 p.m. and on November 2, 2009, from 9 a.m. to 5 p.m. The Boats and Associated Equipment Subcommittee will meet on October 31, from 1:30 p.m. to 2:45 p.m. The Prevention Through People Subcommittee will meet on October 31, 2009, from 3 p.m. to 5 p.m., and the Recreational Boating Safety Strategic Planning Subcommittee will meet on November 1, 2009 from 9 a.m. to 5 p.m. Please note that the meetings may conclude early if the Council has completed its business.

All written materials, comments, and requests to make oral presentations at the meetings should reach Mr. Jeff Ludwig by October 26, 2009, via one of the methods described in **ADDRESSES**. Requests to have a copy of your material distributed to each member of the Council prior to the meeting should reach Mr. Ludwig by October 26, 2009.

ADDRESSES: The meeting will be held at the Holiday Inn Arlington, 4610 N Fairfax Drive, Arlington, VA 22203.

Please send written material, comments, and requests to make oral presentations to Mr. Jeff Ludwig by one of the submission methods described below. All materials, comments, and requests must be identified by docket number USCG–2009–0934.

Submission Methods: Please use only one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail: jeffrey.a.ludwig@uscg.mil.* Include the docket number (USCG–2009–0934) in the subject line of the message.
- *Fax:* (202) 372–1932.
- *Mail:* Mr. Jeff Ludwig, COMDT (CG–54221), 2100 2nd Street, SW., Stop 7581, Washington, DC 20593.

Instructions: All submissions received must include the words ''U.S. Coast Guard'' and docket number USCG–2009–0934. All submissions received will be posted without alteration at *http://www.regulations.gov*, including any personal information provided. Anyone can search the electronic form of comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.) You may review a Privacy Act notice regarding our public dockets in the January 17, 2008 issue of the **Federal Register** (73 FR 3316).

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

FOR FURTHER INFORMATION CONTACT: Mr. Jeff Ludwig, COMDT (CG–54221), 2100 2nd Street, SW., Stop 7581, Washington, DC 20593; (202) 372–1061; *Jeffrey.a.ludwig@uscg.mil.*

SUPPLEMENTARY INFORMATION: Notice of this meeting is given under the Federal Advisory Committee Act, 5 U.S.C. App. (Pub. L. 92–463). NBSAC was established by the Federal Boat Safety Act of 1971. That law requires the Secretary of Homeland Security, and the Commandant of the Coast Guard by delegation, to consult with NBSAC in prescribing Federal regulations, and on other major matters regarding boating safety. *See* 46 U.S.C. 4302(c) and 13110(c).

NBSAC will meet for the purpose of discussing issues related to recreational boating safety.

A. Tentative Agendas of Meetings

National Boating Safety Advisory Council (NBSAC):

Saturday, October 31, 2009:

(1) Remarks—Mr. James P. Muldoon, NBSAC Chairman;

(2) Chief, Office of Auxiliary and Boating Safety Update on NBSAC Resolutions and Recreational Boating Safety Program report.

(3) Executive Secretary's report.

(4) Chairman's session.

(5) TSAC Liaison's report.

(6) NAVSAC Liaison's report.

(7) National Association of State Boating Law Administrators report.

(8) Boats and Associated Equipment Subcommittee meeting.

Sunday, November 1, 2009:

(9) Prevention through People Subcommittee meeting.

(10) Recreational Boating Safety Strategic Planning Subcommittee meeting.

Monday, November 2, 2009:

(11) Prevention through People Subcommittee report.

(12) Boats and Associated Equipment Subcommittee report.

(13) Recreational Boating Safety Strategic Planning Subcommittee report.

A more detailed agenda can be found at: *http://homeport.uscg.mil/NBSAC*, after October 26, 2009.

B. NBSAC Subcommittees

Prevention Through People Subcommittee: Discuss current regulatory projects, grants, contracts, and new issues affecting the prevention of boating accidents through outreach and education of boaters.

Boats and Associated Equipment Subcommittee: Discuss current regulatory projects, grants, contracts, and new issues affecting boats and associated equipment.

Recreational Boating Safety Strategic Planning Subcommittee: Discuss current status of the strategic planning process and any new issues or factors that could impact, or contribute to, the development of the strategic plan for the recreational boating safety program.

C. Meeting Procedure

This meeting is open to the public. At the discretion of the Chair, members of the public may make oral presentations during the meeting. If you would like to make an oral presentation at the meeting, please notify Mr. Jeff Ludwig as described in the **ADDRESSES** section above. If you would like a copy of your material distributed to each member of the Council in advance of the meeting, please submit thirty (30) of copies to Mr. Jeff Ludwig by October 26, 2009.

Please note that the meeting may conclude early if all business is finished.

D. Information on Services for Individuals With Disabilities

For information on facilities or services for individuals with disabilities or to request special assistance at the meeting, contact Mr. Jeff Ludwig as described in the **ADDRESSES** section above as soon as possible.

Dated: October 6, 2009.

K.S. Cook,

Rear Admiral, U.S. Coast Guard, Director of Prevention Policy.

[FR Doc. E9–24832 Filed 10–14–09; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5281–N–75]

Application for the Transfer of Physical Assets

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 Application for the Transfer of Physical Assets is completed and submitted to HUD by prospective purchasers of properties with mortgage either HUD-insured or HUD-held prior to conveying the title. The form cites all the supportive documentation that must be submitted to HUD for approval.

DATES: *Comments Due Date:* November 16, 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 (2502–0275) 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: Application for the Transfer of Physical Assets.

OMB Approval Number: 2502–0275.

Form Numbers: HUD–92266.

Description of the Need for the Information and Its Proposed Use: The Application for the Transfer of Physical Assets is completed and submitted to HUD by prospective purchasers of properties with mortgage either HUD-insured or HUD-held prior to conveying the title. The form cites all the supportive documentation that must be submitted to HUD for approval.

Frequency of Submission: Other, TPA is only submitted when a property experiences a change in ownership. Many projects only experience this change once during the life of its mortgage. Data collection is only as frequent as the ownership changes.

	Number of respondents	Annual responses	×	Hours per response	=	Burden hours
Reporting burden	14,758	0.0199		88.34		26,061

Total Estimated Burden Hours: 26,061.

Status: Extension of a currently approved collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: October 08, 2009.

Lillian Deitzer,

Departmental Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. E9–24805 Filed 10–14–09; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5281–N–73]

Public Housing Mortgage Program

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.

In order for HAs to be approved for a mortgage of security interest in any public housing real estate or other assets, a proposal must be submitted to HUD. After approval and execution of any legal documents associated with the loan and related construction activity, a copy of the executed documents is submitted. Quarterly reports on the progress of the loan payout and payoff as well as the construction activity will be submitted.

DATES: *Comments Due Date:* November 16, 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 (2577–NEW) 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 affected 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: Public Housing Mortgage Program.

OMB Approval Number: 2577–NEW.

Form Numbers: None.

Description of the Need for the Information and Its Proposed Use: In order for HAs to be approved for a mortgage of security interest in any public housing real estate or other assets, a proposal must be submitted to HUD. After approval and execution of any legal documents associated with the loan and related construction activity, a copy of the executed documents is submitted. Quarterly reports on the progress of the loan payout and payoff as well as the construction activity will be submitted.

Frequency of Submission: Quarterly.

	Number of respondents	Annual responses	×	Hours per response	=	Burden hours
Reporting burden	30	3		41.7		3,760

Total Estimated Burden Hours: 3,760.

Status: New Collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: October 8, 2009.

Lillian Deitzer,

Departmental Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. E9–24808 Filed 10–14–09; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5281–N–74]

Manufactured Home Construction and Safety Standards Program

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 National Manufactured Home Construction and Safety Standards Act, 42 U.S.C. authorizes HUD to promulgate and enforce reporting standards for the production of manufactured housing. HUD uses these information collections to calculate and collect monitoring inspection fees for manufactured housing.

DATES: *Comments Due Date:* November 16, 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 (2502–0233) 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: Manufactured Home Construction and Safety Standards Program.

OMB Approval Number: 2502–0233.

Form Numbers: HUD–101, HUD–203, HUD–203–B, HUD–301, HUD–302, HUD–303, HUD–304.

Description of the Need for the Information and Its Proposed Use: The National Manufactured Home Construction and Safety Standards Act, 42 U.S.C. authorizes HUD to promulgate and enforce reporting standards for the production of manufactured housing. HUD uses these information collections to calculate and collect monitoring inspection fees for manufactured housing.

Frequency of Submission: On occasion, Monthly.

	Number of respondents	Annual responses	×	Hours per response	=	Burden hours
Reporting Burden	176	31.94		0.5		2,811

Total Estimated Burden Hours: 2,811.

Status: Extension of a currently approved collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: October 8, 2009.

Lillian Deitzer,

Departmental Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. E9–24806 Filed 10–14–09; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLID2100000 L16100000.DO0000]

Notice of Intent To Prepare an Environmental Impact Statement and a Possible Land Use Plan Amendment to the Jarbidge Resource Management Plan for the Proposed China Mountain Wind Project

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Intent.

SUMMARY: The Bureau of Land Management (BLM) Jarbidge Field Office, Twin Falls District, Idaho, intends to prepare an Environmental Impact Statement (EIS) for the proposed China Mountain Wind Project, which may include a land use plan amendment to the 1987 Jarbidge Resource Management Plan (RMP), and by this notice is announcing the beginning of the scoping process and soliciting input on the identification of issues. The China Mountain Wind Project is located on 30,700 acres of public, state, and private lands in the Jarbidge Foothills, southwest of the town of Rogerson in Twin Falls County, Idaho, and west of the town of Jackpot in Elko County, Nevada. The EIS will analyze the potential environmental impacts of the construction and operation of a proposed wind power generation facility, associated electric transmission facilities and access roads, and a possible land use plan amendment associated with the project. This notice initiates a 30-day public scoping period to identify relevant issues associated with the proposed project and possible land use plan amendment.

A prior notice dated April 21, 2008, initiated a 60-day public scoping process to identify relevant issues associated with the proposed project. That scoping process was subsequently extended for an additional 30 days, ending July 21, 2008.

DATES: The scoping period will commence with the publication of this notice. The formal scoping period will end on November 16, 2009. Comments regarding issues relative to the proposed project and possible plan amendment should be received on or before November 16, 2009 using one of the methods listed below.

The BLM will announce public scoping meetings through local news media, newsletters, and the BLM Web site: *http://www.blm.gov/id/st/en/fo/jarbidge.html* at least 15 days prior to the first meeting. The BLM will provide additional opportunities for public participation upon publication of the Draft EIS, including a public comment period.

ADDRESSES: You may submit comments on issues related to the proposed project by any of the following methods:

- *E-mail: id_chinamtn_eis@blm.gov.*
- *Fax:* (208) 735–2076.
- *Mail:* Project Manager, China Mountain EIS, Jarbidge Field Office, 2536 Kimberly Road, Twin Falls, Idaho 83301.

Comments can also be hand-delivered to the Jarbidge Field Office at the address above. Documents pertinent to this proposal may be examined at the Jarbidge Field Office.

FOR FURTHER INFORMATION CONTACT: China Mountain Wind Project Manager, Jarbidge Field Office, 2536 Kimberly Road, Twin Falls, Idaho 83301, telephone (208) 235–2072.

SUPPLEMENTARY INFORMATION: The EIS will be prepared in accordance with the Federal Land Policy and Management Act of 1976 (FLPMA) (43 U.S.C. 1701 *et seq.*), as amended; the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*), as amended; and the Council on Environmental Quality (CEQ) regulations (40 CFR parts 1500–1508). China Mountain Wind, LLC, has submitted a right-of-way application to BLM to build a commercial wind power generation facility capable of generating up to 425 megawatts (MW) of electricity. Up to 185 wind turbines, each having a generating capacity between 2.3 and 3.0 MW, would be installed on an area covering approximately 30,700 acres in the Jarbidge Foothills, southwest of Rogerson, Idaho, and west of Jackpot, Nevada. The proposed project area includes public land administered by the BLM Elko District, Wells Field Office in northeastern Nevada, public land administered by the BLM Twin Falls District, Jarbidge Field Office, State of Idaho lands, and private lands in south-central Idaho.

Administration ownership	Acres (rounded)
BLM–Jarbidge Field Office, Twin Falls District, Idaho	15,300
BLM–Wells Field Office, Elko District, Nevada	4,700
State of Idaho	2,000
Private	8,700
Total	30,700

The turbines proposed for the project would have tower heights ranging from 200 to 250 feet and rotor diameters ranging from 250 to 300 feet. Each turbine would be set on a large concrete foundation. Turbines would be connected by underground electrical cable to one or two substations. Each substation would be sited on a two-acre area and would consist of a graveled, fenced area containing transformer and switching equipment and an area to park utility vehicles. Up to 25 miles of new three-phase 138 kV or 345 kV overhead electric transmission line would be constructed from each substation to a switching station at the point of interconnection with an existing transmission line. The new transmission line would be supported by single steel or double wood poles with a distance of 400 to 500 feet between poles. Other required facilities would include one or two fenced, graveled switching stations of approximately two acres each; one or more Operations and Maintenance buildings; approximately 40 miles of new access roads; approximately 30 miles of improved existing road; and a temporary concrete batch plant. This concrete batch plant would be centrally located on the site, occupying an area of approximately five acres, and would operate during project construction. The proposed project would disturb up to 540 acres on a temporary basis and up to 180 acres on a permanent basis, following reclamation of construction disturbance.

Approximately 60% of both the temporary and permanent impacts would be on lands under the administration of the BLM and approximately 40% would be on State of Idaho and private lands. The proposed project would operate year round for a minimum of 30 years.

The purpose of the China Mountain Wind project, if determined to be appropriate, is to construct a wind power generation facility that uses wind energy resources in an environmentally sound manner to meet existing and future electricity demands in Idaho and Nevada. The proposed project also provides for development of renewable energy resources as encouraged by the

Energy Policy Act of 2005 and is consistent with the BLM's Wind Energy Development Policy, as described in the Record of Decision for the Final Programmatic EIS on Wind Energy Development on BLM Administered Lands in the Western United States (December 2005).

At this project's original inception the Jarbidge RMP revision process was already well underway (initiated January 10, 2006). The RMP revision process had identified the need to revise the previous land use planning guidance provided by the 1987 Jarbidge RMP—specifically with regards to rights-of-way, including wind energy and utility corridors. With the RMP revision and this project on two parallel yet staggered timelines, the BLM originally expected that the RMP revision (including new rights-of-way guidance) would be complete prior to issuance of a decision for this project (consistent with that guidance). Unforeseen delays in the RMP revision process have extended the timeline, including: wildfire and subsequent restoration planning and response, litigation, and other delays. The issuance of a specific amendment to the 1987 RMP for the project, consistent with analysis developed during the RMP revision process, will allow the BLM to process the China Mountain application, unimpeded by delays associated with the RMP revision. If the RMP revision is completed prior to issuance of a decision for this project, then a land use plan amendment for the project would not be necessary. However, any further delays in the RMP revision such as scheduling, protest response, or litigation would require continuing with the land use plan amendment for the project so as to minimize delays in processing China Wind's application for this project.

The purpose of the public scoping process is to determine relevant issues that will influence the scope of the environmental analysis and EIS alternatives including a possible land use plan amendment for the project. General concerns in the following categories have been identified to date: Tribal concerns; wildlife (including birds and bats); vegetation (including noxious and invasive weeds); threatened, endangered and sensitive plants and animals, including sage grouse; public safety; public access; recreational opportunities; visual resources; cultural resources; rangeland resources; geology and soils; water quality; climate change and variability; hazardous materials; air quality; noise; fire management; and socioeconomics. You may submit comments on issues in writing to the BLM at any public scoping meeting, or you may submit them to the BLM using one of the methods listed in the **ADDRESSES** section above. E-mailed comments, including attachments, should be provided in .doc, .pdf, .html, or .txt format. Electronic submissions in other formats or containing viruses will be rejected. 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.

The EIS process will be a collaborative effort that will consider local, regional, and national needs and concerns. The BLM will work closely with interested parties to identify the management decisions that are best suited to the needs of the public. After gathering public comments, the BLM will identify and provide rationale on those issues that will be addressed in the EIS or those issues beyond the scope of the EIS.

Peter J. Ditton,

Acting State Director, Bureau of Land Management, Idaho.

[FR Doc. E9–24858 Filed 10–14–09; 8:45 am]

BILLING CODE 4310–GG–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–641]

In the Matter of Certain Variable Speed Wind Turbines and Components Thereof; Notice of Commission Determination To Review a Final Initial Determination of the Administrative Law Judge

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review the final initial determination (''ID'') of the presiding administrative law judge (''ALJ'') in the above-captioned investigation under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337 (''section 337''). The ALJ found a violation of section 337.

FOR FURTHER INFORMATION CONTACT: James A. Worth, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–3065. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–2000. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: This investigation was instituted on March 31, 2008, based upon a complaint filed on behalf of General Electric Company (''GE'') of Fairfield, Connecticut on February 7, 2008. The complaint alleged violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain variable speed wind turbines and components thereof that infringe claims 121–125 of U.S. Patent No. 5,083,039 (''the '039 patent'') and claims 1–12, 15–18, and 21–28 of U.S. Patent No. 6,921,985 (''the '985 patent'').

The notice of investigation named as respondents Mitsubishi Heavy Industries, Ltd. (''MHI'') of Tokyo, Japan; Mitsubishi Heavy Industries America, Inc. (''MHIA'') of New York, New York; and Mitsubishi Power Systems, Inc. (''MPSA'') of Lake Mary, Florida.

On October 8, 2008, the Commission issued notice of its determination not to review an ID (Order No. 10) granting GE's motion to amend its complaint and the notice of investigation to add claims 1–19 of United States Patent No. 7,321,221 (''the '221 patent'') to this investigation.

On April 21, 2009, the Commission issued notice of its determination not to review an ID (Order No. 30) granting GE's amended motion for summary determination that it had satisfied the economic prong of the domestic industry requirement with respect to all three asserted patents.

The ALJ conducted an evidentiary hearing commencing on May 11, 2009. At the hearing, GE narrowed the number of asserted claims to: claim 121 of the '039 patent; claims 5, 7, and 8 of the

'221 patent; and claim 15 of the '985 patent.

On August 7, 2009, the ALJ issued a final ID finding a violation of section 337 in this investigation. The ALJ found that there was a violation in the sale for importation, importation, or sale after importation by respondents MHI and MPSA with respect to claim 121 of the '039 patent and claim 15 of the '985 patent. The ALJ found that there was no violation with respect to these claims by MHIA. The ALJ also found that there was no violation of section 337 by any party with respect to claims 5, 7, and 8 of the '221 patent.

On August 24, 2009, the parties filed three petitions and/or contingent petitions for review: (1) MHI, MPSA, and MHIA; (2) GE; and (3) the Commission investigative attorney. On September 1, 2009, each of the parties filed responses thereto.

Having examined the final ID, the petitions for review, the responses thereto, and the relevant portions of the record in this investigation, the Commission has determined to review the final ID, except the issue of importation and the intent finding underlying the ALJ's inequitable conduct determination.

The Commission requests briefing based on the evidentiary record on the issues on review. The Commission is particularly interested in responses to the following questions:

(1) If the Commission were to adopt the claim constructions presented to the administrative law judge by Mitsubishi or the Commission investigative attorney, would the Mitsubishi Wind Turbines or the GE Wind Turbines satisfy these claim constructions under the doctrine of equivalents?

(2) Does the Commission need to address the issue of inventorship to determine whether GE has standing to assert infringement of the '985 patent?

(3) Does claim 15 of the '985 patent require that the device shunt current away from both the inverter and the generator rotor? Can the shunt circuit be located within the inverter?

In connection with the final disposition of this investigation, the Commission may issue (1) an order that could result in the exclusion of the subject articles from entry into the United States, and/or (2) cease and desist orders that could result in respondents being required to cease and desist from engaging in unfair acts in the importation and sale of such articles. Accordingly, the Commission is interested in receiving written submissions that address the form of remedy, if any, that should be ordered. If a party seeks exclusion of an article from entry into the United States for purposes other than entry for consumption, the party should so indicate and provide information establishing that activities involving other types of entry either are adversely affecting it or are likely to do so. For background information, see the Commission Opinion, *In the Matter of Certain Devices for Connecting Computers via Telephone Lines,* Inv. No. 337–TA–360.

If the Commission contemplates some form of remedy, it must consider the effects of that remedy upon the public interest. The factors the Commission will consider include the effect that an exclusion order and/or cease and desist orders would have on (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) U.S. production of articles that are like or directly competitive with those that are subject to investigation, and (4) U.S. consumers. The Commission is therefore interested in receiving written submissions that address the aforementioned public interest factors in the context of this investigation.

If the Commission orders some form of remedy, the President has 60 days to approve or disapprove the Commission's action. During this period, the subject articles would be entitled to enter the United States under a bond, in an amount to be determined by the Commission and prescribed by the Secretary of the Treasury. The Commission is therefore interested in receiving submissions concerning the amount of the bond that should be imposed.

Written Submissions: The parties to the investigation are requested to file written submissions on the issues under review. The submissions should be concise and thoroughly referenced to the record in this investigation, including references to exhibits and testimony. Additionally, the parties to the investigation, interested government agencies, and any other interested persons are encouraged to file written submissions on the issues of remedy, the public interest, and bonding. Such submissions should address the ALJ's recommended determination on remedy and bonding. Complainant and the Commission investigative attorney are also requested to submit proposed remedial orders for the Commission's consideration. Complainant is requested to supply the expiration dates of the patents at issue and the HTSUS numbers under which the accused products are imported. The written submissions and proposed remedial orders must be filed no later than the close of business on October 22, 2009. Reply submissions must be filed no later than the close of business on November 2, 2009. No further submissions will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file with the Office of the Secretary the original and 12 true copies thereof on or before the deadlines stated above. Any person desiring to submit a document (or portion thereof) to the Commission in confidence must request confidential treatment unless the information has already been granted such treatment during the proceedings. All such requests should be directed to the Secretary of the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment is granted by the Commission will be treated accordingly. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary.

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and under sections 210.42–.46 of the Commission's Rules of Practice and Procedure (19 CFR 210.42–.46).

Issued: October 8, 2009.

By order of the Commission.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E9–24787 Filed 10–14–09; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[USITC SE–09–027]

Government in the Sunshine Act Meeting Notice

AGENCY HOLDING THE MEETING: United States International Trade Commission.

TIME AND DATE: October 19, 2009 at 11 a.m.

PLACE: Room 101, 500 E Street, SW., Washington, DC 20436, Telephone: (202) 205–2000.

STATUS: Open to the public.

Matters To Be Considered

1. Agenda for future meetings: none.
2. Minutes.
3. Ratification List.
4. Inv. No. 701–TA–460 (Final) (Ni-Resist Piston Inserts from Argentina)—briefing and vote. (The Commission is currently scheduled to transmit its determination and Commissioners' opinions to the Secretary of Commerce on or before October 29, 2009.)

5. Outstanding action jackets: none.

In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

By order of the Commission

Issued: October 8, 2009.

William R. Bishop,

Hearings and Meetings Coordinator.

[FR Doc. E9–24906 Filed 10–13–09; 4:15 pm]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 332–505]

Use of the ''First Sale Rule'' for Customs Valuation of U.S. Imports

AGENCY: United States International Trade Commission.

ACTION: Notice of earlier-than-expected transmittal of report to Congress.

SUMMARY: On January 2, 2009, the Commission published a notice in the **Federal Register** (74 FR 119) announcing that it had instituted investigation No. 332–505, *Use of the ''First Sale Rule'' for Customs Valuation of U.S. Imports,* for the purpose of preparing the report required by section 15422(c)(1) of the Food, Conservation, and Energy Act of 2008 (Pub. L. 110–234). The Commission indicated that it expected to transmit its report to Congress in February 2010, based on the expectation it would receive the last of several monthly reports from the Commissioner of U.S. Customs and Border Protection (CBP) in November 2009. The Commission received the final report from CBP on September 25, 2009, and now expects to deliver its report to Congress by December 23, 2009.

DATES: *December 23, 2009:* New date for anticipated transmittal of Commission report to Congress.

ADDRESSES: All Commission offices, including the Commission's hearing rooms, are located in the United States International Trade Commission Building, 500 E Street, SW., Washington, DC. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://www.usitc.gov/secretary/edis.htm.*

FURTHER INFORMATION: For information specific to this investigation, contact project leader Michael Ferrantino (202–205–3241 or *michael.ferrantino@usitc.gov*) or deputy project leader Nannette Christ (202–205–3263 or *nannette.christ@usitc.gov*). For information on the legal aspects of this investigation, contact William Gearhart of the Commission's Office of the General Counsel (202–205–3091 or *william.gearhart@usitc.gov*). The media should contact Margaret O'Laughlin, Office of External Relations (202–205–1819 or *margaret.olaughlin@usitc.gov*). Hearing-impaired individuals may obtain information on this matter by contacting the Commission's TDD terminal at 202–205–1810. General information concerning the Commission may also be obtained by accessing its Internet site (*http://www.usitc.gov*). Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000.

Background: Section 15422(c)(1) of the Food, Conservation, and Energy Act of 2008 (''2008 Act''), enacted on May 22, 2008, requires the Commission to submit a report to the House Committee on Ways and Means and the Senate Committee on Finance that contains certain customs transaction valuation information compiled by the Commission from information furnished to the Commission by CBP. Section 15422(b) of the 2008 Act requires that CBP provide monthly reports to the Commission. The 2008 Act requires the Commission to submit its report 90 days after receipt of the final monthly report from CBP. On September 25, 2009, the Commission received the final monthly report from CBP and will transmit its report to the Committees on December 23, 2009. The Commission anticipates that the report it sends to the Committees in this investigation will be made available to the public in its entirety.

By order of the Commission.

Issued: October 8, 2009.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E9–24793 Filed 10–14–09; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms, and Explosives

[OMB Number 1140–0072]

Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 30–Day Notice of Information Collection Under Review: Revision of a currently approved collection, Employee Possessor Questionnaire.

The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** Volume 72, Number 152, page 39974, on August 10, 2009, allowing for a 60-day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until November 16, 2009. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to The Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Department of Justice Desk Officer, Washington, DC 20503. Additionally, comments may be submitted to OMB via facsimile to (202)–395–7285.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

(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, 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.

Overview of This Information Collection

(1) *Type of Information Collection:* Revision of a currently approved collection.

(2) *Title of the Form/Collection:* Employee Possessor Questionnaire

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection: Form Number:* ATF F 5400.28. Bureau of Alcohol, Tobacco, Firearms and Explosives.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. Other: Business or other for-profit. *Abstract:* Each employee possessor in the explosives business or operations required to ship, transport, receive, or possess (actual or constructive), explosive materials must submit this form. ATF F 5400.28 will determine the eligibility of the employee possessor to possess explosives.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* There will be an estimated 10,000 respondents, who will complete the form within approximately 20 minutes.

(6) *An estimate of the total burden (in hours) associated with the collection:* There are an estimated 3,334 total burden hours associated with this collection.

If additional information is required contact: Ms. Lynn Bryant, Department Clearance Officer, United States Department of Justice, Policy and Planning Staff, Justice Management Division, Suite 1600, Patrick Henry Building, 601 D Street NW., Washington, DC 20530.

Dated: October 9, 2009.

Lynn Bryant,

Department Clearance Officer, PRA, United States Department of Justice.

[FR Doc. E9–24846 Filed 10–14–09; 8:45 am]

BILLING CODE 4810–FX–P

DEPARTMENT OF JUSTICE

Office of Justice Programs

[OJP (OJJDP) Docket No. 1506]

Meeting of the Federal Advisory Committee on Juvenile Justice

AGENCY: Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, Justice.

ACTION: Notice of meeting.

SUMMARY: The Office of Juvenile Justice and Delinquency Prevention (OJJDP) announces the Fall meeting of the Federal Advisory Committee on Juvenile Justice (FACJJ), which will be held in Austin TX October 29 to October 31, 2009.

Dates and Locations: The meeting times and locations are as follows: Thursday, October 29, 2009, 4:15 p.m. to 6:15 p.m.; Friday, October 30, 2009, 8:30 a.m. to 5:30 p.m.; and Saturday, October 31, 2009, 8 a.m. to 10:30 a.m. The meeting will take place at the Hilton Garden Inn Austin Downtown, 500 North IH 35, Austin, TX 78701.

FOR FURTHER INFORMATION CONTACT: Robin Delany-Shabazz, Designated Federal Official, OJJDP, *Robin.Delany-Shabazz@usdoj.gov*, or 202–307–9963. [**Note:** This is not a toll-free number.]

SUPPLEMENTARY INFORMATION: The Federal Advisory Committee on Juvenile Justice (FACJJ), established pursuant to Section 3(2)A of the Federal Advisory Committee Act (5 U.S.C. App. 2), will meet to carry out its advisory functions under Section 223(f)(2)(C–E) of the Juvenile Justice and Delinquency Prevention Act of 2002. The FACJJ is composed of one representative from each state and territory. FACJJ duties include: reviewing Federal policies regarding juvenile justice and delinquency prevention; advising the OJJDP Administrator with respect to particular functions and aspects of OJJDP; and advising the President and Congress with regard to State perspectives on the operation of OJJDP and Federal legislation pertaining to juvenile justice and delinquency prevention. More information, including a member list, may be found at *http://www.facjj.org.*

Meeting Agenda

1. Thursday, October 29, 2009, 4:15 p.m. to 6:15 p.m.

- Presentations on Law Enforcement Approaches to Disproportionate Minority Confinement in the Juvenile Justice System (Open Session)

2. Friday, October 30, 2009, 8 a.m. to 5:30 p.m.

- 8:30 a.m. to 11:45 a.m. Registration, Call to Order; Welcome; Report on Responses to 2009 Annual Request for Information; Report from the Annual Report Sub Committee; Roundtable Sessions with Staff of the Office of Juvenile Justice and Delinquency Prevention (Open Session)
- 11:45 a.m. to 1:30 p.m. Working Lunch and Sub Committee Meetings (Closed Session)
- 1:30 p.m. to 4:30 p.m. The Future of FACJJ: Options for Consideration (Open Session)
- 4:30 p.m. to 5:30 p.m. Recognition, Reflections and Questions: A Discussion with the Acting Administrator; Summary and Close. (Open Session)

3. Saturday, October 31, 2009, 8 a.m. to 10:30 a.m.

- Call to Order; Discussion—Topics of Concern: Impact on States and Advice to OJJDP; Sub Committee Report Outs; Next Steps, Summary and Adjournment (Open Session)

For security purposes, members of the FACJJ and of the public who wish to attend, must pre-register online at *http://www.facjj.org.* Should problems arise with web registration, call Daryel Dunston at 240–221–4343. Members of the public must register by Monday, October 26, 2009. [**Note:** these are not toll-free telephone numbers.] Additional identification documents may be required. Space is limited. **Please note:** Photo identification will be required for admission to the meeting.

Written Comments

Interested parties may submit written comments by Monday, October 26, 2009, to Robin Delany-Shabazz, Designated Federal Official for the Federal Advisory Committee on Juvenile Justice, OJJDP, at *Robin.Delany-Shabazz@usdoj.gov.* If e-mail is not available, please fax your comments to 202–307–2819 and call Joyce Mosso at 202–305–4445 to ensure that the fax was received. [**Note:** These are not toll-free numbers.] No oral presentations will be permitted at the meeting. However, written questions and comments from members of the public attending the meeting may be invited.

Dated: October 9, 2009.

Jeff Slowikowski,

Acting Administrator, Office of Juvenile Justice and Delinquency Prevention.

[FR Doc. E9–24836 Filed 10–14–09; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF LABOR

Office of the Secretary

Job Corps: Preliminary Finding of No Significant Impact (FONSI) for the Installation of a Small Wind Turbine at the North Texas Job Corps Center Located at 1701 North Church Street, McKinney, TX

AGENCY: Office of the Secretary, Department of Labor.

RECOVERY: This project will be wholly funded under the American Recovery and Reconstruction Act of 2009.

ACTION: Preliminary Finding of No Significant Impact (FONSI) for a Small Wind Turbine Installation to be located at the North Texas Job Corps Center,

1701 North Church Street, McKinney, Texas.

SUMMARY: Pursuant to the Council on Environmental Quality Regulations (40 CFR part 1500–08) implementing procedural provisions of the National Environmental Policy Act (NEPA), the Department of Labor, Office of the Secretary (OSEC) in accordance with 29 CFR 11.11(d), gives notice that an Environmental Assessment (EA) has been prepared for a proposed Wind Turbine Installation to be located at the North Texas Job Corps Center, 1701 North Church Street, McKinney, Texas, and that the proposed plan for the construction of a wind turbine at the North Texas Job Corps Center will have no significant environmental impact. This Preliminary Finding of No Significant Impact (FONSI) will be made available for public review and comment for a period of 30 days.

DATES: Comments must be submitted by November 16, 2009.

ADDRESSES: Any comment(s) are to be submitted to William A Dakshaw, P.E., Division of Facilities and Asset Management, Department of Labor, 200 Constitution Avenue, NW., Room N–4460, Washington, DC 20210, (202) 693–2867 (this is not a toll-free number).

FOR FURTHER INFORMATION CONTACT: Copies of the EA are available to interested parties by contacting William A Dakshaw, P.E., Division of Facilities and Asset Management, Department of Labor, 200 Constitution Avenue, NW., Room N–4460, Washington, DC 20210, (202) 693–2867 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: This EA summary addresses the proposed construction of a single 50 kW rated wind turbine at the North Texas Job Corps Center.

The wind turbine will be installed on self-supporting towers approximately 120′ above the ground. The wind turbine will produce clean energy for the North Texas Job Corps center, demonstrate renewable energy capabilities to Job Corps Students and help the program meet federal requirements in Executive Order 13423 for renewable energy production.

This project is not expected to have a negative impact on population demographics, the surrounding area, environmental quality, or natural systems and heritage.

Based on the information gathered during the preparation of the EA, the construction of the Wind Turbine Installation at the North Texas Job Corps Center, 1701 North Church Street, McKinney, Texas will not create any significant adverse impacts on the environment.

Dated: October 7, 2009.

Lynn Intrepidi,

Interim National Director of Job Corps.

[FR Doc. E9–24749 Filed 10–14–09; 8:45 am]

BILLING CODE 4510–23–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

Proposed Information Collection Request Submitted for Public Comment and Recommendations; Mine Rescue Teams; Arrangements for Emergency Medical Assistance; and Arrangements for Transportation for Injured Persons

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506 (c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed.

Currently, the Mine Safety and Health Administration (MSHA) is soliciting comments concerning the extension of the information collection related to the 30 CFR Sections 49.2, 49.3 49.4, 49.5 49.6, 49.7, 49.8 and 49.9.

DATES: Submit comments on or before December 14, 2009.

ADDRESSES: Send comments to U.S. Department of Labor, Mine Safety and Health Administration, John Rowlett, Director, Management Services Division, 1100 Wilson Boulevard, Room 2134, Arlington, VA 22209–3939. Commenters are encouraged to send their comments on a computer disk, or via E-mail to *Rowlett.John@dol.gov,* along with an original printed copy. Mr. Rowlett can be reached at (202) 693–9827 (voice), or (202) 693–9801 (facsimile).

FOR FURTHER INFORMATION CONTACT: Contact the employee listed in the **ADDRESSES** section of this notice.

SUPPLEMENTARY INFORMATION:

I. Background

Section 115 (e) of the Federal Mine Safety and Health Act of 1977 (Mine Act) required the Secretary of Labor (Secretary) to publish proposed regulations which provide that mine rescue teams be available for rescue and recovery work to each underground mine in the event of an emergency. In addition, the costs of making advance arrangements for such teams are to be borne by the operator of each such mine.

Congress considered the ready availability of mine rescue in the event of an accident to be vital protection for miners. Congress was concerned that too often in the past, rescue efforts at a disaster site have had to await the delayed arrival of skilled mine rescue teams. In responding to Congressional concerns, the Mine Safety and Health Administration (MSHA) promulgated 30 CFR Part 49, Mine Rescue Teams. The regulations set standards related to the availability of mine rescue teams; alternate mine rescue capability for small and remote mines and mines with special mining conditions; inspection and maintenance records of mine rescue equipment and apparatus; physical requirements for mine rescue team members and alternates; and experience and training requirements for team members and alternates.

II. Desired Focus of Comments

MSHA is particularly interested in comments that:

- 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 submissions of responses.

A copy of the proposed information collection request can be obtained by contacting the employee listed in the For Further Information Contact section of this notice, or viewed on the internet by accessing the MSHA home page

(*http://www.msha.gov/*) and selecting ''Rules & Regs'', and then selecting ''FedReg. Docs''. On the next screen, select ''Paperwork Reduction Act Supporting Statement'' to view documents supporting the **Federal Register** Notice.

Current Actions

Under 30 CFR part 49, Mine Rescue Teams, the regulations set standards related to the availability of mine rescue teams; alternate mine rescue capability for small and remote mines and mines with special mining conditions; inspection and maintenance records of mine rescue equipment and apparatus; physical requirements for mine rescue team members and alternates; and experience and training requirements for team members and alternates. Parts 75 and 77 requires that coal mine operators make arrangements with a licensed physician, medical service, medical clinic, or hospital and with an ambulance service to provide 24-hour emergency medical assistance and transportation. That information is to be posted at the mine.

Type of Review: Extension.

Agency: Mine Safety and Health Administration.

Title: Mine Rescue Teams; Arrangements for Emergency Medical Assistance; and Arrangements for Transportation for Injured Persons.

OMB Number: 1219–0078.

Recordkeeping: § 49.6 states that rescue apparatus and equipment shall be maintained and that a person trained in the use and care of breathing apparatus shall inspect and test the apparatus at lease every 30 days and shall certify by signature and date that the inspections and tests were done. The certification and the record of corrective action taken, if any, shall be maintained at the mine rescue station for a period of one year. § 49.7 requires that each team member and alternate be examined within 60 days of the beginning of the initial training, and annually thereafter by a physician who shall certify the physical fitness of the team member to perform mine rescue and recovery work for prolonged periods under strenuous conditions. The operator shall have MSHA Form 5000–3 on file for each team member. These forms shall be kept on file at either the mine or the mine rescue station for a period of one year. § 49.8 requires that prior to serving on a mine rescue team, each member must complete an initial 20-hour course of instruction and all team members are required to receive 40 hours of refresher training annually. A record of the training received by each mine rescue team member is required to be on file at the mine rescue station for a period of one year.

Frequency: On occasion.

Affected Public: Business or other for-profit.

Respondents: 224.

Responses: 20,563.

Burden Hours: 8,825.

Total Burden Cost: $243,049.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated at Arlington, Virginia, this 9th day of October 2009.

John Rowlett,

Director, Management Services Division.

[FR Doc. E9–24748 Filed 10–14–09; 8:45 am]

BILLING CODE 4510–43–P

NATIONAL SCIENCE FOUNDATION

Advisory Committee Mathematical and Physical Sciences; Notice of Meeting

In accordance with Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting:

Name: Advisory Committee Mathematical and Physical Sciences (#66).

Date/Time: November 4, 2009 2 p.m.–4 p.m., November 5, 2009 8 a.m.–6 p.m., November 6, 2009 8 a.m.–3 p.m.

Place: National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230. November 5, Room 1005, November 6 & 7, Room 1235.

Type of Meeting: Open.

Contact Person: Dr. Morris L. Aizenman, Senior Science Associate, Directorate for Mathematical and Physical Sciences, Room 1005, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230. (703) 292–8807.

Purpose of Meeting: To provide advice and recommendations concerning NSF science and education activities within the Directorate for Mathematical and Physical Sciences.

Agenda: Briefing to new members about NSF and Directorate (11/4). Update on current status of Directorate. Reports from liaisons with other Advisory Committees. Meeting of MPSAC with Divisions within MPS Directorate. Discussion of MPS Long-term Planning Areas.

Summary Minutes: May be obtained from the contact person listed above.

Dated: October 9, 2009.

Susanne E. Bolton,

Committee Management Officer.

[FR Doc. E9–24743 Filed 10–14–09; 8:45 am]

BILLING CODE 7555–01–P

NATIONAL SCIENCE FOUNDATION

Advisory Committee for Education and Human Resources; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting:

Name: Advisory Committee for Education and Human Resources (#1119).

Date/Time: November 4, 2009; 8:30 a.m. to 5 p.m., November 5, 2009; 8:30 a.m. to 1 p.m.

Place: National Science Foundation Headquarters, Stafford Place II—Room 555, 4201 Wilson Boulevard, Arlington, VA 22230.

Type of Meeting: Open.

Contact Person: James Colby, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230, (703) 292–5331 *jcolby@nsf.gov.*

If you are attending the meeting and need access to the NSF, please contact the individual listed above so your name may be added to the building access list. Please report to the North Doors of NSF [corner of N. Stuart and N. Ninth Streets]. After receiving a Visitors Badge, staff will guide you to conference room 555 in the adjacent Stafford II annex of NSF].

Purpose of Meeting: To provide advice with respect to the Foundation's science, technology, engineering, and mathematics (STEM) education and human resources programming.

Agenda

November 4, 2009

I. Acting Assistant Director's Remarks.
II. Discussion of Interagency Collaborations: U.S. Department of Education.
III. Discussion of Cyberlearning: International Context.
IV. Visit From the Office of the NSF Director.
V. Discussion of Interagency Collaborations (continued): National Oceanic and Atmospheric Administration and National Aeronautics and Space Administration.
VI. Discussion of NSF-wide Collaborations.
VII. Review and Acceptance of Committee of Visitor Reports:
- Advanced Technological Education.
- Research on Gender in Science and Engineering.
- Research in Disabilities Education.
- Graduate Research Fellowships.
- Discovery Research K–12.
- Research and Evaluation on Education in Science and Engineering.
- Course, Curriculum, and Laboratory Improvement Program.

November 5, 2009

I. Subcommittee Meetings and Reports.
II. Future Issues for Consideration.

Dated: October 9, 2009.

Susanne Bolton,

Committee Management Officer.

[FR Doc. E9–24816 Filed 10–14–09; 8:45 am]

BILLING CODE P

NATIONAL SCIENCE FOUNDATION

Proposal Review Panel for Physics; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting.

Name: Rutgers University Site Visit (1208).

Date and Time: Tuesday, October 27, 2009; 8 a.m.–5 p.m. Wednesday, October 28, 2009; 8 a.m.–1 p.m.

Place: Rutgers University, Piscataway, NJ.

Type of Meeting: Partially Closed.

Contact Person: Dr. James Reidy, Program Director for Elementary Particle Physics, National Science Foundation, 4201 Wilson Blvd., Arlington, VA 22230. Telephone: (703) 292–7392.

Purpose of Meeting: To provide an evaluation concerning the proposal submitted to the National Science Foundation.

Agenda:

Tuesday, October, 27, 2009

Open: 0800–0930—Orientation, Introduction of Panel, Welcome; 0930–1145—Tevatron presentations.

Closed: 1145–0100—Meeting with the Department Chair, Dean, and Students; 0100–0130—Executive Session.

Open: 0130–0230—CMS—M&O/PLT presentations; 0245–0300—Computing and Networks; 0315–0415—CMS and Facilities Tour.

Closed: 0415–0600—Executive Session.

Wednesday, October 27, 2009

Open: 0745–1015—CMS Physics Presentations.

Closed: 1015–0100—Executive Session.

Reason for Closing: The proposal contains proprietary or confidential material, including technical information on personnel. These matters are exempt under 5 U.S.C. 552b(c)(2)(4) and (6) of the Government in the Sunshine Act.

Dated: October 9, 2009.

Susanne Bolton,

Committee Management Officer.

[FR Doc. E9–24817 Filed 10–14–09; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2009–0440; Docket No. 40–8989]

Issuance of Environmental Assessment and Draft Finding of No Significant Impact for Modification of Exemption From Certain U.S. Nuclear Regulatory Commission Licensing Requirements for Special Nuclear Material for EnergySolutions LLC, Clive, UT; Correction

AGENCY: Nuclear Regulatory Commission.

ACTION: Correction.

SUMMARY: This document corrects a notice appearing in the **Federal Register** on October 7, 2009 (74 FR 51622), in which NRC issues an Environmental Assessment and Draft Finding of No Significant Impact for modification of an exemption from certain NRC licensing requirements for special nuclear material for EnergySolutions, LLC, Clive, UT. This action is necessary to correct an erroneous reference.

FOR FURTHER INFORMATION CONTACT: Michael T. Lesar, Chief, Rulemaking and Directives Branch, Office of Administration, U.S. Nuclear Regulatory Commission, Telephone 301–492–3663, e-mail *Michael.Lesar@nrc.gov.*

SUPPLEMENTARY INFORMATION: In FR Doc. E9–24208, published on October 7, 2009, on page 51622, in the center column, in the SUMMARY paragraph, 22nd line, ''WCS'' is corrected to read ''Energy*Solutions''.*

Dated at Rockville, Maryland, this 9th day of October 2009.

For the Nuclear Regulatory Commission.

Michael T. Lesar,

Chief, Rules and Directives Branch, Office of Administration.

[FR Doc. E9–24772 Filed 10–14–09; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 70–7005; NRC–2009–0283]

Issuance of Environmental Assessment and Final Finding of No Significant Impact for Modification of Exemption From Certain NRC Licensing Requirements for Special Nuclear Material for Waste Control Specialists, LLC, Andrews County, TX

AGENCY: Nuclear Regulatory Commission.

ACTION: Environmental Assessment and Final Finding of No Significant Impact.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) has prepared an Environmental Assessment for the issuance of an Order under Section 274(f) of the Atomic Energy Act that would modify an Order issued to Waste Control Specialists, LLC (WCS) on November 5, 2004. In accordance with 10 CFR 51.33, the NRC prepared a draft Finding of No Significant Impact (FONSI) for public review and comment that was issued on July 9, 2009 (74 FR 34983). The public comment period closed on August 10, 2009. NRC received comments from one resident of Texas. The current action is in response to a request by WCS dated December 10, 2007. The November 5, 2004 Order was published in the **Federal Register** on November 12, 2004 (69 FR 65468). The November 5, 2004 Order, which modified an initial Order issued to WCS on November 21, 2001, exempted WCS from certain NRC regulations and permitted WCS, under specified conditions, to possess waste containing special nuclear material (SNM), in greater quantities than specified in 10 CFR Part 150, at WCS's facility located in Andrews County, Texas, without obtaining an NRC license pursuant to 10 CFR part 70.

FOR FURTHER INFORMATION CONTACT: Nishka Devaser, Project Manager, Environmental and Performance Assessment Directorate, Division of Waste Management and Environmental Protection, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555. Telephone: (301) 415–5196; Fax number: (301) 415–5369; e-mail: *nishka.devaser@nrc.gov.*

NRC's Agency-Wide Documents Access and Management System (ADAMS): Publicly available documents created or received at the NRC are available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html.* From this page, the public can gain entry into ADAMS, which provides text and image files of NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC's Public Document Room reference staff at 1–899–397–4209, 301–415–4737, or by e-mail to *pdr.resource@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Environmental Assessment

Background

As stated above, the 2004 Order exempted WCS from certain NRC regulations and permitted WCS, under specified conditions, to possess waste containing SNM, in greater quantities than specified in 10 CFR Part 150, at WCS's facility located in Andrews County, Texas, without obtaining a NRC license pursuant to 10 CFR part 70. The 2004 Order permits WCS to possess SNM without regard for mass. Rather than relying on mass to ensure criticality safety, concentration-based limits were applied, such that accumulations of SNM at or below these concentration limits would not pose a criticality safety concern. The methodology used to establish these limits is discussed in two Safety

Evaluation Reports (SERs) prepared by NRC in support of the initial Order issued in November 2001 and an amended Order issued in November 2004.

In its December 2007 request, WCS seeks NRC approval to modify the conditions of the 2004 Order to: Discontinue confirmation sampling upon receipt of waste that WCS verifies is adequately characterized by a waste generator to be uniform and which contains less than one-thousandth of the SNM concentration limits presented in Condition 1; and to meet the confirmatory sampling requirements of Condition 7 of the Order for sealed sources using surface smear surveys. By letter dated January 22, 2008, the NRC informed WCS that it would also clarify Condition 2, which states that waste must not contain ''pure forms'' of chemicals containing carbon, fluorine, magnesium, or bismuth in bulk quantities. As a result of its review of WCS' December 10, 2007 request, the NRC, upon its own initiative, is clarifying the requirements for spatial uniformity of SNM concentrations in the waste, as described in Conditions 1, 6, and 7 of the Order. In addition, NRC is revising Condition 4 of the Order, which limits the amount of highly water soluble SNM WCS may possess.

Site and Facility Description

WCS operates a 5.4 km^2 (1,338-acre) hazardous waste disposal facility and a hazardous waste, low-level radioactive waste (LLW), and mixed waste (MW) processing and storage facility in western Andrews County, TX and eastern Lea County, NM. The WCS facility is located near the southwestern edge of the Southern High Plains where surface elevations range from about 1,040 to 1,070 meters (3,415 to 3,500 ft) above mean sea level. The site lies on a broad topographic ridge that forms a surface water drainage divide between the Pecos and Colorado Rivers. The region receives approximately 23 cm (9 inches) of rain annually and is atop a solid base of Triassic red bed clay (Hydraulic Conductivity: 10^{-8} cm/s, [3 $\times 10^{-5}$ ft/day]) with the first regional groundwater, which is not potable and too salty for irrigation use, found 180–210 m (600–700 ft) below the surface.

The primary land use within an eight-kilometer (five-mile) radius of the WCS facility is grazing and ranching. Future water uses in the area will include industrial, domestic, livestock, and agricultural purposes. Oil and gas exploration and production activities have also been conducted in the vicinity of the WCS facility. Other businesses in proximity to the site include the Wallach Quarry (crushed stone, sand and gravel) and Sundance, Inc. (oil recovery and solids disposal), both located about 1.6 kilometers (one mile) west of the facility. The Lea County Landfill is located approximately 1.6 kilometers (one mile) southwest of the facility. In addition, construction of the Louisiana Enrichment Services (LES) uranium enrichment facility is currently underway in Lea County, NM and is located approximately 1.6 kilometers (one mile) west of the WCS facility.

Major structures at the WCS facility include:

- On-site rail spur and rail-unloading facility for hazardous waste only;
- Maintenance Building;
- Administration building with analytical and radiological laboratories;
- Container Storage Building;
- Stabilization and Mixed Waste Treatment (Combined) Building;
- Bulk/Bin Storage Units;
- RCRA subtitle C landfill;
- Ten-acre storage area for low-specific-activity (LSA) waste;
- 11e(2) byproduct material landfill Facility (*Authorized May 2008—under construction);*
- Federal LLW/MW landfill Facility (license issuance pending);
- Texas Compact LLW landfill Facility (license issuance pending); and
- Chemical oxidation (Proposed).

Licenses and Permits Issued Under Various Federal and State Laws

On January 14, 2009, WCS received a licensing order that denied hearing requests, and allowed a license for disposal of Low Level Waste (LLW) to be issued once ownership in fee can be demonstrated by the applicant. The LLW disposal license may not be issued, signed, or granted until surface and mineral ownership can be demonstrated. WCS has proposed two separate LLW disposal facilities:

1. The compact waste disposal facility (CWF) would be allowed to accept LLW as defined in Section 401.004 of the Texas Health and Safety Code for commercial disposal of compact waste; and

2. The Federal Waste Facility (FWF) would be allowed to accept LLW that is the responsibility of the federal government under the Low-Level Radioactive Waste Policy Act, as amended by the Low-Level Radioactive Waste Policy Amendments Act of 1985.

The LLW land disposal facilities have the following limits in the pending license:

- 736,238 m^3 (962,963 yd^3) of LLW and MW generated/owned by the Federal government of which approximately 229,366 m^3 (300,000 yd^3) is expected to be canister disposal and 506,872 m^3 (662,963 yd^3) is expected to be non-canister (bulk) disposal; and
- 65,412 m^3 (85,556 yd^3) of LLW generated within the Texas Compact.

Other WCS permits and authorizations are summarized below:

Byproduct Material Disposal Facility License

- *Issued:* May 29, 2008, by the Texas Commission on Environmental Quality (TCEQ).
- *Authorization:* Receipt and disposal of byproduct material as defined in Title 25 of the Texas Administrative Code, Section 289.260(c)(4).
- Authorization covers dry, discrete solid objects and containerized bulk (*i.e.,* soil or soil-like) byproduct material received by road only (no rail).
- Containers shall be flexible or rigid drums, pails, boxes, sacks, or similar containers that are sealed and do not tear, split, or rupture upon handling, placement, and compaction in the disposal unit, or lose their structural strength and integrity when contacting water. Acceptable containers include (but are not limited to) U.S. Department of Transportation (U.S. DOT) containers. Containers shall not contain free liquids or more than 15% void space.

Low Level Radioactive Waste Treatment, Processing & Storage License (License R04971)

- *Issued:* February 1997.
- *Amended:* April 29, 2009 by the TCEQ.
- *Authorization:* Treatment, processing, and storage of low-level radioactive wastes shipped by road only (including Greater Than Class C (GTCC), sealed sources, solids, and liquids).
- November 5, 2004—Exemption from Part 70 (Special Nuclear Material (SNM) concentration-based limitations).

Industrial Solid Waste and Hazardous Waste Storage, Processing, and Disposal Resource Conservation and Recovery Act Wastes (RCRA) Permit

- *Issued:* August 5, 1994 by the Texas National Resource Conservation Commission (TNRCC).
- *Renewed:* October 5, 2005 by the TCEQ.
- *Authorization:* Treatment, storage, and land disposal of over 2,000 RCRA waste codes.
- WCS holds a RCRA part B equivalent permit to receive ignitable, corrosive, toxic, and select reactive hazardous waste.

Texas Pollutant Discharge Elimination System Permit

- *Issued:* December 2, 1999 by TCEQ.

• *Renewed:* May 31, 2005.
• *Authorization:* Treatment and discharge of liquid wastes.

Toxic Substances Control Act Land Disposal Authorization

• *Issued:* November 22, 1999 by the United States Environmental Protection Agency (EPA).
• *Renewed:* September 19, 2005 by the EPA.
• *Authorization:* Treatment, storage, and land disposal of Toxic Substances Control Act (TSCA) wastes, including polychlorinated biphenyl (PCB) and PCB contaminated materials such as debris, spill solids, transformers (drained and flushed), and transformer carcasses.
• PCB liquids are acceptable for bulking and off-site treatment.

Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)

• March 21, 1997 letter from EPA, Region 6.
• *Authorization:* EPA determination under 40 CFR 300.440 that the WCS facility is acceptable for receipt of hazardous substances, pollutants or contaminants from CERCLA response actions.

Under the State and Federal permits and authorizations described above, WCS is authorized to use the following waste treatment technologies:

• Chemical oxidation.
• Chemical reduction.
• Deactivation.
• Micro- and macro-encapsulation (debris only).
• Neutralization.
• Stabilization.
• Controlled reaction.

Waste shipments are received in a variety of sealed packages such as standard 208-liter (55-gallon) steel drums, rectangular steel boxes, intermodal, roll-offs, waste generator-designed canisters, or from a list of 400 radioactive material packages certified by the DOE for transport by road only. The facility is accessible by rail or nearby interstate highway. It can accommodate over 110 rail cars within its secured and guarded fence perimeter. It has a ten-kilometer (approximately six-mile) private rail spur leading to the site and on-site rail and truck off-loading capabilities. Although rail facilities are available on-site, radioactive waste is currently not authorized to be received at the site by rail.

Review Scope

The purpose of this EA is to assess the environmental impacts of WCS's December 10, 2007, request to modify its 2004 Order and additional actions taken by NRC staff to:

(1) Clarify Condition 2 of the November 2004 Order;
(2) Clarify the requirements for spatial uniformity of the waste; and
(3) Revise Condition 4 of the 2004 Order, which limits the amount of highly water soluble SNM WCS may possess.

This EA does not approve nor deny the requested action. A separate SER has been prepared in support of approval of the requested action. The 2004 Order is only applicable to activities authorized by TCEQ License R04971 for processing and storage of LLW.

Proposed Action

The proposed action is to grant WCS's December 10, 2007, request to modify the conditions of the 2004 Order, with certain additional modifications. As modified by NRC staff, the proposed action is to discontinue confirmation sampling upon receipt of waste that WCS verifies is adequately characterized by a waste generator to be uniform and which contains less than one-tenth of the SNM concentration limits presented in Condition 1, and to discontinue the confirmatory sampling requirements of Condition 7 of the 2004 Order for sealed sources. By letter dated January 22, 2008, the NRC informed WCS that it would also clarify Condition 2, which states that waste must not contain ''pure forms'' of chemicals containing carbon, fluorine, magnesium, or bismuth in bulk quantities. The NRC is also clarifying the requirements for spatial uniformity of SNM concentrations in the waste, as described in Conditions 1, 6, and 7 of the 2004 Order, and revising Condition 4 of the 2004 Order, that limits the amount of highly water soluble SNM WCS may possess pursuant to TCEQ License R04971 for processing and storage of LLW.

Purpose and Need for Proposed Action

WCS is making this request as a result of two issues it has identified with the implementation of the 2004 Order. The first issue pertains to the potential for WCS workers to receive radiation dose without commensurate benefit to overall public and worker safety. This issue arises when certain high dose rate and debris waste is received by WCS and WCS workers, in accordance with the requirements of the 2004 Order, are in close proximity to, or in contact with, the waste for the purpose of taking confirmatory samples to measure SNM concentrations in the waste, even when the SNM concentration in these wastes are known by other means to be very low.

The second issue identified by WCS also pertains to how the confirmatory sampling requirements of the Order should be applied to sealed sources. WCS states that direct confirmatory sampling is not practical, and recommends that it perform surface smear surveys in lieu of destructive direct sampling.

In its December 10, 2007 request, WCS also informed the NRC that it plans to accept bulk quantities of waste containing very low concentrations of SNM that have been homogeneously commingled by the generator with inert compounds so that the final waste no longer contains just SNM or ''pure forms'' of carbon, fluorine, magnesium, and bismuth. Condition 2 of the November 2004 Order prohibits receipt of ''pure forms'' of these chemicals. In its review of this information, the NRC determined that Condition 2 of the November 2004 Order should be more clearly stated. As noted in a letter to WCS dated January 22, 2008, the NRC stated that it finds no criticality safety concerns with the waste that WCS plans to accept, provided the waste is less than 40 percent magnesium fluoride by volume and less then 50 percent magnesium fluoride by weight. In its January 22, 2008 letter, the NRC also stated that it plans to clarify the meaning of Condition 2 in this modification to the 2004 Order.

During review of the proposed changes requested by WCS, the NRC staff also decided to clarify the requirements for spatial uniformity of SNM concentrations in waste received by WCS contained within Conditions 1, 6, and 7 of the 2004 Order. The spatial uniformity requirement in Condition 1 states that, ''The SNM must be homogeneously distributed throughout the waste. If the SNM is not homogeneously distributed, then the limiting concentrations must not be exceeded on average in any contiguous mass of 600 kilograms.'' This requirement is based on an NRC nuclear criticality safety evaluation described in the SER for the November 2001 Order. However, there is a second requirement in Conditions 6 and 7 of the 2004 Order, that prescribe a statistical test for spatial uniformity that would be performed on sample results. The statistical test states that waste is non-homogeneous when the maximum sample result, that cannot exceed the limits in Condition 1, and minimum testing values performed by the generator, is greater than five times the average value. The definition of spatial uniformity in Condition 1 has a technical basis founded on principles of

nuclear criticality safety. The requirement in Condition 6 and 7 does not. Therefore, the NRC is removing the second requirement contained in Conditions 6 and 7 and making conforming changes to the remainder of the Order.

The NRC is also revising Condition 4 of the 2004 Order, as described in a separate Safety Evaluation Report, to:

(1) Eliminate the individual package mass limits for highly water soluble SNM, because 10 CFR part 71 and 49 CFR provide sufficient regulation of packaging and transportation of fissile materials, from which this Order does not exempt WCS; and

(2) Impose a limit on the total mass of highly water soluble SNM that may be possessed pursuant to this Order to amounts less than those of SNM of low strategic significance, as defined in 10 CFR 73.2.

Therefore, the purpose and need for the proposed action is four-fold:

(1) To revise and clarify certain requirements of the November 2004 Order to address potential worker safety concerns associated with the implementation of waste generator and WCS confirmatory sampling requirements;

(2) To clarify the prohibition on the presence of certain chemicals contained in the waste, as stated in Condition 2 of the 2004 Order;

(3) To clarify the requirements in the 2004 Order for spatial uniformity of SNM concentrations in waste; and

(4) To revise Condition 4, which pertains to limits on highly water soluble forms of SNM.

Alternatives

In addition to the proposed action, the NRC considered one alternative. The alternative action was to deny WCS' request and thus not revise the Order (*i.e.,* the no-action alternative).

Environmental Impacts of No Action Alternative:

For the no-action alternative, the environmental impacts would be the same as those evaluated in the EA that supports the 2004 Order. The 2004 EA concluded that the 2004 Order would have no significant radiological or non-radiological environmental impacts. However, as noted above, the current confirmatory sampling requirement for high dose and debris waste may result in doses to workers without a commensurate benefit to overall nuclear safety.

Environmental Impacts of Proposed Action

With regard to the confirmatory sampling requirements of the November 2004 Order, and as described further in the SER for the current modification to the Order, the NRC believes that when SNM concentrations in waste are expected to be below 10% of the limits in Condition 1, as determined by a waste generator in support of the written certification required by Condition 6, the radiation hazard to workers involved in both generator sampling and WCS confirmatory waste sampling activities will, in many cases, outweigh the benefit to criticality safety. As a result, the NRC, in consultation with WCS and the TCEQ, will remove the graded-approach to sampling requirements from the Order, in favor of a simpler threshold for sampling requirements, which applies to both the generator and WCS, at 10% of the Condition 1 limits.

No detrimental environmental impacts are expected as a result of modifying the waste generator and confirmatory sampling requirements of the Order. Sampling requirements do not alter in any way the types, amounts, or characteristics of wastes received at the facility. As a result, there would be no substantive changes in the handling, storage, or treatment of wastes at the facility. The change in sampling requirements is not expected to significantly alter the need for labor resources at WCS. However, as further described in the SER for this modified Order, there is a benefit to overall worker radiological safety as a result of reducing generator and WCS confirmatory sampling requirements for high dose rate and debris waste containing low concentrations of SNM, and not requiring destructive direct sampling of sealed sources.

No detrimental environmental impacts are expected as a result of clarifying Condition 2 of the Order. As described further in the SER, Condition 2 is modified such that specific mass limits for carbon, fluorine and bismuth in the waste are provided in lieu of a vague general prohibition on ''pure forms'' of magnesium, carbon, fluorine and bismuth. This clarification is not expected to significantly alter the types, amounts, or characteristics of wastes received at the facility. In addition, worker radiation doses are not expected to change as a result of a change in specific mass limits for carbon, fluorine and bismuth. As a result, there would be little or no substantive changes in the handling, storage, or treatment of wastes at the facility.

No detrimental environmental impacts are expected as a result of clarifying the requirements for spatial uniformity of SNM concentrations in wastes received at WCS. No changes are made to either the Condition 1 SNM concentration limits, or the maximum contiguous mass of waste over which the limiting concentrations of Condition 1 must be met (*i.e.,* 600 kilograms). Therefore, these modifications to the 2004 Order do not alter in any way the types, amounts, or characteristics of wastes received at the facility, and worker doses would remain unchanged. As a result, there would be no substantive changes in the handling, storage, or treatment of wastes at the facility.

No detrimental environmental impacts are expected as a result of revising the requirements for highly water soluble forms of SNM in wastes received at WCS. There is a reduction of the risk of container leaks involving highly water soluble forms of SNM, given that the Order now limits the total possession of highly water soluble forms of SNM to amounts of SNM less than SNM of low strategic significance, as defined by 10 CFR 73.2. As a result, there would be no substantive changes in the handling, storage, or treatment of wastes at the facility, and no significant changes in radiation hazards to workers.

Other conditions of the Order would remain unchanged. As before, WCS is permitted to possess SNM without regard for mass, except that possession of highly water soluble forms of SNM is limited to amounts of SNM less than SNM of low strategic significance, as defined by 10 CFR 73.2. To ensure criticality safety, an SNM concentration limit is applied to wastes containing both soluble and insoluble forms, such that accumulations of SNM at or below this concentration limit would not pose a criticality safety concern.

Effluent releases and potential doses to the public are regulated by the State of Texas and are not anticipated to change as a result of this action. WCS will continue to conduct its radiation protection program with an emphasis on maintaining doses as low as reasonably achievable. Occupational exposure is expected to remain within regulatory limits, and may decrease as a result of eliminating sampling intervals for high dose rate and debris waste.

The proposed action would not result in any changes in the transportation impacts identified in the 2001 EA. All other environmental impacts would be the same as evaluated in the EAs that support the 2001 and 2004 Orders.

Agencies and Persons Consulted

A draft copy of this EA was provided to officials from the Texas Commission on Environmental Quality (TCEQ). By e-mails dated March 11 and April 14, 2009, the TCEQ recommended certain

changes to clarify the descriptions of certain WCS facilities, to identify the correct State agencies having authority in certain areas, and to clarify the status of the pending LLW disposal facility license. The NRC staff has modified the EA to address the TCEQ comments.

The proposed action does not involve the development of additional land. Hence, the NRC has determined that the proposed action will not affect listed species or critical habitat. Therefore, no further consultation is required under Section 7 of the Endangered Species Act. Likewise, the NRC staff has determined that the proposed action does not have the potential to adversely affect cultural resources. Therefore, no consultation is required under Section 106 of the National Historic Preservation Act.

Public Comments

During a 30-day public comment period that ended August 10, 2009, NRC received comments from Ms. Laray Polk, a resident of Texas (ADAMS Accession Number ML092240577). Ms. Polk expressed concerns that the WCS site is ''unsuitable for disposal of uranium byproduct and low-level waste.'' Though she acknowledges one purpose for amending the Order was to reduce worker radiation doses, Ms. Polk expressed concerns regarding adequate protection of groundwater resources, stating that the ''overall proposal to permanently dispose of the SNM and LLRW at WCS is of a greater determent [sic] to a larger population.'' Specifically, she also expresses concerns that a complex system of aquifers underlies the WCS site, which she describes as a system of ''contiguous hydrologically connected units.'' Ms. Polk further states that the hydrogeology of the site is ''sufficiently complex as to halt disposal of these materials until the mapping incongruities can be resolved by way of an unbiased team of hydrologists and geologists.''

As noted in the section of the EA titled ''Review Scope,'' the amended Order applies only to activities authorized by TCEQ License R04971 for processing and storage of LLW. The Order does not apply to disposal of LLW. Therefore, since processing and storage of LLW occurs above ground in facilities for which liquid and air effluent controls are required, the staff does not believe that amendments to the Order considered in this EA will have significant adverse affects on groundwater quality at the WCS site.

II. Draft Finding of No Significant Impact

The NRC has concluded that the proposed action to grant a modification to WCS' exemption from the requirements of 10 CFR part 70 is, pursuant to 10 CFR 70.17, authorized by law and will not endanger life or property or the common defense and security and is otherwise in the public interest.

The NRC has prepared this EA in support of the proposed action to modify WCS' November 2004 Order, which grants an exemption from the requirements of 10 CFR Part 70. On the basis of this EA, NRC has concluded that there are no significant environmental impacts and the issuance of a modified Order does not warrant the preparation of an Environmental Impact Statement. Accordingly, it has been determined that a Finding of No Significant Impact is appropriate.

III. Further Information

Documents related to this action, including the application for amendment and supporting documentation, are available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html.* From this site, you can access the NRC's ADAMS, which provides text and image files of NRC's public documents. The ADAMS accession numbers for the documents related to this notice are:

Document description	*Accession number*
January 2009 Safety Evaluation Report	ML081550674
January 22, 2008, NRC acknowledgement of WCS request	ML080150622
December 10, 2007, WCS request for modification to Order	ML073550638
November 2004 Letter to WCS re: SNM exemption request	ML043020621
November 2001 Letter to WCS re: SNM exemption request	ML030130085

If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC's Public Document Room (PDR) Reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr@nrc.gov.*

These documents may also be viewed electronically on the public computers located at the NRC's PDR, O1 F21, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852. The PDR reproduction contractor will copy documents for a fee.

Dated at Rockville, Maryland, this 7th day of October 2009.

For the U.S. Nuclear Regulatory Commission.

Patrice M. Bubar,

Deputy Director, Environmental Protection and Performance Assessment Directorate, Division of Waste Management and Environmental Protection, Office of Federal and State Materials and Environmental Management Programs.

[FR Doc. E9–24774 Filed 10–14–09; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards (ACRS) Subcommittee Meeting on Planning and Procedures; Notice of Meeting

The ACRS Subcommittee on Planning and Procedures will hold a meeting on November 4, 2009, Room T2–B3, 11545 Rockville Pike, Rockville, Maryland.

The entire meeting will be open to public attendance, with the exception of a portion that may be closed pursuant to 5 U.S.C. 552b(c)(2) and (6) to discuss organizational and personnel matters that relate solely to the internal personnel rules and practices of the ACRS, and information the release of which would constitute a clearly unwarranted invasion of personal privacy.

The agenda for the subject meeting shall be as follows:

Wednesday, November 4, 2009, 12 p.m.–1 p.m.

The Subcommittee will discuss proposed ACRS activities and related matters. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Officer, Mr. Sam Duraiswamy, (*Telephone:* 301–415–7364, *E-mail: Sam.Duraiswamy@nrc.gov*) five days prior to the meeting, if possible, so that appropriate arrangements can be made. Electronic recordings will be permitted only during those portions of the meeting that are open to the public. Detailed procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on October 6, 2008, (73 FR 58268–58269).

Further information regarding this meeting can be obtained by contacting the Designated Federal Official between 7:30 a.m. and 4 p.m. (ET). Persons planning to attend this meeting are urged to contact the above named individual at least two working days prior to the meeting to be advised of any potential changes in the agenda.

Dated: October 8, 2009.

Antonio F. Dias,

Chief, Reactor Safety Branch B, Advisory Committee on Reactor Safeguards.

[FR Doc. E9–24771 Filed 10–14–09; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards (ACRS) Meeting of the ACRS Subcommittee; Notice of Meeting

The ACRS Subcommittee on Radiation Protection and Nuclear Materials will hold a meeting on November 4, 2009, Room T2–B3, 11545 Rockville Pike, Rockville, Maryland.

The meeting will be open to public attendance.

The agenda for the subject meeting shall be as follows:

Wednesday, November 4, 2009—1:30 p.m.–5 p.m.

The Subcommittee will review proposed changes to NUREG–1520 ''Standard Review Plan for Review of a License Application for a Fuel Cycle Facility.'' The Subcommittee will hear presentations by and hold discussions with NRC staff and other interested persons regarding this matter. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official, Dr. John H. Flack, (telephone: 301–415–0426, e-mail: *John.Flack@nrc.gov)* five days prior to the meeting, if possible, so that appropriate arrangements can be made. Thirty-five hard copies of each presentation or handout should be provided to the Designated Federal Official 30 minutes before the meeting. In addition, one electronic copy of each presentation should be e-mailed to the Designated Federal Official 1 day before the meeting. If an electronic copy cannot be provided within this timeframe, presenters should provide the Designated Federal Official with a CD containing each presentation at least 30 minutes before the meeting. Electronic recordings will be permitted. Detailed procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on October 6, 2008 (73 FR 58268–58269).

Further information regarding this meeting can be obtained by contacting the Designated Federal Official between 7 a.m. and 3:45 p.m. (ET). Persons planning to attend this meeting are urged to contact the above named individual at least two working days prior to the meeting to be advised of any potential changes to the agenda.

Dated: October 7, 2009.

Antonio F. Dias,

Chief, Reactor Safety Branch B, Advisory Committee on Reactor Safeguards.

[FR Doc. E9–24782 Filed 10–14–09; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards (ACRS) Meeting of the ACRS Subcommittee; Notice of Meeting

The ACRS U.S. Evolutionary Power Reactor (EPR) Subcommittee will hold a meeting on November 3, 2009, 11545 Rockville Pike, T2–B3, Rockville, Maryland.

The entire meeting will be open to public attendance.

The agenda for the subject meeting shall be as follows:

Tuesday, November 3, 2009, 8:30 a.m.–5 p.m.

The Subcommittee will review selected chapters of the Safety Evaluation with Open Items concerning the U.S. EPR Design Certification Application. The Subcommittee will hear presentations by and hold discussions with representatives of AREVA, the NRC staff and other interested persons regarding this matter. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official, Mr. Derek Widmayer (Telephone 301–415–7366, E-mail: *Derek.Widmayer@nrc.gov*) five days prior to the meeting, if possible, so that appropriate arrangements can be made. Thirty-five hard copies of each presentation or handout should be provided to the Designated Federal Official 30 minutes before the meeting. In addition, one electronic copy of each presentation should be e-mailed to the Designated Federal Official 1 day before the meeting. If an electronic copy cannot be provided within this timeframe, presenters should provide the Designated Federal Official with a CD containing each presentation at least 30 minutes before the meeting. Electronic recordings will be permitted. Detailed procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on October 6, 2008 (73 FR 58268–58269).

Further information regarding this meeting can be obtained by contacting the Designated Federal Official between 8 a.m. and 5:15 p.m. (ET). Persons planning to attend this meeting are urged to contact the above named individual at least two working days prior to the meeting to be advised of any potential changes to the agenda.

Dated: October 8, 2009.

Antonio Dias,

Chief, Reactor Safety Branch B, Advisory Committee on Reactor Safeguards.

[FR Doc. E9–24781 Filed 10–14–09; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2009–0455]

Notice of Opportunity for Public Comment on the Proposed Models for Plant-Specific Adoption of Technical Specification Task Force Traveler-508, Revision 1, ''Revise Control Room Habitability Actions To Address Lessons Learned From TSTF–448 Implementation''

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of opportunity for public comment.

SUMMARY: The NRC is requesting public comment on the enclosed proposed model safety evaluation, model no significant hazards consideration determination, and model application for plant-specific adoption of Technical Specification Task Force (TSTF) Traveler-508, Revision 1, ''Revise Control Room Habitability Actions to Address Lessons Learned from TSTF–448 Implementation.'' The TSTF Traveler-508, Revision 1, is available in the Agencywide Documents Access Management System (ADAMS) under Accession Number ML091690643. The proposed changes would revise Technical Specification (TS) [3.7.10, ''Control Room Emergency Filtration System]'' the Bases for TS [3.7.10], and TS [5.5.18], ''Control Room Envelope Habitability Program,'' to pursue TS improvements consistent with the justification in TSTF–448, Revision 3, ''Control Room Habitability,'' while addressing inconsistencies with TSTF Traveler-448. This model safety evaluation will facilitate expedited approval of plant-specific adoption of TSTF Traveler-508, Revision 1.

DATES: Comment period expires November 16, 2009. Comments received after this date will be considered, if it is practical to do so, but the Commission is able to ensure consideration only for comments received on or before this date.

ADDRESSES: You may submit comments by any one of the following methods. Please include Docket ID NRC–2009–0455 in the subject line of your comments. Comments submitted in writing or in electronic form will be posted on the NRC Web site and on the Federal rulemaking Web site Regulations.gov. Because your comments will not be edited to remove any identifying or contact information, the NRC cautions you against including any information in your submission that you do not want to be publicly disclosed.

The NRC requests that any party soliciting or aggregating comments received from other persons for submission to the NRC inform those persons that the NRC will not edit their comments to remove any identifying or contact information, and therefore, they should not include any information in their comments that they do not want publicly disclosed.

Federal Rulemaking Web site: Go to *http://www.regulations.gov* and search for documents filed under Docket ID NRC–2009–0455. Address questions about NRC dockets to Carol Gallagher, 301–492–3668; e-mail *Carol.Gallagher@nrc.gov*.

Mail comments to: Michael T. Lesar, Chief, Rulemaking and Directives Branch (RDB), Division of Administrative Services, Office of Administration, Mail Stop: TWB–05–B01M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, or by fax to RDB at (301) 492–3446.

You can access publicly available documents related to this notice using the following methods:

NRC's Public Document Room (PDR): The public may examine and have copied for a fee publicly available documents at the NRC's PDR, Public File Area O1 F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland.

NRC's Agencywide Documents Access and Management System (ADAMS): Publicly available documents created or received at the NRC are available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html*. From this page, the public can gain entry into ADAMS, which provides text and image files of NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC's PDR reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr.resource@nrc.gov*. The Proposed Model Safety Evaluation for Plant-Specific Adoption of TSTF Traveler-508, Revision 1, is available electronically under ADAMS Accession Number ML092570577.

Federal Rulemaking Web site: Public comments and supporting materials related to this notice can be found at *http://www.regulations.gov* by searching on Docket ID: NRC–2009–0455.

FOR FURTHER INFORMATION CONTACT: Ms. Michelle C. Honcharik, Senior Project Manager, Special Projects Branch, Mail Stop: O–12D1, Division of Policy and Rulemaking, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone 301–415–1774 or e-mail at *michelle.honcharik@nrc.gov*. For technical questions please contact Mr. Matthew Hamm, Reactor Systems Engineer, Technical Specifications Branch, Division of Inspection and Regional Support, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone 301–415–1472 or e-mail at *matthew.hamm@nrc.gov*.

SUPPLEMENTARY INFORMATION:

Background

This notice provides an opportunity for the public to comment on proposed changes to the Standard TS (STS) after a preliminary assessment and finding by the NRC staff that the agency will likely offer the changes for adoption by licensees. This notice solicits comment on a proposed change to the STS that modifies the TS. The NRC staff will evaluate any comments received for the proposed change to the STS and reconsider the change or announce the availability of the change for adoption by licensees. Licensees opting to apply for this TS change are responsible for reviewing the NRC staff's evaluation, referencing the applicable technical justifications, and providing any necessary plant-specific information. The NRC will process and note each amendment application responding to the notice of availability according to applicable NRC rules and procedures.

Applicability

TSTF Traveler-508, Revision 1, is applicable to pressurized and boiling water reactors. The Traveler revises the TS and TS Bases for TS [3.7.10] Condition B, TS [3.7.10] Condition [E], and TS [5.5.18], ''Control Room Habitability Program.''

The proposed change does not prevent licensees from requesting an alternate approach or proposing changes other than those proposed in TSTF Traveler-508, Revision 1. However, significant deviations from the approach recommended in this notice or the inclusion of additional changes to the license require additional NRC staff review. This may increase the time and resources needed for the review or result in NRC staff rejection of the LAR. Licensees desiring significant deviations or additional changes should instead submit an LAR that does not claim to adopt TSTF Traveler-508, Revision 1.

Dated at Rockville, Maryland, this 1st day of October 2009.

For the Nuclear Regulatory Commission.

Stacey L. Rosenberg,

Chief, Special Projects Branch, Division of Policy and Rulemaking, Office of Nuclear Reactor Regulation.

The following example of an application was prepared by the NRC staff to facilitate the adoption of technical specifications task force (TSTF) Traveler-508, Revision 1, ''Revise control room habitability actions to address lessons learned from TSTF–448 implementation.'' The model provides the expected level of detail and content for an application to adopt Traveler-508, Revision 1. Licensees remain responsible for ensuring that their actual application fulfills their administrative requirements as well as NRC regulations.

U.S. Nuclear Regulatory Commission,
Document Control Desk,
Washington, DC 20555.

Subject: PLANT NAME
DOCKET NO. 50–[xxx]
APPLICATION FOR TECHNICAL SPECIFICATION IMPROVEMENT TO ADOPT TSTF TRAVELER–508, REVISION 1, ''REVISE CONTROL ROOM HABITABILITY ACTIONS TO ADDRESS LESSONS LEARNED FROM TSTF–448 IMPLEMENTATION.

Dear Sir or Madam:

In accordance with the provisions of Section 50.90 of Title 10 of the *Code of Federal Regulations* (10 CFR), [LICENSEE] is submitting a request for an amendment to the Technical Specifications (TS) for [PLANT NAME, UNIT NOS.]. The proposed changes would address inconsistencies in [PLANT NAME] TS due to the adoption of TSTF Traveler-448, Revision 3, TS changes. The changes are consistent with NRC-approved Industry Technical Specification Task Force (TSTF) Standard Technical Specification Change Traveler-508 Revision 1. The availability of this TS improvement was announced in the **Federal Register** on [DATE] ([ ] FR [ ]) as part of the consolidated line item improvement process (CLIIP).

Attachment 1 provides a description of the proposed change. Attachment 2 provides the existing TS pages marked to show the proposed change. Attachment 3 provides the existing TS Bases pages marked up to show the proposed change. Attachment 4 provides the proposed TS changes in final typed format. Attachment 5 provides the proposed TS Bases changes in final typed format.

[LICENSEE] requests approval of the proposed license amendment by [DATE], with the amendment being implemented [BY DATE OR WITHIN X DAYS].

In accordance with 10 CFR 50.91, ''Notice for Public Comment; State Consultation,'' a copy of this application, with attachments, is being provided to the designated [STATE] Official.

I declare [or certify, verify, state] under penalty of perjury that the foregoing is true and correct.

Executed on [Date] [Signature]

If you should have any questions about this submittal, please contact [NAME, TELEPHONE NUMBER].

Sincerely,

[Name, Title]

Attachments: 1. Evaluation of Proposed Change
2. Proposed Technical Specification Changes (Mark-Up)
3. Proposed Technical Specification Bases Changes (Mark-Up)
4. Proposed Technical Specification Change (Re-Typed)
5. Proposed Technical Specification Bases Changes (Re-Typed)

cc: [NRR Project Manager]
[Regional Office]
[Resident Inspector]
[State Contact]
Robert Elliot, NRR/DIRS/ITSB Branch Chief.

Attachment 1—Evaluation of Proposed Change

1.0 Description

This letter is a request to amend Operating License(s) [LICENSE NUMBER(S)] for [PLANT/UNIT NAME(S)]. The proposed changes would revise Technical Specification (TS) [3.7.10, ''Control Room Emergency Filtration System]'' the Bases for TS [3.7.10], and TS [5.5.18], ''Control Room Envelope Habitability Program,'' to pursue TS improvements consistent with the justification in Technical Specification Task Force (TSTF) change Traveler-448, Revision 3, ''Control Room Habitability,'' while addressing inconsistencies with TSTF–448.

TSTF Traveler-508, Revision 1, ''Revise Control Room Habitability Actions to Address Lessons Learned from TSTF–448 Implementation,'' was announced for availability in the **Federal Register** on [DATE] as part of the consolidated line item improvement process (CLIIP).

2.0 Proposed Changes

Consistent with NRC-approved TSTF Traveler-508, Revision 1, the following changes are proposed for TS [3.7.10] Condition B:

- Delete the mode restrictions in the Condition statement.
- Add new Required Action B.[2] which requires immediate suspension of movement of [recently] irradiated fuel.
- [add new Required Action B.[3], which requires immediate initiation of actions to suspend OPDRVs.]
- Renumber Required Actions in Condition B.
- Change language in renumbered Required Action B.[4] from, ''verify mitigating actions ensure CRE occupant exposures to radiological, chemical, and smoke hazards will not exceed limits.'' to ''verify mitigating actions ensure CRE occupant radiological exposures will not exceed limits, and CRE occupants are protected from chemical and smoke hazards.''

Consistent with NRC-approved TSTF Traveler-508, Revision 1, the following changes are proposed for TS [3.7.10] Condition [E]:

- Add the phrase ''for conditions other than Condition B.'' to the end of the first Condition statement.
- Change the second Condition statement to ''[Required Actions and associated Completion Times of Condition B not met [in MODE 5 or 6, or] during movement of [recently] irradiated fuel assemblies./Required Actions and associated Completion Times of Condition B not met during movement of [recently] irradiated fuel assemblies in the [secondary/primary or secondary] containment or during OPDRVs.]''

Consistent with NRC-approved TSTF Traveler-508, Revision 1, the following changes are proposed for TS [5.5.18], ''Control Room Habitability Program'':

- Revise the last sentence of Paragraph [d] of TS [5.5.18], ''Control Room Habitability Program'' from ''The results shall be trended and used as part of the [18] month assessment of the CRE boundary.'' to ''The results shall be trended and used as part of the periodic assessment of the CRE boundary.''

This application is being made in accordance with the CLIIP. [LICENSEE] is [not] proposing variations or deviations from the TS changes described in TSTF Traveler-508, Revision 1, or the NRC staff's model safety evaluation published on [DATE] ([ ] FR [ ]) as part of the CLIIP Notice of Availability. [Discuss any differences with TSTF Traveler-508, Revision 1, and the effect of any changes on the NRC staff's model safety evaluation.]

3.0 Background

The background for this application is as stated in the model safety evaluation in NRC's Notice of Availability published on [DATE] ([ ] FR [ ]) and TSTF Traveler-508, Revision 1.

4.0 Technical Analysis

[LICENSEE] has reviewed TSTF Traveler-508, Revision 1, and the model safety evaluation published on [DATE] ([ ] FR [ ]) as part of the CLIIP Notice of Availability. [LICENSEE] has concluded that the justifications presented in TSTF Traveler-508, Revision 1, and the model safety evaluation prepared by the NRC staff are applicable to [PLANT, UNIT NOS.], and justify this amendment for the incorporation of the changes to the [PLANT] TS.

[LICENSEE] [will] adopt[ed] and implement[ed] changes to the TS for [PLANT, UNIT NOS.] based on TSTF Traveler-448, Revision 3, [on DATE—or—concurrent with adoption and

implementation of TS changes based on TSTF Traveler-508, Revision 1].

[Provide discussion and justification for any plant-specific items not addressed in the NRC staff's model safety evaluation.]

5.0 Regulatory Analysis

5.1 No Significant Hazards Determination

[LICENSEE] has reviewed the no significant hazards determination published on [DATE] ([ ] FR [ ]) as part of the CLIIP Notice of Availability. [LICENSEE] and has concluded that the determination presented in the notice is applicable to [PLANT, UNIT NO.]. [LICENSEE] has evaluated the proposed changes to the TS using the criteria in 10 CFR 50.92 and has determined that the proposed changes do not involve a significant hazards consideration. An analysis of the issue of no significant hazards consideration is presented below:

[LICENSEE INSERT ANALYSIS HERE.]

5.2 Applicable Regulatory Requirements/Criteria

A description of this proposed change and its relationship to applicable regulatory requirements and guidance was provided in the NRC Notice of Availability published on [DATE] ([ ] FR [ ]), and TSTF–508, Revision 1. [LICENSEE] has reviewed the NRC staff's model safety evaluation published on [DATE] ([ ] FR[ ]) as part of the CLIIP Notice of Availability and concluded that the regulatory evaluation section is applicable to [PLANT, UNIT NO.]

6.0 Environmental Evaluation

[LICENSEE] has reviewed the environmental consideration included in the model SE published in the **Federal Register** on [DATE] ([ ] FR [ ]) as part of the CLIIP. [LICENSEE] has concluded that the staff's findings presented therein are applicable to [PLANT] and the determination is hereby incorporated by reference for this application.

The proposed change would change a requirement with respect to installation or use of a facility component located within the restricted area, as defined in 10 CFR part 20, and would change an inspection or surveillance requirement. However, the proposed change does not involve (i) a significant hazards consideration, (ii) a significant change in the types or significant increase in the amounts of any effluent that may be released offsite, or (iii) a significant increase in individual or cumulative occupational radiation exposure. Accordingly, the proposed change meets the eligibility criterion for categorical exclusion set forth in 10 CFR 51.22(c)(9). Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared in connection with the proposed change.

7.0 References

1. **Federal Register** Notice, Notice of Availability published on [DATE] ([ ] FR [ ]).
2. TSTF Traveler-508, Revision 1, ''Revise Control Room Habitability Actions to Address Lessons Learned from TSTF–448 Implementation.''
[3. Other References]

Proposed Model Safety Evaluation for Plant-Specific Adoption of TSTF Traveler-508, Revision 1, ''Revise Control Room Habitability Actions To Address Lessons Learned From TSTF–448 Implementation''

1.0 Introduction

By letter dated [DATE], [LICENSEE] (the licensee) proposed changes to the technical specifications (TS) for [PLANT NAME]. The proposed changes would allow [PLANT NAME] to address inconsistencies in Technical Specification Task Force (TSTF) Improved Standard Technical Specification (STS) Change Traveler-448, Revision 3.

The proposed changes would revise TS [3.7.10] Condition B as follows:

- Delete the mode restrictions in the Condition statement.
- Add new Required Action B.[2] which requires immediate suspension of movement of [recently] irradiated fuel.
- [add new Required Action B.[3], which requires immediate initiation of actions to suspend OPDRVs.]
- Renumber Required Actions in Condition B.
- Change language in renumbered Required Action B.[4] from, ''verify mitigating actions ensure CRE occupant exposures to radiological, chemical, and smoke hazards will not exceed limits.'' to ''verify mitigating actions ensure CRE occupant radiological exposures will not exceed limits, and CRE occupants are protected from chemical and smoke hazards.''

The proposed changes would revise TS [3.7.10] Condition [E] as follows:

- Add the phrase ''for conditions other than Condition B.'' to the end of the first Condition statement.
- Change the second Condition statement to ''[Required Actions and associated Completion Times of Condition B not met [in MODE 5 or 6, or] during movement of [recently] irradiated fuel assemblies./Required Actions and associated Completion Times of Condition B not met during movement of [recently] irradiated fuel assemblies in the [secondary/primary or secondary] containment or during OPDRVs.]''

The proposed changes would revise TS [5.5.18], ''Control Room Habitability Program'' as follows:

- Revise the last sentence of paragraph [d] of TS [5.5.18], ''Control Room Habitability Program'' from ''The results shall be trended and used as part of the [18] month assessment of the CRE boundary.'' to ''The results shall be trended and used as part of the periodic assessment of the CRE boundary.''

The licensee stated that the application is consistent with NRC-approved Revision 1 to TSTF Traveler-508, Revise Control Room Habitability Actions to Address Lessons Learned from TSTF–448 Implementation.'' [Discuss any differences with TSTF–508, Revision 1.] The availability of this TS improvement was announced in the **Federal Register** on [Date] ([ ] FR [ ]) as part of the consolidated line item improvement process (CLIIP).

2.0 Regulatory Evaluation

Section 182a of the Atomic Energy Act (the ''Act'') requires applicants for nuclear power plant operating licenses to include TS as part of the license. The TS ensure the operational capability of structures, systems and components that are required to protect the health and safety of the public. The Commission's regulatory requirements related to the content of the TS are contained in Title 10 of the *Code of Federal Regulations* (10 CFR) Section 50.36. This regulation requires that the TS include items in the following specific categories: (1) Safety limits, limiting safety systems settings, and limiting control settings (10 CFR 50.36(c).(1)); (2) limiting conditions for operation (10 CFR 50.36(c).(2)); (3) surveillance requirements (10 CFR 50.36(c)(3)); (4) design features (10 CFR 50.36(c)(4)); and (5) administrative controls (10 CFR 50.36(c).(5)).

In general, there are two classes of changes to TS: (1) Changes needed to reflect modifications to the design basis (TS are derived from the design basis), and (2) voluntary changes to take advantage of the evolution in policy and guidance as to the required content and preferred format of TS over time. This amendment deals with the second class of changes.

Licensees may revise the TS to adopt current improved STS format and content provided that plant-specific review supports a finding of continued

adequate safety because: (1) The change is editorial, administrative or provides clarification (*i.e.*, no requirements are materially altered); (2) the change is more restrictive than the licensee's current requirement; or (3) the change is less restrictive than the licensee's current requirement, but nonetheless still affords adequate assurance of safety when judged against current regulatory standards. The detailed application of this general framework, and additional specialized guidance, are discussed in Section 3.0 in the context of specific proposed changes.

3.0 Technical Evaluation

The NRC staff has found changes made by TSTF Traveler-508, Revision 1, to the STS, as amended by TSTF Traveler-448, Revision 3, to satisfy applicable regulatory requirements, as described above in Section 2.0. The NRC staff reviewed the licensee's proposed TS changes against the corresponding changes made by TSTF Traveler-508, Revision 1.

3.1 Proposed Changes

The NRC staff compared the proposed TS changes to the STS and the STS markups and evaluations in TSTF Traveler-508. [The NRC staff verified that differences from the STS as amended by TSTF Traveler-448 were adequately justified on the basis of plant-specific design or retention of current licensing basis.] The NRC staff also reviewed the proposed changes to the TS Bases for consistency with the STS Bases and the plant-specific design and licensing bases, although approval of the TS Bases is not a condition for accepting the proposed amendment.

3.2 TS [3.7.10, ''Control Room Emergency Ventilation System (CREVS)] Condition B

As stated in Section 1.0, the licensee proposed several changes to Condition B. The first proposed change would delete the phrase ''in MODE 1, 2, 3, or 4'' from the Condition B statement. This change would mean the licensee would have to complete the Required Actions of Condition B within the associated Completion Times while in all MODES and situations listed in the APPLICABILITY statement. The licensee also proposed adding new Required Action B.2 and a Note as well as renumbering Required Actions B.2 and B.3. New Required Action B.2 requires the licensee to immediately suspend movement of [recently] irradiated fuel assemblies when one or more [CREVS] is inoperable due to an inoperable Control Room Envelope (CRE) boundary. The Note above new Required Action B.[2] states ''Not required following completion of Required Action B.[3].'' [The licensee also proposed adding new Required Action B.3 and a Note. New Required Action B.3 requires the licensee to immediately initiate action to suspend Operations with the Potential to Drain the Reactor Vessel (OPDRVs) when one or more [CREVS] is inoperable due to an inoperable Control Room Envelope (CRE) boundary. The Note above new Required Action B.3 states ''Not required following completion of Required Action B.[4].] Finally, the licensee proposed rewording the renumbered Required Action [3] from ''Verify mitigating actions ensure CRE occupant exposures to radiological, chemical, and smoke hazards will not exceed limits'' to ''Verify mitigating actions ensure CRE occupant radiological exposures will not exceed limits, and CRE occupants are protected from chemical and smoke hazards.''

The NRC staff reviewed the licensee's proposed TS changes. The NRC staff determined that the removal of MODE restrictions and the addition of the [two] new Required Action[s] constituted a relaxation compared to the STS as amended by TSTF Traveler-448. The NRC staff also determined that the STS as amended by TSTF Traveler-448 were overly restrictive in that movement of [irradiated] fuel [and OPDRVs] is [are] not allowed when a CRE is inoperable, even if compensatory measures are taken to confirm CRE occupants will be protected in the event of a Design Basis Accident (DBA). The NRC staff determined that the relaxation is justified and acceptable because the addition of the new Required Action[s] ensure that CRE occupants would continue to be protected from radiological, chemical, and smoke hazards during the time a CRE may be inoperable. The NRC staff also determined that changing the language of Required Action B.[3] was acceptable since quantifiable limits on smoke and chemicals hazards do not exist in the safety evaluation for TSTF Traveler-448, and the proposed change addresses the inconsistency between the STS as amended by TSTF Traveler-448 and the model safety evaluation for TSTF Traveler-448.

3.3 TS [3.7.10, ''Control Room Emergency Ventilation System (CREVS)''] Condition [E]

The licensee proposed rewording the two condition statements separated by the *OR* operator that make up Condition [E] of TS [3.7.10]. The proposed changes are necessary to make the conditions consistent with the removal of the MODE restrictions of Condition B. Condition [E] is currently worded as such: ''[Two CREVS trains inoperable [in MODE 5 or 6, or] during movement of [recently] irradiated fuel assemblies [in the secondary containment or during OPDRVs] *OR* One or more CREVS trains inoperable due to an inoperable CRE boundary [in MODE 5 or 6, or] during movement of [recently] irradiated fuel assemblies [in the secondary containment or during OPDRVs].'' The proposed rewording is: ''[Two CREVS trains inoperable [in MODE 5 or 6, or] during movement of [recently] irradiated fuel assemblies [in the secondary containment or during OPDRVs] for reasons other than Condition B *OR* Required Actions and associated Completion Times of Condition B not met [in MODE 5 or 6, or] during movement of [recently] irradiated fuel assemblies [in the secondary containment or during OPDRVs].''

The NRC staff reviewed the proposed rewording of Condition [E] and determined that the rewording was editorial because it was necessary to maintain consistency with the changes made to Condition B and no requirements or restrictions on operations were altered. Therefore the proposed changes are acceptable.

3.4 S [5.5.18], ''Control Room Habitability Program''

The licensee proposed replacing the term ''18 month'' with the term ''periodic'' in the last sentence of TS [5.5.18] Paragraph d. The NRC staff determined that the term ''18 month'' in the last sentence of Paragraph d of TS [5.518] was inconsistent with the licensee's Control Room Habitability Program. The NRC staff determined that the STS, as amended by TSTF Traveler-448 incorrectly used the term ''18 month'' to describe the assessment referred to in the last sentence of Paragraph d of the Control Room Habitability Program. The NRC staff determined that the proposed change is editorial since no requirements are materially altered and the change will address an inconsistency in TSTF Traveler-448. Therefore the change is acceptable.

4.0 State Consultation

In accordance with the Commission's regulations, the [STATE NAME] State official was notified of the proposed issuance of the amendment. The State official had [(1) no comments or (2) the following comments—with subsequent disposition by the NRC staff].

5.0 Environmental Consideration

The amendment[s] change[s] a requirement with respect to the installation or use of a facility component located within the restricted area as defined in 10 CFR part 20 or surveillance requirements. The NRC staff has determined that the amendment involves no significant increase in the amounts, and no significant change in the types, of any effluents that may be released offsite, and that there is no significant increase in individual or cumulative occupational radiation exposure. The Commission has previously issued a proposed finding that the amendment involves no significant hazards consideration and there has been no public comment on such finding published [DATE] ([ ] FR [ ]). Accordingly, the amendment meets the eligibility criteria for categorical exclusion set forth in 10 CFR 51.22(c)(9). Pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared in connection with the issuance of the amendment.

6.0 Conclusion

The NRC staff has concluded, based on the considerations discussed above, that: (1) There is reasonable assurance that the health and safety of the public will not be endangered by operation in the proposed manner; (2) such activities will be conducted in compliance with the Commission's regulations; and (3) the issuance of the amendments will not be inimical to the common defense and security or to the health and safety of the public.

7.0 References

1. License Amendment Request dated [DATE], [Title of Amendment Request], ADAMS Accession No. [MLXXXXXXXXX].
2. **Federal Register** Notice of Availability for TSTF Traveler-448 Revision 3, ''Control Room Habitability,'' dated January 17, 2007 (72 FR 2022).
3. **Federal Register** Notice of Availability for TSTF Traveler-508, Revision 1, ''Revise Control Room Habitability Actions to Address Lessons Learned from TSTF–448 Implementation,'' dated [DATE] ([ ] FR [ ]).].

Proposed Model No Significant Hazards Consideration Determination for Plant-Specific Adoption of TSTF Traveler-508, Revision 1, ''Revise Control Room Habitability Actions To Address Lessons Learned From TSTF–448 Implementation''

Description of Amendment Request: [Plant name] requests adoption of an approved change to the standard technical specifications (STS), as amended by Technical Specification Task Force (TSTF) Standard Technical Specification Change Traveler-448, Revision 3, ''Control Room Habitability'' and TSTF Traveler-508, Revision 1, ''Revise Control Room Habitability Actions to Address Lessons Learned from TSTF–448 Implementation.'' TSTF Traveler-508, Revision 1, revised the STS, as previously amended by TSTF Traveler-448, Revision 3, to address inconsistencies with TSTF Traveler-448, Revision 3. The licensee's proposed changes are consistent with NRC-approved TSTF Traveler-508, Revision 1.

Basis for proposed no significant hazards consideration determination: As required by Title10 of the *Code of Federal Regulations* (10 CFR) Section 50.91(a), the [LICENSEE] analysis of the issue of no significant hazards consideration is presented below:

Criterion 1: Does the Proposed Change Involve a Significant Increase in the Probability or Consequences of an Accident Previously Evaluated?

Response: No.

The proposed changes do not adversely affect accident initiators or precursors nor alter the design assumptions, conditions, or configuration of the facility. The proposed changes do not alter or prevent the ability of structures, systems, and components (SSCs) to perform their intended function to mitigate the consequences of an initiating event within the assumed acceptance limits. This is a revision to the TSs for the control room ventilation system, which is a mitigation system designed to minimize unfiltered air inleakage into the control room envelope (CRE) and to filter the CRE atmosphere to protect the CRE occupants following accidents previously analyzed. An important part of the system is the CRE boundary. Under the proposed change, the movement of irradiated fuel and operations with the potential to drain the reactor vessel may be resumed following confirmation that the CRE occupants will be protected in the event of a DBA. This ensures that the consequences of an accident previously evaluation are not significantly increased. The CRE ventilation system is not an initiator or precursor to any accident previously evaluated. Therefore, the probability of any accident previously evaluated is not increased. The consequences of an accident during the proposed Actions are not significantly increased as the Actions require verification that the CRE occupants are protected by the required mitigating actions.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

Criterion 2: Does the Proposed Change Create the Possibility of a New or Different Kind of Accident from any Previously Evaluated?

Response: No.

This revision will not impact the accident analysis. The changes will not alter the requirements of the CRE ventilation system or its function during accident conditions. No new or different accidents result from performing the new surveillance or following the new program. The changes do not involve a physical alteration of the plant (*i.e.,* no new or different type of equipment will be installed) or a significant change in the methods governing normal plant operation. The changes do not alter assumptions made in the safety analysis. The proposed changes are consistent with the safety analysis assumptions and current plant operating practice.

Therefore, the proposed amendment does not create the possibility of a new or different kind of accident from any accident previously evaluated.

Criterion 3: Does the Proposed Change Involve a Significant Reduction in the Margin of Safety?

Response: No.

The proposed changes do 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 these changes. The proposed changes will not result in plant operation in a configuration outside the design basis. Compensatory measures are required to be established in order to maintain plant operation in a configuration that is within the design basis. The proposed changes do not adversely affect systems that respond to safely shutdown the plant and to maintain the plant in a safe shutdown condition.

Therefore, the proposed amendment would not involve a significant reduction in a margin of safety.

Based on the NRC staff's review of the licensee's analysis, the NRC staff concludes that the proposed amendment presents no significant hazards consideration under the standards set forth in 10 CFR 50.92(c) and, accordingly, a finding of ''no significant hazards consideration'' is justified.

[FR Doc. E9–24773 Filed 10–14–09; 8:45 am]

BILLING CODE 7590–01–P

OFFICE OF PERSONNEL MANAGEMENT

[(OMB Control No. 3206–0138; Form RI 30–9)]

Submission for OMB Review; Comment Request for Review of a Revised Information Collection

AGENCY: Office of Personnel Management.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, May 22, 1995), this notice announces that the Office of Personnel Management (OPM) has submitted to the Office of Management and Budget (OMB) a request for review of a revised information collection. This information collection, ''Reinstatement of Disability Annuity Previously Terminated Because of Restoration to Earning Capacity'' (OMB Control No. 3206–0138; Form RI 30–9), informs former disability annuitants of their right to request restoration under title 5, U.S.C. Sections 8337 and 8455. It also specifies the conditions to be met and the documentation required for a person to request reinstatement.

We estimate 200 forms are completed annually. The form takes approximately 60 minutes to respond, including a medical examination. The annual estimated burden is 200 hours. Burden may vary depending on the time required for a medical examination.

For copies of this proposal, contact Cyrus S. Benson on (202) 606–4808, FAX (202) 606–0910 or via E-mail to *Cyrus.Benson@opm.gov.* Please include a mailing address with your request.

DATES: Comments on this proposal should be received within 30 calendar days from the date of this publication.

ADDRESSES: Send or deliver comments to—

James K. Freiert, Deputy Assistant Director, Retirement Services Program, Center for Retirement and Insurance Services, U.S. Office of Personnel Management, 1900 E Street, NW., Room 3305, Washington, DC 20415–3500; and

OMB Desk Officer, Office of Information & Regulatory Affairs, Office of Management and Budget, New Executive Office Building, NW., 725 17th Street, NW., Room 10235, Washington, DC 20503.

For information regarding administrative coordination contact: Cyrus S. Benson, Team Leader, Publications Team, RIS Support Services/Support Group, U.S. Office of Personnel Management, 1900 E Street, NW., Room 4H28, Washington, DC 20415, (202) 606–0623.

Office of Personnel Management.

John Berry,

Director.

[FR Doc. E9–24849 Filed 10–14–09; 8:45 am]

BILLING CODE 6325–P

OFFICE OF PERSONNEL MANAGEMENT

[OMB Control No. 3206–0042; RI 25–15]

Submission for OMB Review; Request for Review of a Revised Information Collection

AGENCY: Office of Personnel Management.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, May 22, 1995 and 5 CFR 1320), this notice announces that the Office of Personnel Management (OPM) has submitted to the Office of Management and Budget (OMB) a request for review of a revised information collection. This information collection, ''Notice of Change in Student's Status'' (OMB Control No. 3206–0042; Form RI 25–15), is used to collect sufficient information from adult children of deceased Federal employees or annuitants to assure that the child continues to be eligible for payments from OPM.

We estimate 2,500 certifications are processed annually. Each form takes approximately 20 minutes to complete. The annual estimated burden is 835 hours.

For copies of this proposal, contact Cyrus S. Benson by telephone (202) 606–4808, FAX (202) 606–0910 or by e-mail to *Cyrus.Benson@opm.gov.* Please include a mailing address with your request.

DATES: Comments on this proposal should be received within 30 calendar days from the date of this publication.

ADDRESSES: Send or deliver comments to—

James K. Freiert, Deputy Assistant Director, Retirement Services Program, Center for Retirement and Insurance Services, U.S. Office of Personnel Management, 1900 E Street, NW., Room 3305, Washington, DC 20415–3500; and

OPM Desk Officer, Office of Information & Regulatory Affairs, Office of Management and Budget, New Executive Office Building, 725 17th Street, NW., Room 10235, Washington, DC 20503.

For information regarding administrative coordination contact: Cyrus S. Benson, Team Leader, Publications Team, RIS Support Services/Support Group, U.S. Office of Personnel Management, 1900 E Street, NW., Room 4H28, Washington, DC 20415, (202) 606–0623.

Office of Personnel Management.

John Berry,

Director.

[FR Doc. E9–24850 Filed 10–14–09; 8:45 am]

BILLING CODE 6325–38–P

RAILROAD RETIREMENT BOARD

Sunshine Act

Notification of Item Added to the Agenda, U.S. Railroad Retirement Board

On October 9, 2009, by recorded vote the Board has voted to add the following item to its agenda for the October 14, 2009:

(2) Employer Status Determination (Decision on Reconsideration)—Trinity Railway Express—Train Dispatching—Herzog Transit Services, Inc.

The person to contact for more information is Beatrice Ezerski, Secretary to the Board, Phone No. 312–751–4920.

Dated: October 9, 2009.

Beatrice Ezerski,

Secretary to the Board.

[FR Doc. E9–24904 Filed 10–13–09; 11:15 am]

BILLING CODE 7905–01–P

SMALL BUSINESS ADMINISTRATION

Telegraph Hill Partners SBIC, L.P., License No. 09/79–0453; Notice Seeking Exemption Under Section 312 of the Small Business Investment Act, Conflicts of Interest

Notice is hereby given that Telegraph Hill Partners SBIC, L.P., 360 Post Street, Suite 601, San Francisco, CA 94108, a Federal Licensee under the Small Business Investment Act of 1958, as amended (''the Act''), in connection with the financing of a small concern, has sought an exemption under Section 312 of the Act and Section 107.730, Financings which Constitute Conflicts of Interest of the Small Business Administration (''SBA'') Rules and Regulations (13 CFR 107.730). Telegraph Hill Partners SBIC, L.P. proposes to provide equity security financing to AltheaDx, Inc., 3550 Dunhill Street, San Diego, CA 92121. The financing is contemplated for working capital and general corporate purposes.

The financing is brought within the purview of § 107.730(a)(1) of the Regulations because Telegraph Hill Partners II, L.P., THP II Affiliates Fund, L.P., and THP Affiliates Fund, L.P., all Associates of Telegraph Hill Partners

SBIC, L.P., own more than ten percent of AltheaDx, Inc.

Therefore, this transaction is considered a financing of an Associate requiring an exemption. Notice is hereby given that any interested person may submit written comments on the transaction within fifteen days of the date of this publication to the Associate Administrator for Investment, U.S. Small Business Administration, 409 Third Street, SW., Washington, DC 20416.

Dated: September 24, 2009.

Sean J. Greene,

Associate Administrator for Investment.

[FR Doc. E9–24844 Filed 10–14–09; 8:45 am]

BILLING CODE 8025–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60799]

Draft 2010–2015 Strategic Plan for Securities and Exchange Commission

AGENCY: Securities and Exchange Commission.

ACTION: Request for comment.

SUMMARY: The Securities and Exchange Commission (SEC) is providing notice that it is seeking comments on its draft 2010–2015 Strategic Plan. The draft Strategic Plan includes a draft of the SEC's mission, vision, values, strategic goals, planned initiatives, and performance metrics.

DATES: Comments should be received on or before November 16, 2009.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Send an e-mail to *strategicplan@sec.gov.*

Paper Comments

- Send paper comments in triplicate to Kenneth A. Johnson, Management and Program Analyst, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–2521.

FOR FURTHER INFORMATION CONTACT: Kenneth A. Johnson, Management and Program Analyst, Office of the Executive Director, at (202) 551–4300, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–2521.

SUPPLEMENTARY INFORMATION: The draft strategic plan is available at the Commission's Web site at *http://www.sec.gov/about/secstratplan1015.htm* or by contacting Kenneth A. Johnson, Management and Program Analyst, Office of the Executive Director, at (202) 551–4300, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–2521.

Dated: October 8, 2009.

By the Commission.

Elizabeth M. Murphy,

Secretary.

[FR Doc. E9–24713 Filed 10–14–09; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60800; File No. SR–NYSEAmex–2009–66]

Self-Regulatory Organizations; NYSE Amex LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Its Schedule of Transaction Fees and Rebates

October 8, 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 September 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 Exchange. The Exchange filed this proposal pursuant to Section 19(b)(3)(A) 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 change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to (i) increase from $0.0015 per share to $0.0030 per share the rebate it provides to customers adding liquidity and (ii) increase from $0.0020 per share to $0.0025 per share the fee charged to floor brokers when taking liquidity from the Exchange. These changes will take effect on October 1, 2009. The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and *http://www.nyse.com.*

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(2).

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 currently pays a rebate of $0.0015 per share to customers providing liquidity in securities with a trading price of at least $1.00 per share. With effect from October 1, 2009, this rebate will increase to $0.0030 per share. The Exchange intends to reevaluate this rebate again in three months time and will submit an additional rule filing if it decides to change its rebate policy at that time. The description of the rebate in the 2009 NYSE Amex Price List is also amended to clarify that it applies to both displayed and non-displayed orders.

Floor brokers currently pay a fee of $0.0020 per share when taking liquidity from the Exchange. Effective October 1, 2009, this fee will be increased to $0.0025 per share.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[5] in general, and Section 6(b)(4) of the Act,[6] 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 similarly situated 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

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(4).

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)[7] of the Act and subparagraph (f)(2) of Rule 19b–4[8] 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.

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–2009–66 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–2009–66. 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 Section, 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 Exchange's principal office and on its Internet Web site at *http://www.nyse.com.* 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–2009–66 and should be submitted on or before November 5, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–24738 Filed 10–14–09; 8:45 am]

BILLING CODE 8011–01–P

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(2).

[9] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60801; File No. SR–ISE–2009–70]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Payment for Order Flow Fees

October 8, 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 September 29, 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 Exchange has designated this proposal as one establishing or changing a due, fee, or other charge imposed by ISE under 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 change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The ISE proposes to amend its payment for order flow program. The text of the proposed rule change is available on the Exchange's Web site (*http://www.ise.com*), at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the 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 currently has a payment-for-order-flow (''PFOF'') program that helps its market makers establish PFOF arrangements with an EAM in exchange for that EAM preferencing some or all of its order flow to that market maker. This program is funded through a fee paid by Exchange market makers for each customer contract they execute, and is administered by both Primary Market Makers (''PMM'')[5] and Competitive Market Makers (''CMM''),[6] depending on who the order is preferenced to.

The Exchange now proposes to adopt an administrative fee to offset its costs in administering the PFOF program. Specifically, ISE proposes to assess an

[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] *See* Securities Exchange Act Release No. 43833 (January 10, 2001), 66 FR 7822 (January 25, 2001).

[6] *See* Securities Exchange Act Release No. 53127 (January 13, 2006), 71 FR 3582 (January 23, 2006).

administrative fee of 0.45% of the total amount of funds collected each month. ISE will closely monitor the amount of funds raised by this administrative fee and amend the fee in the future if necessary, so that the fee provides sufficient funds to adequately offset ISE's costs in administering the PFOF program. The Chicago Board Options Exchange currently assesses a similar fee to administer its PFOF program. ISE proposes to implement this fee beginning on October 1, 2009. ISE is not making any other changes to its PFOF program.

2. Statutory Basis

The basis under the Securities Exchange Act of 1934 (the ''Exchange Act'') for this proposed rule change is the requirement under Section 6(b)(4) that an exchange have an equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities. In particular, the proposed fee change will allow the Exchange to offset its costs of administering its PFOF program.

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 [7] and Rule 19b–4(f)(2) [8] 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–2009–70 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–2009–70. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–ISE–2009–70 and should be submitted on or before November 5, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–24790 Filed 10–14–09; 8:45 am]

BILLING CODE 8011–01–P

[7] 15 U.S.C. 78s(b)(3)(A). [sic]

[8] 17 CFR 240.19b–4(f)(2).

[9] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice 6786]

Department of State Performance Review Board Members

In accordance with section 4314(c)(4) of 5 United States Code, the Department of State has appointed the following individuals to the Department of State Performance Review Board for career Senior Executive Service members:

Joan E. Donoghue, Principal Deputy Legal Adviser, Office of the Legal Adviser, Department of State;

Raymond D. Maxwell, Director, Bureau of Near Eastern Affairs, Department of State; (Outside Member);

James L. Millette, Deputy Assistant Secretary, Bureau of Resource Management, Department of State;

Margaret J. Pollack, Deputy Assistant Secretary, Bureau of Population, Refugees and Migration, Department of State; and

Ruth A. Whiteside, Director, Foreign Service Institute, Department of State.

Dated: October 7, 2009.

Steven A. Browning,

Acting Director General of the Foreign Service and Director of Human Resources, Department of State.

[FR Doc. E9–24823 Filed 10–14–09; 8:45 am]

BILLING CODE 4710–15–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Notice of Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits Filed Under Subpart B (Formerly Subpart Q) During the Week Ending September 19, 2009

The following Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits were filed under Subpart B (formerly Subpart Q) of the Department of Transportation's Procedural Regulations (See 14 CFR 301.201 *et. seq.*). The due date for Answers, Conforming Applications, or Motions to Modify Scope are set forth below for each application. Following the Answer period DOT may process the application

by expedited procedures. Such procedures may consist of the adoption of a show-cause order, a tentative order, or in appropriate cases a final order without further proceedings.

Docket Number: DOT–OST–2009–0222.

Date Filed: September 14, 2009.

Due Date for Answers, Conforming Applications, or Motion to Modify Scope: October 5, 2009.

Description: Application of Olympic Air Anonymos Etaireia Aeroporikon Metaforon d/b/a Olympic Air requesting a foreign air carrier permit and corresponding exemption authority to the full extent authorization by the Air Transport Agreement between the United States and the European Community and the Member States of the European Community to enable it to engage in: (i) Foreign scheduled and charter air transportation of persons, property and mail from any point or points behind any Member State of the European Union via any point or points in any Member State and via intermediate points to any point or points in the United States or beyond; (ii) foreign scheduled and charter air transportation of persons, property and mail between any point or points in the United States and any point or points in any member of the European Common Aviation Area; (iii) other charters pursuant to prior approval requirements; and (iv) transportation authorized by any additional route rights made available to European Community carriers in the future.

Docket Number: DOT–OST–2009–0224.

Date Filed: September 15, 2009.

Due Date for Answers, Conforming Applications, or Motion to Modify Scope: September 30, 2009.

Description: Application of Calm Air International LP d/b/a (''Calm Air''), a Canadian air carrier, requesting an amendment to its air carrier permit to engage in non-scheduled charter trips in foreign air transportation between Canada and the United States as more specifically set forth herein.

Renee V. Wright,

Program Manager, Docket Operations, Federal Register Liaison.

[FR Doc. E9–24783 Filed 10–14–09; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket No. PHMSA–2009–0304]

Pipeline Safety: Information Collection Activities

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, PHMSA invites comments on an information collection under Office of Management and Budget (OMB) Control No. 2137–0584, titled ''Gas and Hazardous Liquid Pipeline Safety Program Certifications.'' PHMSA will request approval from OMB for a revision of the current information collection. That revision relates to the use of on-line certification media containing questions which will improve PHMSA's ability to efficiently allocate grant monies to State programs, resulting in the creation of additional incentives for pipeline safety under the State's jurisdiction.

DATES: Interested persons are invited to submit comments on or before December 14, 2009.

ADDRESSES: Comments may be submitted in the following ways:

E-Gov Web site: http://www.regulations.gov. This site allows the public to enter comments on any **Federal Register** notice issued by any agency.

Fax: 1–202–493–2251.

Mail: Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building, Room W12–140, Washington, DC 20590–0001.

Hand Delivery: Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except on Wednesdays and Federal holidays.

Instructions: Identify the docket number, PHMSA–2009–0304, at the beginning of your comments. Note that all comments received will be posted without change to *http://dms.dot.gov*, including any personal information provided. You should know that anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.) Therefore, you may want to review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477) or visit *http://dms.dot.gov* before submitting any such comments.

Docket: For access to the docket or to read background documents or comments, go to *http://dms.dot.gov* at any time or to Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 a.m., Monday through Friday, except on Wednesdays and Federal holidays.

If you wish to receive confirmation of receipt of your written comments, please include a self-addressed, stamped postcard with the following statement: ''Comments on PHMSA–2009–0304''. The Docket Clerk will date-stamp the postcard prior to returning it to you via the U.S. mail. Please note that due to delays in the delivery of U.S. mail to Federal offices in Washington, DC, we recommend that persons consider an alternative method (Internet, fax, or professional delivery service) of submitting comments to the docket and ensuring their timely receipt at DOT.

FOR FURTHER INFORMATION CONTACT: Cameron Satterthwaite by telephone at 202–366–1319, by fax at 202–366–4566, or by mail at U.S. Department of Transportation, Pipeline and Hazardous Materials Safety Administration, 1200 New Jersey Avenue, SE., PHP–30, Washington, DC 20590–0001.

SUPPLEMENTARY INFORMATION: Section 1320.8(d), Title 5, Code of Federal Regulations requires PHMSA to provide interested members of the public and affected agencies an opportunity to comment on information collection and recordkeeping requests. This notice identifies an information collection request that PHMSA is submitting to OMB for revision under OMB Control No. 2137–0584. This information collection is contained in 49 CFR Part 198. We are proposing to revise this information collection to incorporate changes to the tools used to determine the amount of funds received by each participating State. We believe these revisions will improve PHMSA's ability to efficiently allocate grant monies to States that are currently enhancing or seeking to enhance their respective programs, thereby resulting in the creation of additional incentives for pipeline safety under the State's jurisdiction.

Gas and Hazardous Liquid Pipeline Safety Program Certifications

For the hazardous liquids program, the Office of Pipeline Safety (OPS) currently has two States with an agreement under 49 U.S.C. 60106(a) and 15 State programs that are certified under 49 U.S.C. 60105(a) with six States acting as Interstate Agents.

For the natural gas program, the Office of Pipeline Safety (OPS) currently has one State with an agreement under 49 U.S.C. 60106(a) and 51 State programs that are certified under 49 U.S.C. 60105(a) (Hawaii and Alaska are exceptions) with nine States acting as Interstate Agents.

An estimate of the revised burden is as follows:

Title: Pipeline Safety: Gas and Hazardous Liquid Pipeline Safety Program Certifications.

OMB Control Number: 2137–0584.

Type of Request: Revision of a currently approved information collection.

Abstract: A State agency participating in the pipeline safety program must maintain records to demonstrate that the agency is properly monitoring the operations of pipeline operators in that State. The State agency must also submit an annual certificate to PHMSA verifying compliance. PHMSA uses the information collected to evaluate the State's eligibility for Federal grants.

Estimated number of respondents: 67.

Estimated annual burden hours: 3,920 hours.

Frequency of collection: Annually.

Issued in Washington, DC on October 7, 2009.

John A. Gale,

Director of Regulations.

[FR Doc. E9–24838 Filed 10–14–09; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Buy America Waiver Notification

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice.

SUMMARY: This notice provides information regarding the FHWA's finding that a Buy America waiver is appropriate for the purchase of foreign butterfly valves for a Federal-aid/American Recovery and Reinvestment Act (ARRA) project for the City of Colorado Springs, Colorado.

DATES: The effective date of the waiver is October 16, 2009.

FOR FURTHER INFORMATION CONTACT: For questions about this notice, please contact Mr. Gerald Yakowenko, FHWA Office of Program Administration, (202) 366–1562, or via e-mail at *gerald.yakowenko@dot.gov.* For legal questions, please contact Mr. Michael Harkins, FHWA Office of the Chief Counsel, (202) 366–4928, or via e-mail at *michael.harkins@dot.gov.* Office hours for the FHWA are from 7:45 a.m. to 4:15 p.m., *e.t.*, Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

An electronic copy of this document may be downloaded from the **Federal Register's** home page at: *http://www.archives.gov* and the Government Printing Office's database at: *http://www.access.gpo.gov/nara.*

Background

The FHWA's Buy America policy in 23 CFR 635.410 requires a domestic manufacturing process for any steel or iron products (including protective coatings) that are permanently incorporated in a Federal-aid construction project. The regulation also provides for a waiver of the Buy America requirements when the application of such requirements would be inconsistent with the public interest or when satisfactory quality domestic steel and iron products are not sufficiently available. This notice provides information regarding the FHWA's finding that a Buy America waiver is appropriate for the acquisition of butterfly valves for the Woodmen Road Corridor Improvement Project in the City of Colorado Springs, Colorado. Specifically, the City of Colorado Springs was not able to find a domestic supplier for a 42 inch Vanessa Zero Leakage 30,000 Series Butterfly Valve. This project is funded under the American Recovery and Reinvestment Act of 2009.

In accordance with the Division I, section 126 of the ''Omnibus Appropriations Act, 2009'' (Pub. L. 111–8), the FHWA published a notice of intent to issue a waiver for the butterfly valves (*http://www.fhwa.dot.gov/construction/contracts/waivers.cfm?id=37*) on August 24, 2009. The FHWA received one comment in response to this notice which suggested that the butterfly valves may be available domestically. This comment was provided by Mr. Edward J. Schutz, Director of Sales with the Henry Pratt Company.

Mr. Adam Baker with the City of Colorado Springs contacted Mr. Shutz with the Henry Pratt Company regarding the company's products and conformance with the City of Colorado Spring's design criteria. Both parties agreed that the company's products would not meet the project specifications. A copy of the City's September 16, 2009, letter to Mr. Schutz documenting this conversation and Mr. Schutz's confirmation is available upon request.

During the 15-day comment period, the FHWA conducted an additional review to locate potential domestic manufacturers for the butterfly valves. Based on all the information available to the agency, the FHWA concludes that there are no domestic manufacturers for the specified butterfly valves. Thus, the FHWA concludes that a Buy America waiver is appropriate as provided by 23 CFR 635.410(c)(1).

In accordance with the provisions of section 117 of the SAFETEA–LU Technical Corrections Act of 2008 (Pub. L. 110–244, 122 Stat.1572), the FHWA is providing this notice as its finding that a waiver of Buy America requirements is appropriate. The FHWA invites public comment on this finding for an additional 15 days following the effective date of the finding. Comments may be submitted to the FHWA's Web site via the link provided to the City of Colorado Springs waiver page noted above.

(Authority: 23 U.S.C. 313; Pub. L. 110–161, 23 CFR 635.410)

Issued on: October 8, 2009.

King Gee,

Associate Administrator for Infrastructure.

[FR Doc. E9–24851 Filed 10–14–09; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Consensus Standards, Light-Sport Aircraft

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of availability; request for comments.

SUMMARY: This notice announces the availability of four revised consensus standards to previously accepted consensus standards relating to the provisions of the Sport Pilot and Light-Sport Aircraft rule issued July 16, 2004, and effective September 1, 2004. ASTM International Committee F37 on Light Sport Aircraft developed the revised standards with Federal Aviation Administration (FAA) participation. By this notice, the FAA finds the revised standards acceptable for certification of

the specified aircraft under the provisions of the Sport Pilot and Light-Sport Aircraft rule.

DATES: Comments must be received on or before December 14, 2009.

ADDRESSES: Comments may be mailed to: Federal Aviation Administration, Small Airplane Directorate, Programs and Procedures Branch, ACE–114, Attention: Terry Chasteen, Room 301, 901 Locust, Kansas City, Missouri 64106. Comments may also be e-mailed to: *9-ACE-AVR-LSA-Comments@faa.gov*. All comments must be marked: Consensus Standards Comments, and must specify the standard being addressed by ASTM designation and title.

FOR FURTHER INFORMATION CONTACT: Terry Chasteen, Light-Sport Aircraft Program Manager, Programs and Procedures Branch (ACE–114), Small Airplane Directorate, Aircraft Certification Service, Federal Aviation Administration, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone (816) 329–4147; e-mail: *terry.chasteen@faa.gov*.

SUPPLEMENTARY INFORMATION: This notice announces the availability of four revised consensus standards to previously accepted consensus standards relating to the provisions of the Sport Pilot and Light-Sport Aircraft rule. ASTM International Committee F37 on Light Sport Aircraft developed the new and revised standards. The FAA expects a suitable consensus standard to be reviewed at least every two years. The two-year review cycle will result in a standard revision or reapproval. A standard is issued under a fixed designation (i.e., F2244); the number immediately following the designation indicates the year of original adoption or, in the case of revision, the year of last revision. A number in parentheses indicates the year of last reapproval. A reapproval indicates a two-year review cycle completed with no technical changes. A superscript epsilon (ε) indicates an editorial change since the last revision or reapproval. A notice of availability (NOA) will only be issued for new or revised standards. Reapproved standards issued with no technical changes or standards issued with editorial changes only (*i.e.*, superscript epsilon (ε)) are considered accepted by the FAA without need for a NOA.

Comments Invited: Interested persons are invited to submit such written data, views, or arguments, as they may desire. Communications should identify the consensus standard number and be submitted to the address specified above. All communications received on or before the closing date for comments will be forwarded to ASTM International Committee F37 for consideration. The standard may be changed in light of the comments received. The FAA will address all comments received during the recurring review of the consensus standard and will participate in the consensus standard revision process.

Background: Under the provisions of the Sport Pilot and Light-Sport Aircraft rule, and revised Office of Management and Budget (OMB) Circular A–119, ''Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities'', dated February 10, 1998, industry and the FAA have been working with ASTM International to develop consensus standards for light-sport aircraft. These consensus standards satisfy the FAA's goal for airworthiness certification and a verifiable minimum safety level for light-sport aircraft. Instead of developing airworthiness standards through the rulemaking process, the FAA participates as a member of Committee F37 in developing these standards. The use of the consensus standard process assures government and industry discussion and agreement on appropriate standards for the required level of safety.

Comments on Previous Notices of Availability

In the Notice of Availability (NOA) issued on July 28, 2008, and published in the **Federal Register** on July 28, 2008, the FAA asked for public comments on the new and revised consensus standards accepted by that NOA. The comment period closed on September 26, 2008. No public comments were received regarding the standards accepted by this NOA.

Consensus Standards in This Notice of Availability

The FAA has reviewed the standards presented in this NOA for compliance with the regulatory requirements of the rule. Any light-sport aircraft issued a special light-sport airworthiness certificate, which has been designed, manufactured, operated and maintained, in accordance with this and previously accepted ASTM consensus standards provides the public with the appropriate level of safety established under the regulations. Manufacturers who choose to produce these aircraft and certificate these aircraft under 14 CFR part 21, §§ 21.190 or 21.191 are subject to the applicable consensus standard requirements. The FAA maintains a listing of all accepted standards on the FAA Web site.

The Revised Consensus Standard and Effective Period of Use

The following previously accepted consensus standards have been revised, and this NOA is accepting the later revision. Either the previous revision or the later revision may be used for the initial certification of special light-sport aircraft until April 1, 2010. This overlapping period of time will allow aircraft that have started the initial certification process using the previous revision level to complete that process. After April 1, 2010, manufacturers must use the later revision and must identify the later revision in the Statement of Compliance for initial certification of special light-sport aircraft unless the FAA publishes a specific notification otherwise. The following Consensus Standard may not be used after April 1, 2010:

ASTM Designation F2240–05, titled: Standard Specification for Manufacturer Quality Assurance Program for Powered Parachute Aircraft.

ASTM Designation F2244–05, titled: Standard Specification for Design and Performance for Powered Parachute Aircraft.

ASTM Designation F 2245–07a, titled: Standard Specification for Design and Performance of a Light Sport Airplane.

ASTM Designation F 2316–06, titled: Standard Specification for Airframe Emergency Parachutes for Light Sport Aircraft.

The Consensus Standards

The FAA finds the following revised consensus standards acceptable for certification of the specified aircraft under the provisions of the Sport Pilot and Light-Sport Aircraft rule. The consensus standards listed below may be used unless the FAA publishes a specific notification otherwise.

a. ASTM Designation F2240–08, titled: Standard Specification for Manufacturer Quality Assurance Program for Powered Parachute Aircraft.

b. ASTM Designation F2244–08, titled: Standard Specification for Design and Performance for Powered Parachute Aircraft.

c. ASTM Designation F 2245–09, titled: Standard Specification for Design and Performance of a Light Sport Airplane.

d. ASTM Designation F 2316–08, titled: Standard Specification for Airframe Emergency Parachutes for Light Sport Aircraft.

Availability

These consensus standards are copyrighted by ASTM International, 100 Barr Harbor Drive, P.O. Box C700, West Conshohocken, PA 19428–2959. Individual reprints of a standard (single or multiple copies, or special compilations and other related technical information) may be obtained by contacting ASTM at this address, or at (610) 832–9585 (phone), (610) 832–9555 (fax), through *service@astm.org* (e-mail), or through the ASTM Web site at *http://www.astm.org*. To inquire about standard content and/or membership, or about ASTM International Offices abroad, contact Daniel Schultz, Staff Manager for Committee F37 on Light Sport Aircraft: (610) 832–9716, *dschultz@astm.org*.

Issued in Kansas City, Missouri on October 1, 2009.

Scott Horn,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. E9–24746 Filed 10–14–09; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2009–0136]

Requested Administrative Waiver of the Coastwise Trade Laws

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Invitation for public comments on a requested administrative waiver of the coastwise trade laws for the vessel POCH MA HON.

SUMMARY: As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below. The complete application is given in DOT docket MARAD–2009–0136 *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388 (68 FR 23084; April 30, 2003), that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR part 388.

DATES: Submit comments on or before November 16, 2009.

ADDRESSES: Comments should refer to docket number MARAD–2009–0136 Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except Federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Joann Spittle, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue, SE., Room W21–203, Washington, DC 20590. Telephone 202–366–5979.

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel POCH MA HON is:

Intended Commercial Use of Vessel: ''Take a maximum of 6 paying passengers on sailing charters from a few hours to several days.'' *Geographic Region:* ''West Coast of Florida from Tampa Bay to Key West''.

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

Dated: October 6, 2009.

By Order of the Maritime Administrator.

Christine Gurland,

Secretary, Maritime Administration.

[FR Doc. E9–24785 Filed 10–14–09; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2009–0137]

Requested Administrative Waiver of the Coastwise Trade Laws

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Invitation for public comments on a requested administrative waiver of the Coastwise Trade Laws for the vessel WYSPA.

SUMMARY: As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below. The complete application is given in DOT docket MARAD–2009–0137 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388 (68 FR 23084; April 30, 2003), that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR part 388.

DATES: Submit comments on or before November 16, 2009.

ADDRESSES: Comments should refer to docket number MARAD–2009–0137. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. You may also send comments electronically via the

Internet at *http://www.regulations.gov*. All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except Federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Joann Spittle, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue, SE., Room W21–203, Washington, DC 20590. Telephone 202–366–5979.

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel WYSPA is:

Intended Commercial Use of Vessel: ''Charter: Bareboat Charter, Charter with Captain.''

Geographic Region: ''CA, OR, WA''.

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

Dated: October 6, 2009.

By Order of the Maritime Administrator.

Christine Gurland,

Secretary, Maritime Administration.

[FR Doc. E9–24786 Filed 10–14–09; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

Voluntary Intermodal Sealift Agreement (VISA)

AGENCY: Maritime Administration, DOT.

ACTION: Notice of open season for enrollment in the VISA program.

Introduction

The VISA program was established pursuant to section 708 of the Defense Production Act of 1950, as amended (DPA), which provides for voluntary agreements for emergency preparedness programs. VISA was approved for a two year term on January 30, 1997, and published in the **Federal Register** on February 13, 1997 (62 FR 6837). Approval is currently extended until October 1, 2009, as published in the **Federal Register** on November 7, 2007 (72 FR 62898). The Maritime Administration has requested approval from the Department of Justice (DOJ) for an extension of VISA for another two years. DOJ is currently reviewing the extension request, and we expect that approval will be forthcoming.

As implemented, the VISA program is open to U.S.-flag vessel operators of oceangoing militarily useful vessels, to include tugs and barges. An operator is defined as an owner or bareboat charterer of a vessel. Tug enrollment alone does not satisfy VISA eligibility. Operators include vessel owners and bareboat charter operators if satisfactory signed agreements are in place committing the assets of the owner to the bareboat charterer for purposes of VISA. Voyage and space charterers are not considered U.S.-flag vessel operators for purposes of VISA eligibility.

VISA Concept

The mission of VISA is to provide commercial sealift and intermodal shipping services and systems, including vessels, vessel space, intermodal systems and equipment, terminal facilities, and related management services, to the Department of Defense (DOD), as necessary, to meet national defense contingency requirements or national emergencies.

VISA provides for the staged, time-phased availability of participants' shipping services/systems to meet contingency requirements through prenegotiated contracts between the Government and participants. Such arrangements are jointly planned with the Maritime Administration, U.S. Transportation Command (USTRANSCOM), and participants in peacetime to allow effective and best valued use of commercial sealift capacity, to provide DOD assured contingency access, and to minimize commercial disruption, whenever possible.

There are three time-phased stages in the event of VISA activation. VISA Stages I and II provide for prenegotiated contracts between DOD and participants to provide sealift capacity to meet all projected DOD contingency requirements. These contracts are executed in accordance with approved DOD contracting methodologies. VISA Stage III will provide for additional capacity to DOD when Stages I and II commitments or volunteered capacity are insufficient to meet contingency requirements, and adequate shipping services from non-participants are not available through established DOD contracting practices or U.S. Government treaty agreements.

VISA Annual Enrollment Open Season

The purpose of this notice is to invite interested, qualified U.S.-flag vessel operators that are not currently enrolled in the VISA program to participate. The annual enrollment is intended to link the VISA enrollment cycle with DOD's peacetime cargo contracting to ensure eligible participants priority consideration for DOD awards of cargo.

Alignment of VISA enrollment and eligibility for VISA priority will solidify the linkage between commitment of contingency assets by VISA participants and receiving VISA priority consideration for the award of DOD peacetime cargo. This is the only planned enrollment period for carriers to join the VISA program and derive benefits for DOD peacetime contracts during the time frame of October 1, 2009 through September 30, 2010. The only exception to this open season period for VISA enrollment will be for a non-VISA carrier that reflags a vessel into U.S. registry. That carrier may submit an application to participate in the VISA program at any time upon completion of reflagging.

Advantages of Peacetime Participation

Because enrollment of carriers in the VISA program provides DOD with assured access to sealift services during contingencies based on a level of commitment, as well as a mechanism for joint planning, DOD awards peacetime cargo contracts to VISA participants on a priority basis. This applies to liner trades and charter contracts alike. Award of DOD cargoes to meet DOD peacetime and contingency requirements is made on the basis of the following priorities:

- U.S.-flag vessel capacity operated by VISA participants and U.S.-flag Vessel Sharing Agreement (VSA) capacity held by VISA participants.
- U.S.-flag vessel capacity operated by non-participants.
- Combination U.S.-flag/foreign-flag vessel capacity operated by VISA participants, and combination U.S.-flag/foreign-flag VSA capacity held by VISA participants.
- Combination U.S.-flag/foreign-flag vessel capacity operated by non-participants.
- U.S.-owned or operated foreign-flag vessel capacity and VSA capacity held by VISA participants.
- U.S.-owned or operated foreign-flag vessel capacity and VSA capacity held by non-participants.
- Foreign-owned or operated foreign-flag vessel capacity of non-participants.

Participation

Any U.S.-flag vessel operator organized under the laws of a state of the United States, or the District of Columbia, who is able and willing to commit militarily useful sealift assets and assume the related consequential risks of commercial disruption, may be eligible to participate in the VISA program. The term ''operator'' is defined in the VISA document as ''an ocean common carrier or contract carrier that owns, controls or manages vessels by which ocean transportation is provided''. Applicants wishing to become participants must provide satisfactory evidence that the vessels being committed to the VISA program are operational and that vessels are intended to be operated by the applicant in the carriage of commercial or government preference cargoes. While vessel brokers, freight forwarders and agents play an important role as a conduit to locate and secure appropriate vessels for the carriage of DOD cargo, they may not become participants in the VISA program due to lack of requisite vessel ownership or operation. However, brokers, freight forwarders and agents should encourage the carriers they represent to join the program.

Commitment

Any U.S.-flag vessel operator desiring to receive priority consideration in the award of DOD peacetime contracts must commit no less than 50 percent of its total U.S.-flag militarily useful capacity in Stage III of the VISA program. Participants operating vessels in international trade may receive top tier consideration in the award of DOD peacetime contracts by committing the minimum percentages of capacity to all three stages of VISA or bottom tier consideration by committing the minimum percentage of capacity to only Stage III of VISA. USTRANSCOM and the Maritime Administration will coordinate to ensure that the amount of sealift assets committed to Stages I and II will not have an adverse national economic impact. To minimize domestic commercial disruption, participants operating vessels exclusively in the domestic Jones Act trades are not required to commit the capacity of those U.S. domestic trading vessels to VISA Stages I and II. Overall VISA commitment requirements are based on annual enrollment.

In order to protect a U.S.-flag vessel operator's market share during contingency activation, VISA allows participants to join with other vessel operators in Carrier Coordination Agreements (CCAs) to satisfy commercial or DOD requirements. VISA provides a defense against antitrust laws in accordance with the DPA. CCAs must be submitted to the Maritime Administration for coordination with the Department of Justice for approval, before they can be utilized.

Vessel Position Reporting

If VISA applicants have the capability to track their vessels, they must state which system is used in their VISA application and will be required to provide the Maritime Administration with access to their vessel tracking systems upon approval of their VISA application. If VISA applicants do not have a tracking system, they must indicate this in their VISA application. The VISA program requires enrolled ships to comply with 46 CFR Part 307, Establishment of Mandatory Position Reporting System for Vessels.

Compensation

In addition to receiving priority in the award of DOD peacetime cargo, a participant will receive compensation during contingency activation for that capacity activated under Stage I, II and III. The amount of compensation will depend on the Stage at which capacity is activated. During enrollment, each participant must select one of several compensation methodologies. The compensation methodology selection will be completed with the appropriate DOD agency, resulting in prices in contingency contracts between DOD and the participant.

Application for VISA Participation

New applicants may apply to participate by obtaining a VISA application package (Form MA–1020 (OMB Approval No. 2133–0532)) from the Director, Office of Sealift Support, at the address indicated below. Form MA–1020 includes instructions for completing and submitting the application, blank VISA Application forms and a request for information regarding the operations and U.S. citizenship of the applicant company. A copy of the VISA document as published in the **Federal Register** on November 7, 2007, will also be provided with the package. This information is needed in order to assist the Maritime Administration in making a determination of the applicant's eligibility. An applicant company must provide an affidavit that demonstrates that the company is qualified to document a vessel under 46 U.S.C., section 12103, and that it owns, or bareboat charters and controls, oceangoing, militarily useful vessel(s) for purposes of committing assets to the VISA program.

New VISA applicants are required to submit their applications for the VISA program as described in this Notice no later than 60 days after the date of publication of this Federal Register notice. Applicants must provide the following:

- U.S. citizenship documentation;
- Copy of their Articles of Incorporation and/or By Laws;
- Copies of loadline documents from a recognized classification society to validate oceangoing vessel capability;
- U.S. Coast Guard Certificates of Documentation for all vessels in their fleet.
- Copy of Bareboat Charters, if applicable, valid through the period of enrollment, which state that the owner will not interfere with the charterer's obligation to commit chartered vessel(s) to the VISA program for the duration of the charter.
- Copy of Time Charters, valid through the period of enrollment, for tug services to barge operators, if sufficient tug service is not owned or bareboat chartered by the VISA applicant. Barge operators must provide evidence to MARAD that tug service of sufficient horsepower will be available for all barges enrolled in the VISA program.

Approved VISA participants will be responsible for ensuring that information submitted with their application remains up to date beyond the approval process. Any changes to VISA commitments must be reported to the Maritime Administration and USTRANSCOM not later than seven days after the change. If charter agreements are due to expire, participants must provide the Maritime Administration with charters that extend the charter duration for another 12 months or longer.

Once the Maritime Administration has reviewed the application and determined VISA eligibility, the Maritime Administration will sign the VISA application document which completes the eligibility phase of the VISA enrollment process.

After VISA eligibility is approved by the Maritime Administration, approved applicants are required to execute a joint VISA Enrollment Contract (VEC) with DOD [USTRANSCOM and the Military Sealift Command (MSC)] which will specify the participant's Stage III commitment, and appropriate Stage I and/or II commitments for the period October 1, 2009 through September 30, 2010. Once the VEC is completed, the applicant completes the DOD contracting process by executing a Drytime Contingency Contract (DCC)

with MSC and, if applicable, a VISA Contingency Contract (VCC) with USTRANSCOM (for Liner Operators). The Maritime Administration reserves the right to revalidate all eligibility requirements without notice.

For Additional Information and Applications Contact: Jerome D. Davis, Director, Office of Sealift Support, U.S. Maritime Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590. Telephone (202) 366–0688; Fax (202) 366–5904. Other information about the VISA can be found on the Maritime Administration's Internet Web Page at *http://www.marad.dot.gov.*

(Authority: 49 CFR 1.66)

Dated: October 8, 2009.

By Order of the Maritime Administrator.

Murray Bloom,

Acting Secretary, Maritime Administration.

[FR Doc. E9–24788 Filed 10–14–09; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF VETERANS AFFAIRS

Disciplinary Appeals Board Panel

AGENCY: Department of Veterans Affairs.

ACTION: Notice with request for comments.

SUMMARY: Section 203 of the Department of Veterans Affairs Health Care Personnel Act of 1991 (Pub. L. 102–40), dated May 7, 1991, revised the disciplinary grievance and appeal procedures for employees appointed under 38 U.S.C. 7401(1). It also required the periodic designation of employees of the Department who are qualified to serve on Disciplinary Appeals Boards. These employees constitute the Disciplinary Appeals Board panel from which Board members in a case are appointed. This notice announces that the roster of employees on the panel is available for review and comment. Employees, employee organizations, and other interested parties shall be provided, without charge, a list of the names of employees on the panel upon request and may submit comments concerning the suitability for service on the panel of any employee whose name is on the list.

DATES: Names that appear on the panel may be selected to serve on a Board or as a grievance examiner after November 16, 2009.

ADDRESSES: Requests for the list of names of employees on the panel and written comments may be directed to: Secretary of Veterans Affairs (051), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420. Requests and comments may also be faxed to (202) 273–9776.

FOR FURTHER INFORMATION CONTACT: Latoya Smith, Employee Relations Specialist (051), Office of Human Resources Management, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420. Ms. Smith may be reached at (202) 461–7975.

SUPPLEMENTARY INFORMATION: Public Law 102–40 requires that the availability of the roster be posted in the **Federal Register** periodically, and not less than annually.

Dated: October 7, 2009.

John R. Gingrich,

Chief of Staff, Department of Veterans Affairs.

[FR Doc. E9–24733 Filed 10–14–09; 8:45 am]

BILLING CODE 8320–01–P

Federal Register

Thursday,
October 15, 2009

Part II

Internal Revenue Service

26 CFR Parts 1 and 602

Measurement of Assets and Liabilities for Pension Funding Purposes; Benefit Restrictions for Underfunded Pension Plans; Final Rule

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 602

[TD 9467]

RIN 1545–BG72; RIN 1545–BH07

Measurement of Assets and Liabilities for Pension Funding Purposes; Benefit Restrictions for Underfunded Pension Plans

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations providing guidance regarding the determination of the value of plan assets and benefit liabilities for purposes of the funding requirements that apply to single employer defined benefit plans, regarding the use of certain funding balances maintained for those plans, and regarding benefit restrictions for certain underfunded defined benefit pension plans. These regulations reflect provisions added by the Pension Protection Act of 2006, as amended by the Worker, Retiree, and Employer Recovery Act of 2008. These regulations affect sponsors, administrators, participants, and beneficiaries of single employer defined benefit pension plans.

DATES: *Effective Date:* These regulations are effective on October 15, 2009.

Applicability Date: These regulations apply to plan years beginning on or after January 1, 2010.

FOR FURTHER INFORMATION CONTACT: Michael P. Brewer, Lauson C. Green, or Linda S.F. Marshall at (202) 622–6090 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collections of information contained in these final regulations have been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under control number 1545–2095. The collections of information in this final regulation are in §§ 1.430(f)–1(f), 1.430(h)(2)–1(e), 1.436–1(f), and 1.436–1(h). The information required under § 1.430(f)–1(f) is required in order for plan sponsors to make elections regarding a plan's credit balances upon occasion. The information required under § 1.430(h)(2)–1(e) is required in order for a plan sponsor to make an election to use an alternative interest rate for purposes of determining a plan's funding obligations under § 1.430(h)(2)–1. The information required under §§ 1.436–1(f) and 1.436–1(h) is required in order for a qualified defined benefit plan's enrolled actuary to provide a timely certification of the plan's adjusted funding target attainment percentage (AFTAP) for each plan year to avoid certain benefit restrictions.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

This document contains final Income Tax Regulations (26 CFR part 1) under sections 430(d), 430(f), 430(g), 430(h)(2), 430(i), and 436, as added to the Internal Revenue Code (Code) by the Pension Protection Act of 2006 (PPA '06), Public Law 109–280 (120 Stat. 780), and amended by the Worker, Retiree, and Employer Recovery Act of 2008 (WRERA '08), Public Law 110–458 (122 Stat. 5092).

Section 412 provides minimum funding requirements that generally apply for pension plans (including both defined benefit pension plans and money purchase pension plans). PPA '06 makes extensive changes to those minimum funding requirements for defined benefit plans that generally apply for plan years beginning on or after January 1, 2008. Section 430, which was added by PPA '06, specifies the minimum funding requirements that apply to single employer defined benefit pension plans (including multiple employer plans) pursuant to section 412. Section 436, which was also added by PPA '06, sets forth certain limitations on benefits that may apply to a single employer defined benefit plan based on its funded status. Neither section 430 nor section 436 applies to multiemployer plans.

Section 302 of the Employee Retirement Income Security Act of 1974, as amended (ERISA), sets forth funding rules that are parallel to those in section 412 of the Code, and section 303 of ERISA sets forth additional funding rules for single employer plans that are parallel to those in section 430 of the Code. In addition, section 206(g) of ERISA sets forth benefit limitations that are parallel to those in section 436 of the Code. Under section 101 of Reorganization Plan No. 4 of 1978 (43 FR 47713) and section 3002(c) of ERISA, the Secretary of the Treasury has interpretive jurisdiction over the subject matter addressed in these regulations for purposes of ERISA, as well as the Code. Thus, these final Treasury Department regulations issued under sections 430 and 436 of the Code apply for purposes of sections 206(g) and 303 of ERISA.

If the value of plan assets (less the sum of the plan's prefunding balance and funding standard carryover balance) is less than the funding target, section 430(a)(1) defines the minimum required contribution as the sum of the plan's target normal cost and the shortfall and waiver amortization charges for the plan year. If the value of plan assets (less the sum of the plan's prefunding balance and funding standard carryover balance) equals or exceeds the funding target, section 430(a)(2) defines the minimum required contribution as the plan's target normal cost for the plan year reduced (but not below zero) by the amount of the excess.

Under section 430(d), except as otherwise provided in section 430(i)(1) (regarding at-risk status), a plan's funding target for a plan year is the present value of all benefits accrued or earned under the plan as of the beginning of the plan year.

Prior to amendment by WRERA '08, section 430(b) defined a plan's target normal cost for a plan year as the present value of all benefits expected to accrue or be earned under the plan during the plan year (with any increase in any benefit attributable to services performed in a preceding plan year by reason of a compensation increase during the current plan year treated as having accrued during the current plan year). Section 101(b)(2) of WRERA '08 amended section 430(b) to modify the definition of a plan's target normal cost by adding the amount of plan-related expenses expected to be paid from plan assets during the plan year, and by subtracting the amount of mandatory employee contributions expected to be made during the plan year. This modification applies to plan years beginning after December 31, 2008; however, a plan sponsor is permitted to elect to apply this modification beginning with the first plan year beginning after December 31, 2007.

Under section 430(f)(3), certain funding balances—referred to as the prefunding balance and the funding standard carryover balance—are permitted to be used to reduce the otherwise applicable minimum required contribution for a plan year in certain situations. Under section 430(f)(6), the prefunding balance represents the accumulation of the contributions that

an employer makes for a plan year that exceed the minimum required contribution for the year. An employer that makes contributions for a plan year that exceed the minimum required contribution for the year is permitted in certain circumstances to use those excess contributions in order to satisfy the minimum funding requirement in a subsequent plan year. However, section 430(f)(6)(iii) provides that contributions required to avoid a benefit restriction under section 436 are disregarded for purposes of determining the extent to which contributions for a plan year exceed the minimum required contribution for the plan year. Under section 430(f)(7), the funding standard carryover balance is based on the funding standard account credit balance as determined under section 412 for a plan as of the last day of the last plan year beginning in 2007.

The treatment of these balances under section 430 reflects Congressional concern with the treatment of a funding standard account credit balance under the section 412 rules in effect prior to PPA '06. Accordingly, section 430(f)(3) sets forth a new restriction on the ability of a poorly funded plan to use the prefunding balance and the funding standard carryover balance as a credit against the minimum required contribution for a plan year. Under section 430(f)(3)(C), the prefunding balance or funding standard carryover balance can only be used for a plan year if the value of plan assets for the preceding plan year (after subtracting the prefunding balance) was at least 80 percent of the funding target (determined without regard to the at-risk rules of section 430(i)) for that preceding plan year. In addition, section 430(f)(4) requires that the prefunding balance and the funding standard carryover balance be subtracted from the value of plan assets for certain purposes (including the determination of the plan's funding target attainment percentage (FTAP), as defined under section 430(d)(2)), and section 430(f)(8) requires that the prefunding balance and the funding standard carryover balance be adjusted for actual investment return on plan assets. In order to give employers the opportunity to minimize the impact of the requirement to subtract the prefunding balance and funding standard carryover balance from plan assets, section 430(f)(5) permits an employer to elect to reduce those balances.

Section 430(g)(1) provides that all determinations made with respect to minimum required contributions for a plan year (such as the value of plan assets and liabilities) are made as of the plan's valuation date. Section 430(g)(2) provides that, other than for plans with 100 or fewer participants (determined as provided in section 430(g)(2)(B) and (C)), the valuation date for a plan year must be the first day of the plan year. Under section 430(g)(2)(B), all defined benefit pension plans (other than multiemployer plans) maintained by the employer, a predecessor employer, or by any member of the employer's controlled group are treated as a single plan for this purpose, but only participants with respect to the employer or member of the controlled group are taken into account.

Section 430(g)(3) provides rules regarding the determination of the value of plan assets for purposes of section 430. Under section 430(g)(3)(A), except as otherwise provided in section 430(g)(3)(B), the fair market value of plan assets must be used for this purpose. As an alternative to the use of fair market value, section 430(g)(3)(B) permits the use of an actuarial value of assets based on the average of fair market values, but only if such method is permitted under regulations prescribed by the Secretary, does not provide for averaging of such values over more than the period beginning on the last day of the 25th month preceding the month in which the valuation date occurs and ending on the valuation date (or a similar period in the case of a valuation date that is not the 1st day of a month), and does not result in a determination of the actuarial value of plan assets that, at any time, is lower than 90 percent or greater than 110 percent of the fair market value of plan assets as of the valuation date.

Under section 430(g)(4), if a contribution made after the valuation date for the current plan year is a contribution for a preceding plan year, the contribution is taken into account in determining the value of plan assets for the current plan year. For 2009 and future plan years, only the present value (determined as of the valuation date for the current plan year, using the plan's effective interest rate for the preceding plan year) of the contributions made for the preceding plan year is taken into account. If any contributions for the current plan year are made before the valuation date (which could only occur for a small plan with a valuation date that is not the first day of the plan year), plan assets as of the valuation date must exclude those contributions and also must exclude interest on those contributions (determined at the plan's effective interest rate for the plan year) for the period between the date of the contribution and the valuation date. Under section 430(h)(2)(A), a plan's effective interest rate for a plan year is defined as the single interest rate that, if used to determine the present value of the benefits taken into account in determining the plan's funding target for the plan year in lieu of the interest rates under section 430(h)(2), would result in an amount equal to the plan's funding target determined for the plan year under section 430(d).

Under section 430(h)(1), the determination of any present value or other computation under section 430 is to be made on the basis of actuarial assumptions and methods each of which is reasonable (taking into account the experience of the plan and reasonable expectations) and which, in combination, offer the actuary's best estimate of anticipated experience under the plan.

Section 430(h)(2) specifies the interest rates that must be used in determining a plan's target normal cost and funding target. Under section 430(h)(2)(B), present value is determined using three interest rates (segment rates) for the applicable month, each of which applies to benefit payments expected to be paid during a certain period. The first segment rate applies to benefits reasonably determined to be payable during the 5-year period beginning on the first day of the plan year. The second segment rate applies to benefits reasonably determined to be payable during the 15-year period following the initial 5-year period. The third segment rate applies to benefits reasonably determined to be payable after the end of that 15-year period.

Section 430(h)(2)(C) defines each segment rate as a single interest rate determined for a month by the Treasury Department on the basis of the corporate bond yield curve for the month. Under section 430(h)(2)(D), the corporate bond yield curve for a month is to be prescribed by the Treasury Department and is to reflect the average, for the 24-month period ending with the preceding month, of yields on investment grade corporate bonds with varying maturities that are in the top three quality levels available. Section 430(h)(2)(D)(ii) provides an alternative to the use of the three segment rates, under which the corporate bond yield curve (determined without regard to the 24 month average) is substituted for the segment rates.

Section 430(h)(2)(G) provides a transition rule for plan years beginning in 2008 and 2009 (other than for plans where the first plan year begins on or after January 1, 2008). Under this transition rule, the interest rates to be used in the valuation are based on a blend of the segment rates and the long-term corporate bond rates used for plan

years prior to the effective date of PPA '06. Under section 430(h)(2)(G)(iv), a plan sponsor may elect to have this transition rule not apply.

Section 430(i) sets forth special rules that apply to a plan that is in at-risk status. If a plan is in at-risk status, then special assumptions must be used in determining the plan's funding target and target normal cost, a loading factor is applied to the plan's liabilities in certain cases, and, under section 409A(b)(3), restrictions apply to the employer's ability to set aside assets for purposes of paying deferred compensation to a covered employee under a nonqualified deferred compensation plan.

Under section 430(i)(4), a plan is in at-risk status for a year if, for the preceding year: (1) The plan's FTAP, determined without regard to the at-risk assumptions, was less than 80 percent (with a transition rule discussed in the next sentence); and (2) the plan's FTAP, determined using the at-risk assumptions (without regard to whether the plan was in at-risk status for the preceding year), was less than 70 percent. Under a transition rule, reduced percentages apply for plan years beginning before 2011 instead of 80 percent in the first part of the test for determining at-risk status. Under section 430(i)(4), in the case of plan years beginning in 2008, the plan's FTAP for the preceding plan year is to be determined under rules provided by the Treasury Department.

Under section 430(i)(6), the at-risk rules do not apply if a plan had 500 or fewer participants on each day during the preceding plan year. For this purpose, the number of participants is determined using the same rules as apply for determining whether a plan is a small plan for purposes of eligibility for the use of a valuation date other than the first day of the plan year. If a plan is in at-risk status, the plan's funding target and target normal cost are determined (under section 430(i)(1) and (2)) using special actuarial assumptions. Under these assumptions, all employees who are not otherwise assumed to retire as of the valuation date, but who will be eligible to elect to commence benefits in the current and 10 succeeding plan years, are assumed to retire at the earliest retirement date under the plan, but not before the end of the current plan year. In addition, all employees are assumed to elect the form of retirement benefit available under the plan for each assumed retirement age that results in the highest present value.

The funding target of a plan in at-risk status for a plan year is generally the sum of: (1) The present value of all benefits accrued or earned as of the beginning of the plan year determined using the special assumptions described in this preamble; and (2) in the case of a plan that has been in at-risk status for at least 2 of the 4 preceding plan years, a loading factor. That loading factor is equal to the sum of: (1) $700 multiplied by the number of participants in the plan; plus (2) 4 percent of the funding target determined as if the plan were not in at-risk status. The target normal cost of a plan in at-risk status for a plan year is generally the sum of: (1) The present value of benefits expected to accrue or be earned under the plan during the plan year; determined using the special assumptions described in this preamble; and (2) in the case of a plan that has been in at-risk status for at least 2 of the 4 preceding plans years, a loading factor of 4 percent of the present value of all benefits under the plan that accrue, are earned, or are otherwise allocated to service for the plan year (determined as if the plan were not in at-risk status). The target normal cost of a plan in at-risk status is adjusted for plan-related expenses expected to be paid from plan assets during the plan year and mandatory employee contributions expected to be made during the plan year under the same rules that apply to plans that are not in at-risk status.

Under section 430(i)(3), the funding target of a plan in at-risk status and the target normal cost of a plan in at-risk status are never less than the respective funding target and target normal cost determined without regard to the at-risk rules. In addition, if a plan has been in at-risk status for fewer than 5 consecutive plan years, a phase-in rule applies to the determination of the funding target and the target normal cost under section 430(i)(5).

Section 401(a)(29) requires that a defined benefit plan (other than a multiemployer plan) satisfy the requirements of section 436. Section 436 sets forth a series of limitations on the accrual and payment of benefits under an underfunded plan. Under section 436(g), these limitations (other than the limitations on accelerated benefit payments under section 436(d)) do not apply to a plan for the first 5 plan years of the plan, taking into account any predecessor plan.

Section 436(b) sets forth a limitation on plant shutdown and other unpredictable contingent event benefits in situations where the plan's adjusted funding target attainment percentage (AFTAP) for the plan year is less than 60 percent or would be less than 60 percent taking into account the occurrence of the event. For this purpose, an *unpredictable contingent event benefit* means any benefit payable solely by reason of (1) a plant shutdown (or a similar event), or (2) an event other than attainment of age, performance of service, receipt or derivation of compensation, or the occurrence of death or disability. Under section 436(b)(2), the limitation does not apply for a plan year if the plan sponsor makes a specified contribution (in addition to any minimum required contribution). If the AFTAP for a plan year is less than 60 percent, then the specified contribution is equal to the amount of the increase in the plan's funding target for the plan year attributable to the occurrence of the event. If the AFTAP for a plan year is 60 percent or more but would be less than 60 percent taking into account the occurrence of the event, then the specified contribution is the amount sufficient to result in an AFTAP of 60 percent taking into account the occurrence of the event.

Under section 436(c), a plan amendment that has the effect of increasing the liabilities of the plan by reason of any increase in benefits (including changes in vesting) may not take effect if the plan's AFTAP for the plan year is less than 80 percent or would be less than 80 percent taking into account the amendment. Under section 436(c)(2), the limitation does not apply for a plan year if the plan sponsor makes a specified contribution (in addition to any minimum required contribution). If the plan's AFTAP for the plan year is less than 80 percent, then the specified contribution is equal to the amount of the increase in the plan's funding target for the plan year attributable to the amendment. If the plan's AFTAP for the plan year is 80 percent or more but would be less than 80 percent taking into account the amendment, then the specified contribution is the amount sufficient to result in an AFTAP of 80 percent taking into account the amendment. In addition, under section 436(c)(3), the limitation does not apply to an amendment that provides for a benefit increase under a formula that is not based on compensation, but only if the rate of increase does not exceed the contemporaneous rate of increase in average wages of participants covered by the amendment.

Under section 436(d), a plan is required to set forth certain limitations on accelerated benefit distributions. If the plan's AFTAP for a plan year is less than 60 percent, the plan must not make any prohibited payments after the valuation date for the plan year. If the plan's AFTAP for a plan year is at least 60 percent but is less than 80 percent, the plan must not pay any prohibited

payment to the extent the payment exceeds the lesser of (1) 50 percent of the amount otherwise payable under the plan and (2) the present value of the maximum PBGC guarantee with respect to a participant. In addition, if the plan sponsor is in bankruptcy proceedings, the plan may not pay any prohibited payment unless the plan's enrolled actuary certifies that the AFTAP of the plan is at least 100 percent. However, section 436(d) does not apply to a plan for a plan year if the terms of the plan provide for no benefit accruals with respect to any participant for the period beginning on September 1, 2005, and extending throughout the plan year.

Under section 436(d)(5), a prohibited payment is (1) any payment in excess of the monthly amount paid under a single life annuity (plus any social security supplements that are provided under the plan) to a participant or beneficiary, (2) any payment for the purchase of an irrevocable commitment from an insurer to pay benefits, or (3) any other payment specified by the Secretary by regulations.

Under section 436(e), a plan is required to provide that if the plan's AFTAP is less than 60 percent for a plan year, all benefit accruals under the plan must cease as of the valuation date for the plan year.[1] Under section 436(e)(2), the limitation ceases to apply with respect to any plan year, effective as of the first day of the plan year, if the plan sponsor makes a contribution (in addition to any minimum required contribution for the plan year) equal to the amount sufficient to result in an AFTAP of 60 percent.

Section 436(f) sets forth a series of rules relating to contributions required to avoid benefit restrictions. Under section 436(f)(1), an employer is permitted to provide security to the plan (in the form of a surety bond, cash, United States obligations that mature in 3 years or less, or other form satisfactory to the Treasury Department and the parties involved) that is treated as an asset of the plan for purposes of determining the plan's AFTAP. Under section 436(f)(2), if an employer uses the option in section 436(b)(2), 436(c)(2), or 436(e)(2) to make the specified contribution that would avoid a limitation under section 436, the specified contribution must be an actual contribution and the employer may not use a prefunding balance or funding standard carryover balance in lieu of making the specified contribution.

Section 436(f)(3) describes certain situations in which an employer is deemed to have made the election in section 430(f)(5) to reduce the plan's funding standard carryover balance or prefunding balance. Such an election has the effect of increasing the plan's AFTAP to avoid a benefit limitation under section 436 (because the result of the election is a higher asset value used to determine the AFTAP). In particular, if the limitation under section 436(d) would otherwise apply to a plan, the plan sponsor is treated as having made an election (a deemed election) to reduce any prefunding balance or funding standard carryover balance by the amount necessary to prevent the benefit limitation from applying. A comparable rule applies to the other benefit limitations under sections 436(b), 436(c), and 436(e), but only in the case of a plan maintained pursuant to a collective bargaining agreement. In any of these cases (the election with respect to the limitations under section 436(d) or a deemed election in the case of a plan maintained pursuant to a collective bargaining agreement), the deeming rule applies only if the prefunding balance and funding standard carryover balances are large enough to avoid the application of the section 436 limitation.

Section 436(h) sets forth a series of presumptions that apply during the portion of the plan year that is before the plan's enrolled actuary has certified the plan's AFTAP for the year. Under section 436(h)(1), if a plan was subject to a limitation under section 436(b), 436(c), 436(d), or 436(e) for the plan year preceding the current plan year, the plan's AFTAP for the current year is presumed to be the same as for the preceding year until the plan's enrolled actuary certifies the plan's AFTAP for the current year (or until the first day of the 10th month, if earlier). Under section 436(h)(3), if any of these limitations did not apply to the plan for the preceding year, but would have applied if the plan's AFTAP for the preceding year was 10 percentage points lower, the plan's AFTAP is presumed to be 10 percentage points lower than the AFTAP for the prior plan year as of the first day of the 4th month of the current plan year (and that day is deemed to be the plan's valuation date for purposes of applying the benefit limitations), unless the plan's enrolled actuary has certified the plan's AFTAP for the current year by that day. If the plan's enrolled actuary has not certified the plan's AFTAP by the first day of the 10th month of the current plan year, section 436(h)(2) provides that the plan's AFTAP is conclusively presumed to be less than 60 percent as of that day (and that day is deemed to be the valuation date for purposes of applying the benefit limitations).

Under section 436(i), unless the plan provides otherwise, if a limitation on prohibited payments or future benefit accruals under section 436(d) or (e) ceases to apply to a plan, those payments and benefit accruals resume, effective as of the day following the close of the limitation period.

Section 436(j) provides definitions that are used under section 436, including the definition of AFTAP. In general, a plan's AFTAP is based on the plan's FTAP for the plan year. However, the plan's AFTAP is determined by adding the aggregate amount of purchases of annuities for employees other than highly compensated employees (within the meaning of section 414(q)) made by the plan during the two preceding plan years to the numerator and the denominator of the fraction used to determine the FTAP. In addition, section 436(j)(3) provides a special rule which applies to certain well-funded plans under which the plan's FTAP for purposes of section 436 (and hence the plan's AFTAP) is determined by using the plan's assets without reduction for the prefunding balance and the funding standard carryover balance. Section 436(j)(3)(B) sets forth a transition rule for determining eligibility for this special rule.

Section 436(k), as added by WRERA '08, provides the Secretary with authority to issue special rules for the application of section 436 in the case of a plan that uses a valuation date other than the first day of the plan year.

Section 436(m) (designated section 436(k) prior to amendment by WRERA '08) provides that, for plan years that begin in 2008, the determination of the plan's FTAP for the preceding year is to be made pursuant to guidance issued by the Secretary.

Under section 101(j) of ERISA, as amended by PPA '06, the plan administrator of a single employer plan is required to provide a written notice to participants and beneficiaries within 30 days after certain specified dates. These dates include the date the plan has become subject to a restriction described in the ERISA provisions that are parallel to Code sections 436(b) and 436(d) and, in the case of a plan that is subject to the ERISA provisions that are parallel to Code section 436(e), the valuation date for the plan year for

[1] Pursuant to section 203 of WRERA, for the first plan year beginning during the period beginning on October 1, 2008, and ending on September 30, 2009, section 436(e)(1) is applied by substituting the plan's adjusted funding target attainment percentage for the preceding plan year for such percentage for such plan year but only if the adjusted funding target attainment percentage for the preceding plan year is greater.

which the plan's AFTAP is less than 60 percent (or, if earlier, the date the AFTAP is presumed to be less than 60 percent under the ERISA provisions that parallel the presumption rules in Code section 436(h)). Under section 101(j) of ERISA, the Secretary of the Treasury can specify other dates under which notice is to be provided. Any notice under section 101(j) of ERISA must be provided in writing, except that the notice may be in electronic or other form to the extent that such form is reasonably accessible to the recipient.

Sections 430 and 436 generally apply to plan years beginning on or after January 1, 2008. The applicability of section 430 for purposes of determining the minimum required contribution and the application of section 436 is delayed for certain plans in accordance with sections 104 through 106 of PPA '06.

Under section 1107 of PPA '06, a plan sponsor is permitted to delay adopting a plan amendment pursuant to statutory provisions under PPA '06 (or pursuant to any regulation issued under PPA '06) until the last day of the first plan year beginning on or after January 1, 2009 (January 1, 2011, in the case of governmental plans). If section 1107 of PPA '06 applies to an amendment of a plan, section 1107 provides that the plan does not fail to meet the anti-cutback requirements of section 411(d)(6) by reason of such amendment, except as otherwise provided by the Secretary of the Treasury.

Proposed regulations regarding the rules for funding balances under section 430(f) and the benefit restrictions for underfunded plans under section 436 were published on August 31, 2007 (REG–113891–07, 72 FR 50544). The regulations were proposed to apply to plan years beginning on or after January 1, 2008. Comments were received regarding the regulations, and a public hearing was held on January 28, 2008.

Proposed regulations regarding the measurement of assets and liabilities for pension funding purposes (generally covering the rules of sections 430(d), (g), (h)(2), and (i)) were published on December 31, 2007 (REG–139236–07, 72 FR 74215). The regulations were proposed to apply to plan years beginning on or after January 1, 2009. Comments were received regarding the regulations, and a public hearing was held on May 29, 2008.

Notice 2008–21 (2008–1 CB 431) provides that the regulations under section 430(f) and 436 will not apply to plan years beginning before January 1, 2009. See § 601.601(d)(2) relating to objectives and standards for publishing regulations, revenue rulings and revenue procedures in the Internal Revenue Bulletin. Notice 2008–21 also provides that the IRS will not challenge a reasonable interpretation of an applicable provision under section 430 or 436 for a plan year beginning in 2008 and provides transitional guidance with respect to years before the regulations are effective.

On December 23, 2008, WRERA '08 was enacted. WRERA '08 contains technical corrections and other changes to the rules of sections 430 and 436, including a modification to the asset valuation method set forth in section 430(g)(3)(B). Notice 2009–22 (2009–14 IRB 741) provides interim rules regarding the asset valuation method as modified by WRERA '08.

Explanation of Provisions

I. Overview

These regulations finalize the rules proposed in REG–113891–07 (published August 31, 2007), regarding funding balances and benefit restrictions for underfunded plans, and the rules proposed in REG–139236–07 (published December 31, 2007), regarding measurement of assets and liabilities for pension funding purposes, with certain revisions. The Treasury Department and the IRS published proposed regulations relating to other portions of the rules under section 430 (including sections 430(a), (c), and (j)) on April 15, 2008 (REG–108508–08, 72 FR 20203). Those regulations will be finalized separately.

II. Section 1.430(d)–1 Determination of Funding Target and Target Normal Cost

Section 1.430(d)–1 generally adopts the rules set forth in the proposed regulations for determining the funding target and the target normal cost under sections 430(b) and 430(d) for a plan that is not in at-risk status, including rules relating to the application of actuarial assumptions described in sections 430(h)(1) and 430(h)(4).

The final regulations generally adopt the definition of target normal cost for a plan that is not in at-risk status that was set forth in the proposed regulations. However, the final regulations contain modifications to this definition to reflect amendments made by WRERA '08. Under the proposed regulations, plan administrative expenses would not have been taken into account in determining a plan's target normal cost or funding target for the plan year. Under the final regulations, the target normal cost of a plan for the plan year is the present value (determined as of the valuation date) of all benefits under the plan that accrue during, are earned during, or are otherwise allocated to service for the plan year, subject to certain special adjustments as added by section 101(b)(2) of WRERA '08. These special adjustments are optional for plan years beginning during 2008, but are required to be made for later plan years.

Under the special adjustments, the target normal cost of the plan for the plan year is adjusted (not below zero) by adding the amount of plan-related expenses expected to be paid from plan assets during the plan year, and by subtracting the amount of any mandatory employee contributions expected to be made during the plan year. For this purpose, the final regulations reserve the issue of the definition of plan-related expenses, which is expected to be addressed in forthcoming proposed regulations.

The regulations clarify that the benefits taken into account in determining target normal cost are the benefits that are accrued, earned, or otherwise allocated to service beginning with the first day of the plan year through the valuation date, plus benefits that are expected to accrue, be earned, or otherwise allocated to service during the remainder of the plan year. Thus, for a plan with a valuation date other than the first day of the plan year, the actual benefits earned during the part of the year before the valuation date must be included in the target normal cost. The final regulations generally adopt the definition of the funding target for a plan that is not in at-risk status as set forth in the proposed regulations, but with a few clarifications that take into account comments received on the proposed regulations. Under the regulations, the funding target of a plan for the plan year is the present value (determined as of the valuation date) of all benefits under the plan that have been accrued, earned, or are otherwise allocated to years of service prior to the first day of the plan year.

Under the proposed regulations, the definition of a plan's FTAP was set forth in proposed § 1.430(i)–1. These final regulations include this definition in § 1.430(d)–1, and the definition is cross-referenced in §§ 1.430(i)–1 and 1.436–1. Under the final regulations, except as otherwise provided in a transition rule, the FTAP of a plan for a plan year is a fraction (expressed as a percentage), the numerator of which is the value of plan assets for the plan year after subtraction of the plan's funding balances under section 430(f)(4)(B) and § 1.430(f)–1, and the denominator of which is the funding target of the plan for the plan year (determined without regard to the at-risk rules under section 430(i) and § 1.430(i)–1).

The regulations provide transition rules for determining a plan's FTAP for the 2007 plan year. These rules are generally the same as the rules set forth in the proposed regulations under section 430(i) for determining a plan's FTAP for the last plan year before section 430 applies to the plan. However, the final regulations differ from the proposed regulations in the transition rules that apply for the determination of a plan's FTAP for a plan year that begins on or after January 1, 2008, but for which section 430 does not apply for purposes of determining the plan's minimum required contribution. In such a case, the FTAP is determined for that plan year in the same manner as for a plan to which section 430 applies to determine the plan's minimum required contribution, except that the value of plan assets that forms the FTAP numerator is determined without subtraction of the funding standard carryover balance or the credit balance under the funding standard account. These rules are needed to enable a plan described in sections 104 through 106 of PPA '06 to disclose its FTAP for purposes of the annual funding notice under section 101(f) of ERISA.[2]

The regulations adopt the special rule set forth in the proposed regulations for determining the FTAP for a new plan. Under the final regulations, if the funding target of the plan is equal to zero for the plan year, the FTAP is equal to 100 percent for the plan year. Unlike the proposed regulations, the final regulations do not limit the application of this rule to a plan that has no predecessor plan because of concerns that it is not always appropriate to carry over the FTAP from the predecessor plan.

The final regulations contain rules regarding the determination of present value in order to clarify the application of various rules that were set forth in the proposed regulations. Under the regulations, the present value of a benefit with respect to a participant that is taken into account under the regulations is determined as of the valuation date by multiplying the amount of that benefit by the probability that the benefit will be paid at a future date and then discounting the resulting product using the appropriate interest rate. The probability that the benefit will be paid with respect to the participant at that future date is determined using actuarial assumptions as to the probability of future service, advancement in age, and other events (such as death, disability, termination of employment, and selection of an optional form of benefit) that affect whether the participant or beneficiary will be eligible for the benefit and whether the benefit will be paid at that future date.

As under the proposed regulations, these regulations provide that the benefits taken into account in determining the funding target and the target normal cost are all benefits earned or accrued under the plan that have not yet been paid as of the valuation date, including retirement-type and ancillary benefits. The benefits taken into account are based on the participant's or beneficiary's status (such as active employee, vested or partially vested terminated employee, or disabled participant) as of the valuation date, and those benefits are allocated to funding target or target normal cost.

In order to determine a plan's funding target and target normal cost, the future benefits to be paid from the plan must be allocated among prior plan years (in which case they will be taken into account in determining the funding target for the current plan year), the current plan year (in which case they will be taken into account in determining the target normal cost for the current plan year), and future plan years (in which case they will not be taken into account in determining either the funding target or the target normal cost for the current plan year). The final regulations adopt the rules set forth in the proposed regulations for this allocation of benefits where benefits are a function of the accrued benefit and where benefits are a function of service, but the final regulations modify those rules for benefits in other circumstances.

To the extent that the amount of a benefit that is expected to be paid is a function of the accrued benefit, the amount of the benefit taken into account in determining the funding target for a plan year under the final regulations is determined by applying that function to the accrued benefit as of the first day of the plan year, and the portion of the benefit that is taken into account in the target normal cost for the plan year is determined by applying that function to the increase in the accrued benefit during the plan year. To the extent that the amount of a benefit that is expected to be paid is not a function of the accrued benefit but is a function of the participant's service, the portion of the benefit that is taken into account in determining the funding target for the plan year under the final regulations is determined by applying that function to the participant's service as of the first day of the plan year, and the portion of the benefit that is taken into account in determining the target normal cost for the plan year is determined by applying that function to the increase in the participant's years of service during the plan year. For a benefit that is determined as the excess of a function of the participant's service over a function of the participant's accrued benefit, the amount of the funding target and the target normal cost attributable to the portion of the benefit that is a function of the accrued benefit is determined pursuant to the rules that apply to such benefits and the amount of the funding target and the target normal cost attributable to the net benefit (the excess of the benefit that is a function of service over the benefit that is a function of accrued benefit) is determined pursuant to the rules that apply to a benefit that is a function of service.

The proposed regulations included rules for allocating benefits where the amount of a benefit that is expected to be paid is neither a function of the accrued benefit at the time the benefit is expected to be paid nor a function of the participant's service at that time. Under those rules, the benefit would have been allocated proportionately over the years until the participant met the age and service conditions for eligibility for the benefit. A number of commenters suggested that this allocation yielded inappropriate results in certain cases. In response to these comments, the final regulations provide that, to the extent the amount of a benefit that is expected to be paid is neither a function of the accrued benefit nor a function of the participant's service (and is not the excess of a function of the participant's service over a function of the accrued benefit), the portion of the participant's benefit that is taken into account in determining the funding target for a plan year is equal to the total benefit multiplied by the ratio of the participant's years of service as of the first day of the plan year to the years of service the participant will have at the time of the event that causes the benefit to be payable (whether the benefit is expected to be paid at the time of that decrement or at a future time), and the portion of the benefit that is taken into account in determining the

[2] Section 430(i)(4) provides for special rules to apply in determining a plan's FTAP only for plan years beginning during 2008. Accordingly, the regulations limit the use of the special rule under which the plan's FTAP is determined based on the plan's current liability to the determination of the plan's FTAP for the 2007 plan year, even for a plan described in sections 104 through 106 of PPA '06 for which section 430 does not apply for purposes of determining a plan's minimum required contribution until a plan year after the 2008 plan year.

target normal cost for the plan year is the increase in the proportionate benefit attributable to the increase in the participant's years of service during the plan year.

Under the proposed regulations, the determination of the funding target and the target normal cost would not have taken into account any benefit limitations or anticipated benefit limitations under section 436. The reason for this provision was to avoid the circularity in calculations that would result from calculating the funding target based on the imposition of benefit restrictions for purposes of determining whether the benefit restrictions need to be imposed. In response to comments, the final regulations contain modifications to the rules regarding recognition of the section 436 benefit restrictions. In particular, the final regulations provide that benefits that were not paid or accrued prior to the valuation date as a result of the benefit limitations are generally not included in the funding target and the target normal cost, but that the determination of the funding target and the target normal cost is not permitted to anticipate any future applications of the section 436 benefit restrictions.

The final regulations retain the treatment from the proposed regulations regarding the non-recognition of the benefit accrual limitations of section 436(e) in determining target normal cost. This has the effect of requiring an employer sponsoring a plan that provides for ongoing benefit accruals to include the present value of those accruals in the target normal cost, even if the plan is temporarily not permitted to provide for accruals, with the goal of improving the plan's funded status. However, if the plan sponsor actually adopts a plan freeze, the target normal cost will reflect that plan freeze. In connection with this provision, the final regulations provide that if the plan contains a provision under which missed benefit accruals are automatically restored once the plan's AFTAP is above 60 percent (taking into account the missed benefit accruals), then any missed benefit accruals for the prior plan year are taken into account in determining the funding target if, as of the valuation date, the period of the missed benefit accruals is 12 months or less. The final regulations also contain rules regarding restrictions that arise as a result of benefit limitations that are imposed under section 401(a)(32) as a result of a liquidity shortfall and benefit limitations that are imposed under § 1.401(a)(4)–5(b) with respect to certain highly compensated employees.

As under the proposed regulations, these regulations provide that a plan generally is required to reflect in the plan's funding target and target normal cost the liability for benefits that are funded through insurance contracts held by the plan, and to include the corresponding insurance contracts in plan assets.[3] As an alternative treatment of benefits that are funded through insurance contracts, the regulations provide that the plan is permitted to exclude benefits provided under such contracts from the plan's funding target and target normal cost and to exclude the corresponding insurance contracts from plan assets. This treatment is only available with respect to insurance purchased from an insurance company licensed under the laws of a State and only to the extent that a participant's or beneficiary's right to receive those benefits is an irrevocable contractual right under the insurance contract, based on premiums paid to the insurance company prior to the valuation date under the insurance contracts. Thus, the alternative treatment is not available if the plan trustee can surrender a contract to the insurer for its cash value because the participant's or beneficiary's rights to receive those benefits is not an irrevocable contractual right. A plan's treatment of benefits funded through insurance contracts pursuant to either of these methods is part of the plan's funding method. Accordingly, that treatment can be changed only with the consent of the Commissioner.

Except as otherwise provided, the determination under the regulations of a plan's funding target and target normal cost for a plan year are determined based on plan provisions that are adopted no later than the valuation date for the plan year and that take effect during that plan year. For example, a plan amendment adopted on or before the valuation date for the plan year that has an effective date occurring in the current plan year is taken into account in determining the funding target and the target normal cost for the current plan year if it is permitted to take effect under the rules of section 436(c) for the current plan year; however, an amendment is not taken into account if it does not take effect until a future plan year.

The regulations apply the rules under section 436(c) (as described in section VII.C of this preamble) to determine when an amendment that increases benefits takes effect. For an amendment that decreases benefits, the amendment takes effect under a plan on the first date on which the benefits of any individual who is or could be a participant or beneficiary under the plan would be decreased due to the amendment if the individual were on that date to satisfy the applicable conditions for the benefits.

The regulations provide that section 412(d)(2) applies for purposes of determining whether a plan amendment is treated as having been adopted on the first day of the plan year (including a plan amendment adopted no later than 2½ months after the close of the plan year). This is consistent with the IRS's prior interpretations of the pre-PPA '06 counterpart to section 412(d)(2) (section 412(c)(8) as in effect prior to amendments made by PPA '06) as set forth in Rev. Rul. 79–325 (1979–2 CB 190), which provides that section 412(c)(8) applies to plan amendments made during the plan year (as well as to plan amendments made within 2½ months after the end of the plan year). Thus, if an amendment is adopted after the valuation date for a plan year (and no later than 2½ months after the close of the plan year) but takes effect during that plan year, the full increase in liability is taken into account as of the valuation date for that plan year if a section 412(d)(2) election is made, and none of the increase in liability is taken into account as of the valuation date for that plan year if no section 412(d)(2) election is made.

Accordingly, the rule in section 2.02 of Revenue Ruling 77–2 (1977–1 CB 120) under which the charges for a plan year are based on a blend of the charges determined with and without regard to the plan amendment, and the alternative to that rule in section 3 of Revenue Ruling 77–2, no longer apply. However, the rule in section 2.01 of Revenue Ruling 77–2 (under which a change in benefit structure that does not become effective until a future plan year is disregarded) continues to apply. This is because section 430 does not contain any provision that corresponds to section 412(c)(12) as in effect prior to amendments made by PPA '06 (under which the provisions of a collective bargaining agreement were taken into account for funding purposes before the corresponding plan amendments became effective).

[3] The PBGC has informed the IRS and Treasury Department that this inclusion of insurance contracts in plan assets and the associated benefit liabilities in the funding target does not apply for purposes of Title IV of ERISA and its regulations, which generally require that, if an insurer makes an irrevocable commitment to provide all benefit liabilities with respect to an individual, those benefits cease to be benefit liabilities of the plan, the individual is no longer a plan participant, and the irrevocable commitment is excluded from plan assets.

The regulations clarify that if an amendment is taken into account for a plan year, then the allocation of benefits that is used for purposes of determining the funding target and the target normal cost for the plan year is based on the plan as amended. Thus, the present value of the increase in the participant's accrued benefit attributable to service before the beginning of the plan year is taken into account in the funding target for the year.[4]

To address a concern regarding avoidance of the benefit restrictions under section 436(c), the final regulations contain a new rule regarding amendments adopted after the valuation date that increase the target normal cost for the plan year. Under this rule, in any case in which an increase in the target normal cost as the result of a plan amendment made after the valuation date would have caused the benefit restrictions of section 436(c) to apply if the increase were included in the plan's funding target (after taking into account all unpredictable contingent event benefits permitted to be paid for unpredictable contingent events that occurred during the current plan year and plan amendments that went into effect in the current plan year), the amendment must be taken into account in determining the plan's funding target and target normal cost for the plan year. This rule is necessary to prevent the avoidance of the benefit restrictions of section 436(c) by means of a mid-year plan amendment that purports not to increase benefits earned prior to the beginning of the plan year (so that the amendment does not increase the funding target for the plan year and the amount required to ''buy up'' the amendment under section 436(c)(2) by paying the increase to the funding target on account of the amendment would be zero).

Like the proposed regulations, the regulations require all currently employed plan participants, formerly employed plan participants (including retirees and terminated vested participants), and other individuals currently entitled to benefits under the plan to be included in the valuation. Unlike § 1.412(c)(3)–1(c)(3)(ii), the regulations do not permit exclusion from the valuation of those plan participants who could have been excluded from participation in the plan under the rules of section 410(a). However, the final regulations adopt the rules of § 1.412(c)(3)–1(c)(3)(iii) (relating to the exclusion of terminated employees who do not have a vested benefit under the plan and whose service might be taken into account in future years upon return to service, but only if the plan's experience as to separated employees returning to service has been such that the exclusion would not be unreasonable) and the rules of § 1.412(c)(3)–1(d)(2) (under which the future participation in the plan of current employees who are not yet participants is permitted to be anticipated). Whether former employees who are terminated with partially vested benefits are assumed to return to service is determined under the same rules that apply to former employees without vested benefits.

The regulations provide that the determination of any present value or other computation under section 430 must be made on the basis of actuarial assumptions and a funding method. Except as specifically provided, the same actuarial assumptions and funding method must be used for all computations under sections 430 and 436.

The final regulations cross reference other regulations for the details of the statutorily specified interest rates, mortality tables, and actuarial assumptions that apply to plans in at-risk status. Under the final regulations, with respect to the actuarial assumptions used for the plan other than those that are specified by statute, each of those actuarial assumptions must be reasonable (taking into account the experience of the plan and reasonable expectations). In addition, the actuarial assumptions (other than the statutorily specified assumptions), in combination, must offer the plan's enrolled actuary's best estimate of anticipated experience under the plan. The final regulations provide that, in the case of a plan which has fewer than 100 participants and beneficiaries who are not in pay status, the actuarial assumptions are permitted to assume no pre-retirement mortality, but only if that assumption would be a reasonable assumption.

The regulations provide that actuarial assumptions established for a plan year cannot subsequently be changed for that plan year unless the Commissioner determines that the assumptions that were used are unreasonable. Similarly, the regulations provide that a funding method established for a plan year cannot subsequently be changed for that plan year unless the Commissioner determines that the use of that funding method for that plan year is impermissible. For this purpose, actuarial assumptions and funding methods are established by the timely completion (and filing, if required) of the actuarial report (Schedule SB, ''Single-Employer Defined Benefit Plan Actuarial Information'' of Form 5500, ''Annual Return/Report of Employee Benefit Plan'') for a plan year under section 6059. If the Schedule SB is not completed (and filed, if required) by the deadline, then the prior plan year actuarial assumptions and methods will continue to apply, unless the Commissioner permits or requires other actuarial assumptions or another funding method permitted under section 430 to be used for the current plan year.

The regulations provide that a plan's funding method includes not only the overall funding method used by the plan, but also each specific method of computation used in applying the overall method. However, the choice of which actuarial assumptions are appropriate to the overall method or to the specific method of computation is not a part of the funding method. The assumed earnings rate used for purposes of determining the actuarial value of assets under section 430(g)(3)(B) is treated as an actuarial assumption, rather than as part of the funding method.

In accordance with section 430(h)(4), the regulations provide rules relating to the probability that benefit payments will be paid as single sums or other optional forms under a plan and the impact of that probability on the determination of the present value of those benefit payments under section 430. In general, any determination of present value or any other computation under the regulations must take into account the probability that future benefit payments under the plan will be made in the form of optional forms of benefits provided under the plan (including single-sum distributions), determined on the basis of the plan's experience and other related assumptions, and any difference in the present value of future benefit payments that results from the use of actuarial assumptions in determining benefit payments in any such optional form of benefits that are different from those prescribed by section 430(h).

The proposed regulations would have provided that, in the case of a distribution that is subject to section 417(e)(3) and that is determined using the applicable interest rates and applicable mortality table under section 417(e)(3), the computation of the present value of that distribution is treated as having taken into account any difference in present value that results from the use of actuarial assumptions

[4] The regulations do not address the effect on the determination of a plan's funding shortfall of an amendment that is permitted to take effect on account of a contribution under section 436(c)(2).

that are different from those prescribed by section 430(h) if the present value of the distribution is determined by valuing, using special actuarial assumptions, the annuity (either the deferred or immediate annuity) that is used under the plan to determine the amount of the distribution. The final regulations adopt that method and clarify that its use is mandatory for benefits determined using the section 417(e) actuarial assumptions.

Under this special computation, for the period beginning with the annuity starting date for the distribution, the applicable mortality table under section 417(e)(3) that would apply to a distribution with an annuity starting date occurring on the valuation date is substituted for the mortality table under section 430(h)(3) that would otherwise be used. In determining the present value of a distribution, the final regulations adopt the rules in the proposed regulations and provide that if a plan uses the generational mortality tables under § 1.430(h)(3)–1(a)(4) or § 1.430(h)(3)–2, the plan is permitted to use a 50–50 male-female blend of the annuitant mortality rates under the § 1.430(h)(3)–1(a)(4) generational mortality tables in lieu of the applicable mortality table under section 417(e)(3) that would apply to a distribution with an annuity starting date occurring on the valuation date.

In addition, under this special computation, the valuation interest rates under section 430(h)(2) are used for purposes of discounting the projected annuity payments from their expected payment dates to the valuation date (rather than the interest rates under section 417(e)(3) which the plan uses to determine the amount of the benefit).

However, a plan is permitted to make adjustments to the interest rates in order to reflect differences between the phase-in of the section 430(h)(2) segment rates under section 430(h)(2)(G) and the adjustments to the segment rates under section 417(e)(3)(D)(iii).

The proposed regulations would have provided that, in the case of a distribution that is subject to section 417(e)(3) but is determined as the greater of the benefit determined using the assumptions required under section 417(e)(3) and some other actuarial basis, the computation of present value must take into account the extent to which the present value of the distribution is greater than the present value determined using this annuity substitution method. Commenters requested a similar rule where the value of the distribution is lower because of the use of different actuarial assumptions that are not more favorable, citing the situation where section 415 may require the use of less favorable actuarial assumptions. In response to these concerns, the final regulations provide that, if a distribution that is subject to section 417(e)(3) is determined on a basis other than using the applicable interest rates and the applicable mortality table under section 417(e)(3), then the computation of present value must take into account the extent to which the present value of the distribution is different from the present value determined using this annuity substitution method.

As under the proposed regulations, the final regulations provide that, in the case of an applicable defined benefit plan described in section 411(a)(13)(C), the amount of a future distribution is based on the amount determined by projecting the future interest credits or equivalent amounts under the plan's interest crediting rules using actuarial assumptions that satisfy the requirements of the regulations. Thus, the present value of a future distribution is not necessarily the current amount of a participant's hypothetical account balance. Commenters requested that various safe harbors be provided for making this determination. The IRS and the Treasury Department believe that this determination should be made using the actuary's best estimate of the projected future interest credits, and that the use of broadly applicable safe harbors for this purpose is not appropriate.

In the case of a single-sum distribution determined under the rules of section 411(a)(13)(A), the amount of the future distribution is equal to the projected account balance at the expected date of payment calculated in accordance with the regulations. In the case of a distribution determined as an annuity, the regulations provide that the amount of the future distribution must be determined by converting the projected account balance to an annuity using the plan's annuity conversion provisions and actuarial assumptions that satisfy the requirements of the regulations.

The regulations provide that, if the plan bases the conversion of the projected account balance to an annuity using the applicable interest rates and applicable mortality table under section 417(e)(3), the future annuity is determined by dividing the projected account balance (or accumulated percentage of final average compensation) by an annuity factor corresponding to the assumed form of payment using, for the period beginning with the annuity starting date, the current applicable mortality table under section 417(e)(3) that would apply to a distribution with an annuity starting date occurring on the valuation date (in lieu of the mortality table under section 430(h)(3) that would otherwise be used) and the valuation interest rates under section 430(h)(2) (as opposed to the interest rates under section 417(e)(3) which the plan uses to determine the amount of the benefit). In determining the amount of a future annuity for this purpose, if a plan uses the generational mortality tables under § 1.430(h)(3)–1(a)(4) or § 1.430(h)(3)–2, the plan is permitted to use a 50–50 male-female blend of the annuitant mortality rates under the § 1.430(h)(3)–1(a)(4) generational mortality tables in lieu of the applicable mortality table under section 417(e)(3) that would apply to a distribution with an annuity starting date occurring on the valuation date. In the case of a plan that determines an annuity under the regulations using a variable interest rate or rates other than the applicable interest rates under section 417(e)(3), the amount of the annuity must be based on actuarial assumptions that satisfy the requirements of the regulations.

Some commenters maintained that unpredictable contingent event benefits should not be taken into account for minimum funding purposes before the occurrence of the unpredictable contingent event. The final regulations provide that any determination of present value or any other computation under this section must take into account, based on information as of the valuation date, the probability that future benefits (or increased benefits) under the plan will become payable due to the occurrence of an unpredictable contingent event (as described in § 1.436–1(j)(9)). However, if, as of the valuation date, the likelihood of the occurrence of the event is de minimis, the regulations permit the use of a zero probability of the occurrence of the event.

The regulations provide that any reasonable technique can be used to determine the present value of the benefits expected to be paid during a plan year, based on the interest rates and mortality assumptions applicable for the plan year. For example, the present value of a monthly retirement annuity payable at the beginning of each month can be determined using estimating techniques such as the standard actuarial approximation that reflects 13/24ths of the discounted expected payments for the year as of the beginning of the year and 11/24ths of the discounted expected payments for the year as of the end of the year; or by assuming that the payment is made in

the middle of the year. In the case of a participant for whom there is a less than 100 percent probability that the participant will terminate employment during the plan year, for purposes of determining the benefits expected to accrue, be earned, or otherwise allocated to service during the plan year (which are used to determine the target normal cost), it is permissible to assume the participant will not terminate during the plan year, unless using this method of calculation would be unreasonable.

Like the proposed regulations, the final regulations reflect the provisions of section 430(h)(5), requiring approval of the Commissioner for changes in actuarial assumptions for certain large plans. Under the regulations, except as otherwise provided, any change in actuarial assumptions used to determine a plan's funding target for a plan year cannot be changed from the actuarial assumptions that were used for the preceding year without the approval of the Commissioner if the plan is sponsored by a member of a controlled group which maintains plans with over $50 million in unfunded vested benefits and the change in assumptions results in a decrease in the plan's funding shortfall (within the meaning of section 430(c)(4)) for the current plan year (disregarding the effect on the plan's funding shortfall resulting from changes in interest and mortality assumptions) that exceeds $50,000,000, or that exceeds $5,000,000 and is 5 percent or more of the funding target of the plan before such change.

The proposed regulations did not contain an exception to this rule for a plan exiting at-risk status. Commenters maintained that a plan exiting at-risk status should be able to resume use of its previously used actuarial assumptions without obtaining the Commissioner's approval. To address these concerns, the final regulations provide that a plan that is not in at-risk status for the current plan year and that was in at-risk status for the prior plan year (but not for a period of 5 or more consecutive plan years) is granted automatic approval to use the actuarial assumptions that were applied before the plan entered at-risk status and that were used in combination with the required at-risk assumptions during the period the plan was in at-risk status.

These regulations provide automatic approval for changes in funding method for the first plan year section 430 applies to determine the minimum required contribution for the plan (the first plan year beginning in 2008, or a later year for plans described in sections 104 through 106 of PPA '06). The regulations also provide automatic approval for changes in funding method for the first plan year that a plan applies all the provisions of the regulations under section 430(d), section 430(f), section 430(g), section 430(i), and section 436 (which could be the first plan year beginning on or after January 1, 2010 or an earlier plan year). Thus, a plan can receive automatic approval for a change in funding method for the first plan year beginning on or after January 1, 2009, if it applies all of these regulation provisions, without regard to whether it applies the provisions of § 1.430(h)(2)–1 for that plan year. In addition, the regulations provide automatic approval for a change of funding method that is necessary to reflect the new allocation rules for benefits under § 1.430(d)–1(c)(1)(ii).

III. Section 1.430(f)–1 Effect of Prefunding Balance and Funding Standard Carryover Balance

Section 1.430(f)–1 of these regulations provides rules relating to the application of prefunding and funding standard carryover balances under section 430(f). The regulations generally adopt the rules that were set forth in the corresponding proposed regulations.

Subject to the limitations otherwise provided, the regulations provide that in the case of any plan year with respect to which the plan sponsor elects to use all or a portion of the prefunding balance or the funding standard carryover balance to offset the minimum required contribution for the plan year, the minimum required contribution for the plan year (determined after taking into account any waiver under section 412(c)) is offset as of the valuation date for the plan year by the amount so used. The regulations also provide rules that apply where the plan sponsor elects to use all or a portion of the prefunding balance or the funding standard carryover balance to satisfy the requirement to make quarterly contributions under section 430(j)(3) that are due after the valuation date. Rules with respect to use of the prefunding balance or funding standard carryover balance to satisfy quarterly contribution requirements with respect to installments due before the valuation date are expected to be addressed in future proposed regulations.

Under the regulations, a plan sponsor is permitted to elect to maintain a prefunding balance for a plan. A prefunding balance maintained for a plan consists of a beginning balance of zero, increased by the amount of excess contributions to the extent the employer elects to do so, and decreased (but not below zero) by the sum of, as of the first day of a plan year, any amount of the prefunding balance that was used to offset the minimum required contribution of the plan for the preceding plan year and any reduction in the prefunding balance for the plan year. The plan sponsor's initial election to add to the prefunding balance constitutes an election to maintain a prefunding balance (so that no special election is necessary to establish a prefunding balance). The prefunding balance is adjusted further for actual investment return for the plan year.

The regulations provide that if the plan sponsor elects to add to the plan's prefunding balance, as of the first day of a plan year, the prefunding balance is increased by the amount so elected by the plan sponsor. The amount added to the prefunding balance cannot exceed the present value of the excess contribution for the preceding plan year increased for interest.

The present value of the excess contribution for the preceding plan is the excess, if any, of the present value of the employer contributions (other than contributions to avoid or terminate section 436 benefit limitations) to the plan for such preceding plan year over the minimum required contribution for such preceding plan year. In addition, a contribution for a plan year to correct an unpaid minimum required contribution for a prior plan year is not treated as part of the present value of excess contributions. This present value is increased with interest from the valuation date for the preceding plan year to the first day of the current plan year. The regulations provide that the plan's effective interest rate under section 430(h)(2)(A) for the preceding plan year is generally used to calculate the present value of the contributions for the preceding plan year and for adjusting the excess amount.

The proposed regulations would have prohibited an employer from adding to the prefunding balance any amount of contributions that are excess contributions for a plan year solely by reason of a reduction in the minimum required contribution for the year through the use of the prefunding balance or funding standard carryover balance. This rule was intended to preclude an employer from avoiding the requirement to adjust the prefunding balance and funding standard carryover balance by the actual rate of return on plan assets in the situation where the plan assets have experienced a loss (or a rate of return that is lower than the effective interest rate that is used for interest adjustment with respect to minimum required contributions for the plan year). Commenters argued that this rule was unwarranted and would

prevent plan sponsors from adding excess contributions to the prefunding balance in situations where balance amounts were used to offset minimum contributions earlier for reasons other than interest arbitrage. The final regulations permit an excess contribution to be added to the prefunding balance for a plan year notwithstanding that the amount is an excess contribution solely because an election is made for that plan year to use the funding standard carryover balance or prefunding balance to offset minimum required contributions (or required installments), but provide that the interest adjustment with respect to such a contribution is made using the plan's actual investment experience for the plan year, rather than the effective interest rate under section 430(h)(2)(A). Thus, the funding standard carryover balance and prefunding balance are adjusted with the plan's actual investment return when the balances are not actually used to satisfy the minimum contribution requirement for a plan year, regardless of whether the plan sponsor makes an election to use the balance to offset the minimum contribution requirement and subsequently replenishes the prefunding balance.

The proposed regulations would have provided that the plan sponsor is permitted to maintain a funding standard carryover balance for a plan that had a positive balance in the funding standard account under section 412(b) (as in effect prior to PPA '06) as of the end of the plan's pre-effective plan year (the plan year immediately preceding the first plan year that section 430 applies for purposes of determining the minimum required contribution for the plan). Some commenters suggested that no formal election should be required in order to maintain a funding standard carryover balance. In response, the regulations provide that a funding standard carryover balance is automatically established for a plan that had a positive balance in the funding standard account under section 412(b) (as in effect prior to PPA '06) as of the end of the pre-effective plan year for the plan. A plan sponsor that does not wish to have the funding standard carryover balance established can elect to reduce it to zero.

The final regulations provide that the plan's funding standard carryover balance as of the beginning of the first effective plan year (the first plan year beginning on or after the date section 430 applies for purposes of determining the minimum required contribution for the plan) is the positive balance in the funding standard account under section 412(b) (as in effect prior to PPA '06) as of the end of the pre-effective plan year for the plan. For subsequent plan years, the funding standard carryover balance is decreased (but not below zero) by the sum of, as of the first day of each plan year, any amount of the funding standard carryover balance that was used to offset the minimum required contribution of the plan for the preceding plan year and any reduction in the funding standard carryover balance for the plan year. The regulations also provide that the funding standard carryover balance is adjusted further to reflect the actual rate of return on plan assets for the preceding plan year.

For both the funding standard carryover balance and the prefunding balance, the regulations provide that the adjustment for investment return is applied to the balance as of the beginning of the preceding plan year after subtracting amounts used to offset the minimum required contribution for the preceding plan year and after any reduction of balances for that preceding plan year. For this purpose, the actual rate of return on plan assets for the preceding plan year is determined on the basis of fair market value and must take into account the amount and timing of all contributions, distributions, and other plan payments made during that period.

If a plan's valuation date is not the first day of the plan year, then, for purposes determining a plan's prefunding balance and funding standard carryover balance as of the valuation date, the plan's prefunding balance and funding standard carryover balance (if any) are increased to the valuation date using the plan's effective interest rate under section 430(h)(2)(A) for the plan year. Any elections to reduce the prefunding balance and funding standard carryover balance, to use the prefunding balance and funding standard carryover balance to offset the minimum required contribution for the year, or to add to the prefunding balance occur as of the valuation date for the plan year. After the elections are applied as of the valuation date, the resulting amount of the prefunding balance and funding standard carryover balance is adjusted to the first day of the plan year (discounted using the effective interest rate under section 430(h)(2)(A) for that year) before applying the adjustments for investment experience for the plan year.

The regulations provide that, in the case of any plan with a prefunding balance or a funding standard carryover balance, the amount of those balances must be subtracted from the value of plan assets for purposes of sections 430 and 436, except as otherwise provided in the regulations. For purposes of determining whether a plan is exempt from the requirement to establish a new shortfall amortization base under section 430(c)(5), the amount of the prefunding balance is subtracted from the value of plan assets only if an election to use all or any portion of the prefunding balance to offset the minimum required contribution is made for the plan year. In addition, for this purpose, the funding standard carryover balance is not subtracted from the value of plan assets regardless of whether any portion of either the funding standard carryover balance or the prefunding balance is used to offset the minimum required contribution for the plan year.

If there is in effect for a plan year a binding written agreement with the Pension Benefit Guaranty Corporation (PBGC) which provides that all or a portion of the prefunding balance or funding standard carryover balance (or both balances) is not available to offset the minimum required contribution for a plan year, the regulations provide that the specified amount is not subtracted from the value of plan assets for purposes of determining the funding shortfall under section 430(c)(4). For this purpose, an agreement with the PBGC is taken into account with respect to a plan year only if the agreement was executed prior to the valuation date for the plan year.

To address questions raised by commenters, the final regulations provide ordering rules regarding the application of use and reduction elections with respect to prefunding and funding standard carryover balances. The regulations provide that the amount of prefunding balance or funding standard carryover balance that may be used to offset the minimum required contribution for the plan year must take into account any decrease in those balances which result from a prior election either to use the prefunding balance or funding standard carryover balance under section 430(f) or to reduce those balances under section 430(f) (including deemed elections under section 436(f)(3) and § 1.436–1(a)(5)).

The regulations describe the application of the ordering rules of section 430(f)(5)(A). Under these rules, an election to reduce the funding standard carryover balance or prefunding balance is deemed to occur on the valuation date for the plan before any election to use the balance to offset the minimum required contribution for the current year. Thus, if an election to use the prefunding balance or funding

standard carryover balance to offset the minimum required contribution for the plan year (including an election to satisfy the quarterly contribution requirement) has been made prior to the election to reduce the prefunding balance or funding standard carryover balance, then the amount available for use to offset the otherwise applicable minimum required contribution for the plan year will be retroactively reduced and may result in a missed quarterly contribution.

If an election is made to reduce the prefunding balance or funding standard carryover balance or to use the prefunding balance or funding standard carryover balance to offset the minimum required contribution with respect to a plan year, a special rule applies to determine the amount of remaining prefunding balance or funding standard carryover balance that may be used to offset the minimum required contribution for the prior plan year. Under this special rule, an election to reduce the prefunding balance or the funding standard carryover balance that is made with respect to the later plan year is taken into account by decreasing the funding standard carryover balance or prefunding balance as of the valuation date for the prior plan year by the prior plan year equivalent of the current year election. The prior plan year equivalent of the current year election is determined by dividing the amount of the current year election by a number equal to 1 plus the rate of investment return for the prior plan year. The funding standard carryover balance and prefunding balance are nonetheless adjusted in accordance with the rules described above, after adjusting for all elections for that prior year. Thus, the amount used to offset the minimum required contribution for the earlier plan year is subtracted from the prefunding balance or funding standard carryover balance as of the valuation date for that year prior to the adjustment for investment return for that plan year, and the amount by which the prefunding balance or funding standard carryover balance is decreased for the second year is based on the elections made for the second year.

Accordingly, under the final regulations, a prefunding balance or a funding standard carryover balance is maintained in a manner that tracks the way the balances are reported on Schedule SB, ''Single-Employer Defined Benefit Plan Actuarial Information'' of Form 5500, ''Annual Return/Report of Employee Benefit Plan''. Thus, the balances at the beginning of the year are increased (by investment experience or by addition to the prefunding balance) or decreased (by elections to use or reduce the balances or by investment experience) at the first day of the next plan year. These increases and decreases are made before any elections (whether made or deemed) are applied for the next plan year.

To the extent that a plan has a funding standard carryover balance greater than zero, the regulations provide that no amount of the plan's prefunding balance may be used to offset the minimum required contribution. Thus, a plan's funding standard carryover balance must be exhausted before the plan's prefunding balance may be used to offset the minimum required contribution.

The regulations provide that an election to use the prefunding balance or funding standard carryover balance to offset the minimum required contribution is not available for a plan year if the plan's prior plan year funding ratio is less than 80 percent. The plan's prior plan year funding ratio generally is equal to the fraction (expressed as a percentage), the numerator of which is the value of plan assets on the valuation date for the preceding plan year, reduced by the amount of any prefunding balance (but not the amount of any funding standard carryover balance), and the denominator of which is the funding target of the plan for the preceding plan year (determined without regard to the at-risk rules of section 430(i)(1)).

If the prior plan year was the first year of a new plan and the funding target for the prior plan year was zero, the regulations provide that the prior plan year's funding ratio is deemed to be 80 percent for purposes of this limitation on the use of the prefunding or funding standard carryover balances. Thus, the sponsor of a new plan that has no funding target in its first year can use a prefunding balance that resulted from first year contributions in excess of the target normal cost in order to offset the otherwise minimum required contribution in the second year of the plan. Commentators requested rules with respect to plan mergers and spin-offs. The IRS and the Treasury Department expect to address these issues in future proposed regulations.

The regulations provide that a plan sponsor may make an election for a plan year to reduce any portion of a plan's prefunding balance and funding standard carryover balance. If such an election is made, the amount of those balances that must be subtracted from the value of plan assets will be smaller and, accordingly, the value of plan assets taken into account for purposes of sections 430 and 436 will be larger. This election to reduce a plan's prefunding balance and funding standard carryover balance is taken into account in the determination of plan assets for the plan year and applies for all purposes under sections 430 and 436, including for purposes of determining the plan's prior plan year funding ratio for the following plan year. Section 436(f)(3) and § 1.436–1(a)(5) provide a rule under which the plan sponsor is deemed to make this election. To the extent that a plan has a funding standard carryover balance greater than zero, no election is permitted to be made that reduces the plan's prefunding balance. Thus, a plan must exhaust its funding standard carryover balance before it is permitted to make an election to reduce its prefunding balance.

Like the proposed regulations, these regulations provide that any election under this section by the plan sponsor must be made by providing written notification of the election to the plan's enrolled actuary and the plan administrator. The written notification must set forth the relevant details of the election, including the specific dollar amounts involved in the election. Thus, a conditional or formula-based election generally does not satisfy the requirements.

The final regulations provide rules regarding the timing of elections to use or reduce the prefunding balance or funding standard carryover balance that are generally the same as under the proposed regulations. Under the final regulations, any election to add to the prefunding balance or to use the prefunding balance or funding standard carryover balance to offset the minimum required contribution for a plan year must be made no later than the last date for making the minimum required contribution for the plan year as described in section 430(j)(1). Any election to reduce the prefunding balance or funding standard carryover balance for a plan year (for example, in order to avoid a benefit restriction under section 436) must be made by the end of the plan year to which the election relates. These timing rules establish the latest date that an election can be made. An employer is permitted to make an earlier election, and, in certain circumstances, may need to make such an earlier election in order to timely satisfy a quarterly contribution requirement under section 430(j).

In response to comments received on the desirability of standing elections, the final regulations permit a plan sponsor to provide a standing election in writing to the plan's enrolled actuary to use the funding standard carryover balance and the prefunding balance to

the extent needed to avoid an unpaid minimum required contribution under section 4971(c)(4) taking into account any contributions that are or are not made. In addition, the regulations allow a plan sponsor to provide a standing election in writing to the plan's enrolled actuary to add the maximum amount possible each year to the prefunding balance.[5] Any election made pursuant to a standing election is deemed to occur on the last day available to make the election for the plan year. The regulations provide that any standing election remains in effect for the plan with respect to the enrolled actuary named in the election, unless the standing election is revoked by notice to the plan's enrolled actuary and the plan administrator on or before the date the corresponding election is deemed to occur, or the plan's enrolled actuary who signs the Schedule SB is not the enrolled actuary named in the standing election. If there is a change in enrolled actuary for the plan year which would result in a revocation of the standing election, then the plan sponsor may reinstate the revoked standing election by providing a replacement to the new enrolled actuary by the due date of the Schedule SB of Form 5500.

In general, a plan sponsor's election with respect to the plan's prefunding balance or funding standard carryover balance is irrevocable (and must be unconditional). However, an election to use the prefunding balance or funding standard carryover balance to offset the minimum required contribution for a plan year (including an election to satisfy the quarterly contribution requirements for a plan year) is permitted to be revoked to the extent the amount the plan sponsor elected to use to offset the minimum contribution requirements exceeds the minimum required contribution for a plan year (determined without regard to the offset), if and only if the election is revoked by providing written notification of the revocation to the plan's enrolled actuary and the plan administrator by the end of the plan year (or, for plans with a valuation date other than the first day of the plan year, the deadline for contributions for the plan year as described in section 430(j)(1)). The final regulations defer the deadline for making this revocation for the first plan year beginning in 2008 until the due date (including extensions) of the Schedule SB, ''Single-Employer Defined Benefit Plan Actuarial Information'' of Form 5500, ''Annual Return/Report of Employee Benefit Plan.'' Thus, a plan sponsor that made an election to use the funding standard carryover balance for the first plan year beginning in 2008 to offset the minimum required contribution for that plan year determined prior to the enactment of WRERA '08 has an opportunity to revoke that election to the extent it exceeds the minimum required contribution for that plan year taking into account WRERA '08. However, plan sponsors should note that any such revocation made after the enrolled actuary has certified the AFTAP for the plan year, could result in a change in the AFTAP for that plan year, which could be a material change. If such an excess election is not timely revoked, it has the same effect as an election to reduce the applicable balance to the extent of the excess.

The proposed regulations provided a transition rule for determining a plan's funding ratio for the pre-effective plan year (that is, the plan's prior year funding ratio with respect to the plan's first effective plan year). These regulations adopt this transition rule, but limit its application to the 2007 plan year (rather than apply it to a later plan year for a plan described in sections 104 through 106 of PPA '06). Under the regulations, a plan's funding ratio for the plan year preceding the first plan year beginning on or after January 1, 2008 (the ''2007 plan year'') is generally the same as the computation of FTAP for the 2007 plan year. However, the assets are determined without subtracting the funding standard account balance from the plan assets.

IV. Section 1.430(g)–1 Valuation Date and Valuation of Plan Assets

Section 1.430(g)–1 provides rules relating to a plan's valuation date and the valuation of a plan's assets for a plan year under section 430(g). The rules under the regulations relating to valuation dates do not reflect significant changes from those under the proposed regulations. The regulations provide that the determination of the funding target, target normal cost, and value of plan assets for a plan year is made as of the valuation date of the plan for that plan year.

Except in the case of a small plan, the valuation date of a plan for any plan year is the first day of the plan year. For this purpose, a small plan is defined as a plan that, on each day during the preceding plan year, had 100 or fewer participants (including active and inactive participants and all other individuals entitled to future benefits). For purposes of making this determination, all defined benefit plans (other than multiemployer plans as defined in section 414(f)) maintained by an employer or members of the controlled group are treated as one plan, but only participants with respect to that employer are taken into account. The regulations provide that, in the case of the first plan year of any plan, this exception for small plans is applied by taking into account the number of participants that the plan is reasonably expected to have on each day during the first plan year.

The regulations provide that the selection of a plan's valuation date is part of the plan's funding method and, accordingly, may only be changed with the consent of the Commissioner. However, a change of a plan's valuation date that is required by section 430 is treated as having been approved by the Commissioner and does not require the Commissioner's prior specific approval.

Under the regulations, the value of plan assets for purposes of section 430 is determined in one of two ways: As the fair market value of plan assets on the valuation date, or as the average of the fair market values of assets on the valuation date and the adjusted fair market value of assets determined for one or more earlier determination dates, subject to a 90 to 110 percent corridor. The method of determining the value of assets is part of the plan's funding method and, accordingly, may only be changed with the consent of the Commissioner.

The regulations provide that the fair market value of an asset is determined as the price at which the asset would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts. Except as otherwise provided by the Commissioner, any guidance on the valuation of insurance contracts under Subchapter D of Chapter 1 of the Internal Revenue Code applies for purposes of the regulations. Such guidance has been issued in Revenue Procedure 2005–25 (2005–1 CB 962) and Revenue Procedure 2006–13 (2006–1 CB 315). *See* § 601.601(d)(2) relating to objectives and standards for publishing regulations, revenue rulings and revenue procedures in the Internal Revenue Bulletin.

The regulations provide rules for the treatment of contributions that are made after the valuation date for a plan year that are attributable to a prior plan year. These rules are generally the same as under the proposed regulations. Under these rules, only the present value of the contributions (discounted using the

[5] The regulations do not provide for a standing election to be made with respect to quarterly contributions. The issue of standing elections with respect to quarterly contributions will be considered in conjunction with future regulations regarding quarterly contributions.

effective interest rate for the prior plan year) is included in the value of plan assets. The final regulations clarify that a contribution for a prior plan year is taken into account only if the contribution is made by the deadline for contributions for the immediately preceding plan year under section 430(j). However, for the first plan year that begins on or after January 1, 2008, any such prior plan year contribution is taken into account at the full value without a present value discount, provided it is made by the deadline for contributions under section 412(c)(10), as in effect before amendment by PPA '06.

The regulations also provide rules for the treatment of a contribution that is made before the valuation date of the plan year to which it is attributable. Such a contribution (and any interest on the contribution for the period between the contribution date and the valuation date, determined using the effective interest rate under section 430(h)(2)(A) for the plan year) must be subtracted from plan assets in determining the value of plan assets as of the valuation date. If the result of this subtraction is a number less than zero, the value of plan assets as of the valuation date is equal to zero.

Subject to the plan asset corridor rules, a plan is permitted to determine the value of plan assets on the valuation date as the average of the fair market value of assets on the valuation date and the adjusted fair market value of assets determined for one or more earlier determination dates. The regulations require that the period of time between each determination date (treating the valuation date as a determination date) must be equal and that the period of time cannot exceed 12 months. In addition, the earliest determination date with respect to a plan year cannot be earlier than the last day of the 25th month before the valuation date of the plan year (or a similar period in the case of a valuation date that is not the first day of a month). In a typical situation, the earlier determination dates will be the two immediately preceding valuation dates. However, these rules also permit the use of more frequent determination dates (for example, monthly or quarterly determination dates).

The regulations provide that the adjusted fair market value of plan assets for a prior determination date is the fair market value of plan assets on that date, increased for contributions included in the plan's asset balance on the valuation date that were not included in the plan's asset balance on the earlier determination date, reduced for benefits and all other amounts paid from plan assets during the period beginning with the prior determination date and ending immediately before the valuation date, and adjusted for expected earnings. The fair market value of assets as of a determination date includes any contribution for a plan year that ends with or prior to the determination date that is receivable as of the determination date (but only if the contribution is actually made within 8½ months after the end of the applicable plan year). For this purpose, the present value of a contribution receivable for the applicable plan year is determined using the effective interest rate under section 430(h)(2)(A) for the applicable plan year. For purposes of determining the value of plan assets for the first plan year that begins in 2008, if the plan sponsor makes a contribution to the plan after the valuation date for that plan year but by the deadline for contributions under section 412(c)(10) as in effect before the effective date of PPA '06 and the contribution is for the preceding plan year, then the contribution is taken into account as a plan asset without applying any present value discount.

The final regulations provide that, for purposes of determining the adjusted fair market value of plan assets, assets spun off from a plan as a result of a spin-off described in § 1.414(l)–1(b)(4) are treated as an amount paid from plan assets. In addition, except as otherwise provided by the Commissioner, for purposes of this determination, assets that are added to a plan as a result of a plan-to-plan transfer are treated in the same manner as contributions. It is expected that future proposed regulations will provide additional rules, including rules relating to plan mergers.

The regulations provide that if the value of plan assets determined under the averaging method would otherwise be less than 90 percent of the fair market value of plan assets, then the value of plan assets is equal to 90 percent of the fair market value of plan assets. If the value of plan assets determined under the averaging method would otherwise be greater than 110 percent of the fair market value of plan assets, then the value of plan assets is equal to 110 percent of the fair market value of plan assets. The rules for accounting for contribution receipts are applied prior to the application of this 90 to 110 percent corridor.

To reflect changes to the rules regarding determination of average plan assets made by WRERA '08, portions of the regulations have been reserved to provide rules regarding adjustments for expected earnings that are applied in determining average plan assets. These issues are expected to be addressed in future proposed regulations. In the interim, Notice 2009–22 (2009–14 IRB 741) provides guidance regarding these issues. *See* § 601.601(d)(2) relating to objectives and standards for publishing regulations, revenue rulings and revenue procedures in the Internal Revenue Bulletin. As provided under that guidance, the final regulations permit the use of an assumed earnings rate of zero for purposes of determining the actuarial value of assets for a plan year beginning during 2008 using the averaging rules (even if zero is not the actuary's best estimate of the anticipated annual rate of return on plan assets).

The regulations provide that any change in a plan's valuation date or asset valuation method that is made for the first plan year beginning in 2008, the first plan year beginning in 2009, or the first plan year beginning in 2010 is automatically approved and does not require the Commissioner's specific prior approval. In addition, the regulations provide that a change in a plan's valuation date or asset valuation method for the first plan year to which section 430 applies to determine the plan's minimum required contribution (even if that plan year begins after December 31, 2010) that satisfies the requirements of the regulations is automatically approved and does not require the Commissioner's specific prior approval.

V. Section 1.430(h)(2)–1 Interest Rates Used To Determine Present Value

Section 1.430(h)(2)–1 provides rules relating to the interest rates used in determining the present value of the benefits that are included in the target normal cost and the funding target for the plan for a plan year. These rules follow the rules set forth in the proposed regulations except for a few changes that are noted in this preamble.

The interest rates used under the regulations are generally based on the 24-month moving averages of 3 separate segment rates for the month that includes the valuation date (which are determined based on the monthly corporate bond yield curves for the preceding 24 months). The first segment rate, which is based on the portion of the corporate bond yield curve over the period from 0 to 5 years, applies for purposes of discounting benefits that are expected to be paid during the 5-year period beginning on the valuation date for the plan year in the case of a plan with a beginning of year valuation date. The second segment rate, which is based on the portion of the corporate

bond yield curve over the period between 5 and 20 years, applies for purposes of discounting benefits that are expected to be paid within 15 years after that initial 5 year-period. The third segment rate, which is based on the portion of the corporate bond yield curve over the period between 20 years and 60 years, applies to benefit payments that are expected to be paid after the 20-year period. For example, if a series of monthly payments is assumed to be made beginning on the valuation date, the second segment rate will apply beginning with the 61st such payment and the third segment rate will apply beginning with the 241st such payment. Except in the case of a new plan, a transition rule applies for plan years beginning in 2008 and 2009 under which these segment rates are blended with the long-term corporate bond rate that applies under pre-PPA '06 law.

The monthly corporate bond yield curve is, with respect to any month, a yield curve that is prescribed by the Commissioner for that month based on yields for that month on investment grade corporate bonds with varying maturities that are in the top three quality levels available. Notice 2007–81 (2007–2 CB 899) provides guidance on the monthly corporate bond yield curve and the related first, second, and third segment rates, including a description of the methodology for determining the monthly corporate bond yield curve. *See* § 601.601(d)(2) relating to objectives and standards for publishing regulations, revenue rulings and revenue procedures in the Internal Revenue Bulletin.

The proposed regulations would have used the rules for applying the first segment rate as stated in this preamble to all plans, regardless of the valuation date for the plan. Some commenters noted that section 430(h)(2)(B)(i) applies the first segment rates to benefits expected to be paid in the 5 years from the beginning of the plan year rather than the valuation date. These commenters argued that the regulations should likewise base the period to which the first segment rate applies on the beginning of the plan year rather than the valuation date. The IRS and the Treasury Department continue to believe that the position set forth in the proposed regulations remains the best method of valuing assets and liabilities as of the valuation date. Accordingly, the final regulations reserve the issue of guidance on the interest rates to be used by plans with valuation dates other than the first day of the plan year. A technical correction to the statute may address this in the future.

The regulations reflect the special interest rate for determining a plan's funding target in the case of airlines that make the 10-year amortization election described in section 402(a)(2) of PPA '06, in accordance with section 6615 of the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007, Public Law 110–28 (121 Stat. 112). This special interest rate does not apply for other purposes such as the determination of the plan's target normal cost.

The regulations provide for elections that a plan sponsor can make to use alternative interest rates rather than the segment rates for the month that includes the valuation date. These elections are made by providing written notification of the election to the plan's enrolled actuary. These elections may be adopted for a plan year without obtaining the consent of the Commissioner but, once adopted, they will apply for that plan year and all future plan years and may be changed only with the consent of the Commissioner. Under one such election, a plan sponsor that is using segment rates may elect the use of an alternative month as the applicable month, provided that the alternative month is one of the 4 months preceding that month that as the applicable month. In such a case, the segment rates for an applicable month are based upon data through the end of the immediately preceding month. Under another election, for purposes of determining the funding target, target normal cost, shortfall amortization installments, waiver amortization installments, and the present value of those installments, the plan sponsor may elect to use interest rates under the monthly corporate bond yield curve—which is a set of spot rates for the month preceding the valuation date rather than a 24-month moving average for that month—in lieu of the segment rates. The target normal cost and funding target determined using the monthly corporate bond yield curve will also be used for purposes of sections 404 and 436.

Some commenters have maintained that the rules under which an applicable month earlier than the month before the valuation date can be used should be permitted to be applied when the plan sponsor elects to use the monthly corporate bond yield curve. The IRS and the Treasury Department believe that, while this is a reasonable interpretation of the statute, the better view is that this option should not be available when the plan elects to use the monthly corporate bond yield curve. Accordingly, this interpretation can be used for plan years beginning during 2008 and 2009 (so, for example, for a plan year beginning on January 1, 2009, the plan sponsor could elect to use the monthly corporate bond yield curve for September, October, November 2008, or December 2008, or January 2009, based on data for that month), but such an election is not permitted for plan years beginning on or after the regulations become effective.

The proposed regulations would have required plan sponsors to obtain approval for an election to use alternative interest rates as described above that is made for a plan year after the first plan year for which section 430 applies to the plan. Some commenters argued that the statute permits these elections to be made without approval, with approval required only for a later change or revocation of election. In response to the comments, the final regulations do not require approval for the initial adoption of these elections for any year. For example, a plan sponsor that was using segment rates for the plan year beginning in 2010 can elect to switch to use the monthly corporate bond yield curve for the plan year beginning in 2011 and subsequent years without approval of the Commissioner (and, in such a case, if the plan had been using a different month for the segment rates, then the change to use the yield curve makes the applicable month election irrelevant). However, once an election has been made, any change requires the approval of the Commissioner.

The final regulations provide that, in the case of a plan sponsor using the monthly corporate bond yield curve, if with respect to a decrement the benefit is only expected to be paid for one-half of a year (because the decrement was assumed to occur in the middle of the year), the interest rate for that year can be determined as if the benefit were being paid for the entire year.

The final regulations provide that the interest rate elections are made by the plan sponsor, which is generally the employer or employers responsible for making contributions to or under the plan. In the case of plans that are multiple employer plans to which section 413(c)(4)(A) does not apply, the regulations provide that any reference to the plan sponsor means the plan administrator within the meaning of section 414(g).

The regulations provide that, except as otherwise provided, the effective interest rate determined under section 430(h)(2)(A) for the plan year is the single interest rate that, if used to determine the present value of the benefits that are taken into account in determining the plan's funding target for

the plan year, would result in an amount equal to the plan's funding target determined for the plan year under section 430(d) (without regard to calculations for plans in at-risk status under section 430(i)).

Some commenters asked how to determine the effective interest rate for a plan year for which a plan's funding target is equal to zero. The final regulations provide that if, for the plan year, the plan's funding target is equal to zero, then the effective interest rate determined under section 430(h)(2)(A) for the plan year is the single interest rate that, if used to determine the present value of the benefits that are taken into account in determining the plan's target normal cost for the plan year, would result in an amount equal to the plan's target normal cost determined for the plan year under section 430(b) (without regard to calculations for plans in at-risk status under section 430(i)).

The final regulations provide that the interest rates used to determine the amount of shortfall amortization installments and waiver amortization installments and the present value of those installments are determined based on the dates those installments are assumed to be paid, using the same timing rules that apply in determining target normal cost. Thus, for a plan that uses the segment rates, the first segment rate applies to installments assumed to be paid during the first five plan years, and the second segment rate applies to any installments assumed to be paid during the subsequent 15-year period. For this purpose, the shortfall amortization installments for a plan year are assumed to be paid on the valuation date for that plan year.

Under the regulations, notwithstanding the general rules for determination of segment rates, for plan years beginning in 2008 or 2009, the first, second, or third segment rate for a plan with respect to any month is equal to the sum of the product of that rate for that month, multiplied by the applicable percentage and the product of the weighted average interest rate determined under the rules of section 412(b)(5)(B)(ii)(II) (as that provision was in effect for plan years beginning in 2007), multiplied by a percentage equal to 100 percent minus the applicable percentage. This transition rule does not apply to a plan if the first plan year of the plan begins on or after January 1, 2008. A plan sponsor may elect not to apply the transition rule, but once an election has been made any change to that election requires the approval of the Commissioner.

The proposed regulations would have required that the pre-PPA '06 weighted average be determined as of the same month as the segment rates. In response to comments, the final regulations provide that this weighted average interest rate can be determined for the same month that is used to determine the segment rates, or for the month that contains the first day of the plan year (that is, the month that was used under section 412(b)(5)(B)(ii)(II) as in effect before amendment by PPA '06).

The final regulations provide that any change to any interest rate election that is made for the first plan year beginning in 2009 or 2010 is automatically approved by the Commissioner and does not require the Commissioner's specific prior approval.

VI. Section 1.430(i)–1 Special Rules for Plans in At-Risk Status

Section 1.430(i)–1 of the final regulations provides special rules related to determining the funding target and making other computations for certain defined benefit plans that are in at-risk status for the plan year due to their significantly underfunded status. The at-risk rules do not apply to small plans. For this purpose, a small plan is defined as a plan sponsored by an employer that had 500 or fewer participants (including both active and inactive participants) in defined benefit plans (other than multiemployer plans) sponsored by the employer or any member of the employer's controlled group on each day during the preceding plan year.

The regulations generally adopt the rules set forth in the proposed regulations, with a few modifications that are noted in this preamble. In general, the regulations provide that a plan is in at-risk status for a plan year if the FTAP for the preceding plan year is less than 80 percent (65, 70, and 75 percent, respectively, for plan years beginning in 2008, 2009, and 2010), and the at-risk FTAP for the preceding plan year is less than 70 percent. For this purpose, the FTAP is defined in the same manner as under § 1.430(d)–1. The at-risk FTAP of a plan for a plan year is a fraction (expressed as a percentage) the numerator of which is the value of plan assets for the plan year after subtraction of the prefunding balance and the funding standard carryover balance under section 430(f)(4)(B), and the denominator of which is the at-risk funding target of the plan for the plan year (determined using the special actuarial assumptions that apply to plans in at-risk status, but without regard to the loading factor that is imposed with respect to certain plans in at-risk status).

In the case of a new plan that was neither the result of a merger nor involved in a spin-off, the FTAP and the at-risk FTAP are equal to 100 percent for years before the plan exists. As a result, such a plan will not be in at-risk status in its first year. In addition, if the funding target of the plan is equal to zero for a plan year, the FTAP and the at-risk FTAP are equal to 100 percent for that plan year. Accordingly, a plan that is established without benefits accruing for periods prior to establishment will not be in at-risk status in its second year. The final regulations reserve a place for rules regarding a plan that is involved in a merger or a spin-off and a newly established plan with a predecessor plan that was in at-risk status.

In accordance with section 430(i)(1), the final regulations provide that the at-risk funding target and the at-risk target normal cost of the plan for the plan year are generally determined in the same manner as for plans not in at-risk status, but using special actuarial assumptions. In addition, the at-risk funding target and the at-risk target normal cost are increased to take into account a loading factor if the plan has been in at-risk status for at least 2 out of the preceding 4 plan years. In any case, the at-risk funding target and the at-risk target normal cost of a plan for a plan year cannot be less than the plan's funding target and target normal cost determined without regard to the at-risk rules. This minimum value is determined on a plan-wide (rather than a participant-by-participant) basis.

The actuarial assumptions used to determine a plan's at-risk funding target for a plan year are the actuarial assumptions that are applied under section 430, with certain modifications as set forth in the final regulations. Under the proposed regulations, if by the end of the plan year that begins 10 years after the end of the current plan year (that is, the end of the 11th plan year beginning with the current plan year) an employee would be eligible to commence an immediate distribution upon termination of employment, then the employee would be assumed to terminate and commence an immediate distribution at the earliest retirement date under the plan, or, if later, at the end of the current plan year. For this purpose, the proposed regulations defined the earliest retirement age under the plan as the earliest age at which a participant could terminate employment and receive an immediate distribution. The proposed regulations provided that, under the special at-risk actuarial

assumptions, all employees who are subject to the special early retirement assumption are also assumed to elect the optional form of benefit available under the plan at the assumed retirement age that would result in the highest present value of benefits.

In response to comments, the final regulations clarify that the special early retirement assumption applies to all participants (employees, terminated vested participants, and beneficiaries) who have not commenced payment and is not limited to employees. In addition, the final regulations provide that the earliest retirement age is not earlier than the age at which the participant's benefit is fully vested. The regulations also provide that, under the special at-risk actuarial assumptions, all participants and beneficiaries (not just the participants who are subject to the special early retirement assumption) who are assumed to retire on a particular date are assumed to elect the optional form of benefit available under the plan that would result in the highest present value of benefits commencing at that date.

If a plan that is in at-risk status for the plan year has not been in at-risk status for one or more of the preceding 4 plan years, the plan's funding target for the plan year is determined as a blend of the funding target determined as if the plan were not in at-risk status and the funding target determined as if the plan had been in at-risk status for each of the preceding 4 plan years. For this purpose, the funding target determined as if the plan had been in at-risk status for each of the preceding 4 plan years is determined without applying the loading factor if the plan has not been in at-risk status for two of the preceding four plan years. The increase in the funding target to reflect the at-risk rules is phased in over 5 years at 20 percent per year. The final regulations provide similar rules for determining the at-risk target normal cost of a plan that has been in at-risk status for fewer than 5 consecutive plan years.

For purposes of applying the rules under section 430(i), the regulations set forth rules for making certain calculations with respect to the first plan year to which section 430 applies to the plan. These rules are generally the same as the rules that apply for that plan year for purposes of section 436.

There is no special rule for determining the at-risk funding target for the plan year preceding the plan year section 430 first applies to the plan. This is because, for a plan to which section 430 applies beginning in 2008, if the plan's FTAP for the preceding plan year was less than the 65 percent needed to be in at-risk status (pursuant to the transition rule described in section 430(i)(4)(B)), then the at-risk FTAP would necessarily be below the 70 percent needed for the plan to be in at-risk status (because the at-risk funding target cannot be less than the funding target for a plan that is not in at-risk status). However, plans for which the effective date of section 430 is delayed for purposes of determining the minimum required contribution will have to determine the at-risk funding target for the plan year that precedes the plan year for which section 430 is first effective with respect to the plan.

VII. Section 1.436–1 Limits on Benefits and Benefit Accruals Under Single Employer Defined Benefit Plans

A. Overview and General Rules

1. *In general.*

The final regulations set forth the rule that a defined benefit pension plan that is subject to section 412 and that is not a multiemployer plan is a qualified plan only if it satisfies the requirements of section 436. This requirement is a qualification requirement. A plan satisfies the requirements of section 436 only if the plan meets the requirements of these regulations. The final regulations generally adopt the rules set forth in the proposed regulations, but with a number of modifications that are discussed in this preamble.

2. *New plans.*

In accordance with section 436(g), the final regulations provide that the limitations described in sections 436(b), 436(c), and 436(e) do not apply to a plan for the first five plan years of the plan. Thus, the only benefit limitation under section 436 that could apply under a plan that is not a successor plan during the first five years of its existence is the section 436(d) limitation applicable to accelerated benefit payments (such as single-sum distributions). Except as otherwise provided by the Commissioner in guidance of general applicability, plan years of the plan include the following (in addition to plan years during which the plan was maintained by the employer or plan sponsor): (1) Plan years when the plan was maintained by a predecessor employer within the meaning of § 1.415(f)–1(c)(1); (2) plan years of another defined benefit plan maintained by a predecessor employer within the meaning of § 1.415(f)–1(c)(2) within the preceding five years if any participants in the plan participated in that other defined benefit plan (even if the plan maintained by the employer is not the plan that was maintained by the predecessor employer); and (3) plan years of another defined benefit plan maintained by the employer within the preceding five years if any participants in the plan participated in that other defined benefit plan.

3. *Terminated plans.*

The proposed regulations did not contain any special rules regarding terminated plans. Commenters asked whether, upon plan termination, the benefit restrictions under section 436(d) operate to prevent the purchase of annuities to satisfy plan benefits or the distribution of single sums. In response, these regulations contain special rules for plan terminations. Under the final regulations, in general, any section 436 limitations in effect immediately before the termination of a plan continue to apply. However, the limitations under section 436(d) do not apply to prohibited payments that are made to carry out the termination of a plan in accordance with applicable law. For example, a plan sponsor's purchase of an irrevocable commitment from an insurer to pay benefit liabilities with respect to participants in connection with the standard termination of a plan, in accordance with 4041(b)(3) of ERISA and 29 CFR 4041.28, does not violate section 436(d).

4. *Multiple employer plans.*

The regulations under section 436 apply to plans maintained by one employer (including a controlled group of employers) and to multiple employer plans (within the meaning of section 413(c)). In the case of a multiple employer plan to which section 413(c)(4)(A) applies, the rules under the regulations apply separately with respect to each employer under the plan, as if each employer maintained a separate plan. Thus, the benefit limitations under section 436 can apply differently to employees of different employers under such a multiple employer plan. In the case of a multiple employer plan to which section 413(c)(4)(A) does not apply (that is, a plan described in section 413(c)(4)(B) that has not made the election for section 413(c)(4)(A) to apply), the regulations apply as if all participants in the plan were employed by a single employer. Some commenters objected to the separate application of the rules of section 436 for a multiple employer plan to which section 413(c)(4)(A) applies. These commenters argued that, because it is impossible for an employer to make a contribution that inures only to the benefit of its employees in the event of plan termination, it is inappropriate to apply the requirements of section 436 separately for each employer. No change has been made to reflect this comment because the IRS

and the Treasury Department believe that this rule is consistent with the applicable statutory requirement under section 413(c)(4)(A) that applies that the funding rules apply separately to each employer.

5. *Treatment of plan as of close of prohibited or cessation period.*

The final regulations use the term *section 436 measurement date* to identify the dates on which a section 436 limitation may apply or cease to apply (as discussed in section VII.A.8 of this preamble). The regulations provide that, if a limitation on prohibited payments under section 436(d) (such as single-sum distributions) applies to a plan as of a section 436 measurement date, but that limit subsequently ceases to apply to the plan as of a later section 436 measurement date, then the limitation does not apply to benefits with annuity starting dates that are on or after that later section 436 measurement date. In addition, the final regulations provide that, if a limitation on benefit accruals under section 436(e) applies to a plan, then, unless the plan provides otherwise, benefit accruals under the plan will resume effective as of the section 436 measurement date as of which benefit accruals are no longer restricted. If the accruals resume effective in the middle of a plan year, the plan must comply with the rules relating to partial years of participation and the prohibition on double proration under Department of Labor regulation 29 CFR 2530.204–2(c) and (d).

With respect to a participant who was barred from receiving an optional form of benefit that would have been payable but for the application of a restriction on prohibited payments pursuant to section 436(d), once the restriction ceases to apply, the participant's benefits will continue to be paid in the form previously elected unless the plan offers the participant a new election that modifies the prior election. The final regulations permit a plan to provide that the participant will be offered the opportunity to have a new election under which the form of benefit previously elected may be modified, subject to applicable qualification requirements, and clarify that any such new election will result in a new annuity starting date for purposes of section 417.

Similarly, a plan is permitted to be amended to provide that any benefit accruals that were limited under the rules of section 436(e) are credited under the plan once the limitation no longer applies, subject to applicable qualification requirements (including the limitations of section 436(c)). If a plan provides for the restoration of benefit accruals for the period of the limitation under preexisting plan terms, the plan is generally treated as having adopted an amendment that has the effect of increasing liabilities under the plan. The proposed regulations would have provided an exception to this rule if the period of limitation is 12 months or less. The final regulations retain that exception, but clarify that the exception is available only if the plan's AFTAP would be at least 60 percent taking into account the restored accruals.[6]

In response to questions raised by commenters, the final regulations clarify the treatment of unpredictable contingent event benefits that are limited under the rules of section 436(b). The regulations provide that, in general, if any unpredictable contingent event benefits are limited under section 436(b) with respect to an unpredictable contingent event, then that limitation applies to all such benefits that otherwise would have been paid to any plan participant with respect to that unpredictable contingent event. However, if the limitations of section 436(b) with respect to an unpredictable contingent event cease to apply for a plan year as a result of a contribution that satisfies the requirements of section 436(b)(2) or a certification of the AFTAP for the plan year, then any unpredictable contingent event benefits that were limited under the rules of section 436(b) for the plan year must automatically become payable, retroactive to the period those benefits would have been payable under the terms of the plan (other than plan terms implementing the requirements of section 436(b)). If the benefits do not become payable during the plan year in accordance with the preceding sentence, then the plan is treated as if it does not provide for those benefits. However, all or any portion of those benefits can be restored pursuant to a plan amendment that meets the requirements of section 436(c) and other applicable qualification requirements.

6. *Treatment of plan amendments that do not go into effect.*

The proposed regulations did not contain rules regarding the treatment of plan amendments that do not go into effect because of the restrictions under section 436(c). To clarify the application of these rules, the final regulations provide that, if a plan amendment does not go into effect as of the effective date of the amendment because of the limitations of section 436(c), but is permitted to go into effect later in the plan year as a result of additional contributions that satisfy the requirements of section 436(c)(2) or a certification of the AFTAP for the plan year, then the plan amendment must automatically take effect as of the first day of the plan year (or, if later, the original effective date of the amendment). However, if the plan amendment cannot take effect during the plan year, then it must be treated as if it were never adopted, unless the plan amendment provides otherwise. For example, a plan amendment that provides a benefit increase pursuant to a collective bargaining agreement could provide that if the plan amendment does not take effect pursuant to the rules of section 436(c), it will take effect at the earliest time it is permitted to take effect pursuant to the rules of section 436(c).

7. *Deemed election to reduce prefunding and funding standard carryover balances.*

Pursuant to section 436(f)(3), the final regulations provide that, if a limitation on prohibited payments under section 436(d)(1) or (d)(3) would otherwise apply to a plan, the employer is treated as having made an election under section 430(f) to reduce the prefunding balance or funding standard carryover balance by such amount as is necessary for the AFTAP to be at or above the applicable threshold (60 or 80 percent, as the case may be)[7] in order for the benefit limitation not to apply to the plan. In such a case, the plan sponsor is treated as having made that election on the section 436 measurement date as of which the benefit limitation would otherwise apply. This deemed election applies if the plan provides for prohibited payments that would be limited in a plan year, regardless of whether a plan participant is eligible or elects to receive such a distribution during the plan year (but does not apply if the plan does not provide for prohibited payments that are subject to the benefit limitation or if the plan is not subject to section 436(d) because the

[6] The PBGC has informed the IRS and the Treasury Department that it expects similarly to treat such an automatic restoration of missed benefit accruals as a plan amendment, unless it is covered by the 12-month exception.

[7] Pursuant to section 436(j)(3), for any plan year, if the FTAP is 100 percent or more (or at a lower transition threshold for 2008 through 2010) determined without subtracting the prefunding balance and funding standard carryover balance from the value of plan assets, then the AFTAP is determined without regard to that subtraction. The deemed election under section 436(f)(3) is irrelevant in the case of the 100% funding threshold that applies under section 436(d)(2) when an employer is in bankruptcy because, either the plan is 100 percent or more funded without the subtraction (and therefore no subtraction need be made under section 436(j)(3)), or the plan is less than 100 percent funded without the subtraction so that the value of plan assets must necessarily be insufficient for a deemed election to increase the plan's AFTAP to 100%.

plan was frozen before September 1, 2005). However, the deemed reduction applies with respect to this limitation only if the prefunding and funding standard carryover balances to be reduced are large enough to avoid the application of the limitation. Thus, no reduction of prefunding and funding standard carryover balances is required if the limitation would still apply for a year even if those balances were reduced to zero. The final regulations provide that, if a plan is presumed to have an AFTAP of less than 60 percent because the plan did not receive a certification of the AFTAP before the first day of the 10th month of the plan year under the section 436(h)(2) presumption rules, then the plan is treated as if the plan's funding standard carryover balance and prefunding balance are insufficient to increase the plan's AFTAP to the threshold percentage.

In addition, the regulations provide that, in the case of a plan maintained pursuant to one or more collective bargaining agreements between an employee representative and one or more employers in which a benefit limitation under section 436(b), 436(c), or 436(e) would otherwise apply to the plan, the employer is treated as having made an election under section 430(f) to reduce the prefunding balance or funding standard carryover balance by such amount as is necessary for the AFTAP to be at or above the applicable threshold for the benefit limitation not to apply to the plan, taking into account the unpredictable contingent event benefits or plan amendment, as applicable. In such a case, the plan sponsor is treated as having made that election on the section 436 measurement date as of which the benefit limitation would otherwise apply. As in the case of the deemed reduction in funding balances to avoid the application of section 436(d), the deemed reduction applies only if the prefunding and funding standard carryover balances to be reduced are large enough to avoid the application of the limitation under section 436(b), 436(c), or 436(e), as applicable.

The proposed regulations would have provided that, in the case of a plan with respect to which a collective bargaining agreement applies to some, but not all, of the plan participants, the plan is considered a collectively bargained plan if at least 25 percent of the participants in the plan are members of collective bargaining units for which the benefit levels under the plan are specified under a collective bargaining agreement. A number of commentators asked which participants are taken into account in this calculation. The final regulations adopt the definition in the proposed regulations, but also provide that such a plan is considered a collectively bargained plan if at least 50 percent of the employees benefiting under the plan (within the meaning of § 1.410(b)–3(a)) are members of collective bargaining units for which the benefit levels under the plan are specified under a collective bargaining agreement.

8. *Section 436 measurement date.*

The *section 436 measurement date* is a defined term under the final regulations that is used to describe the date that stops or starts the application of the limitations of sections 436(d) and 436(e) and is also used for calculations with respect to applying the limitations of sections 436(b) and 436(c). The regulations provide that the date of the enrolled actuary's certification of the AFTAP for the plan year is a section 436 measurement date if it is made during the plan year. The regulations further provide that a section 436 measurement date also occurs where there is a change in the plan's presumed AFTAP under the presumption rules of section 436(h). In addition, the regulations provide a series of rules in cases where the enrolled actuary's certification of the AFTAP for a plan year is made after the end of the plan year, as described in section VII.G of this preamble.

9. *Notice requirement under section 101(j) of ERISA.*

Section 101(j) of ERISA requires the plan administrator of a single employer plan to provide a written notice to participants and beneficiaries within 30 days after certain specified dates, including the date the plan has become subject to a restriction described in the ERISA provisions that are parallel to Code sections 436(b) and 436(d); and, in the case of a plan that is subject to the ERISA provisions that are parallel to Code section 436(e), the valuation date for the plan year for which the plan's AFTAP is less than 60 percent (or, if earlier, the date the AFTAP is presumed to be less than 60 percent). These regulations do not include any guidance on section 101(j) of ERISA. The benefit restrictions under section 436 (and the parallel provisions under section 206(g) of ERISA) apply without regard to whether the requirements of section 101(j) of ERISA are satisfied.

B. Limitation on Plant Shutdown and Other Unpredictable Contingent Event Benefits

In accordance with section 436(b), the final regulations provide that a plan that provides for any unpredictable contingent event benefit[8] must provide that the benefit will not be paid to a plan participant during a plan year if the AFTAP for the plan year is less than 60 percent (or is 60 percent or more but would be less than 60 percent if the AFTAP were redetermined applying an actuarial assumption that the likelihood of the occurrence of the unpredictable contingent event during the plan year is 100 percent). However, this prohibition on payment of unpredictable contingent event benefits no longer applies for a plan year, effective as of the first day of the plan year, if the plan sponsor makes the contribution specified in section 436(b)(2), as described in section VII.F of this preamble.

The regulations provide that an *unpredictable contingent event benefit* is any benefit or increase in benefits to the extent the benefit or increase would not be payable but for the occurrence of an unpredictable contingent event, and that an *unpredictable contingent event* is a plant shutdown (whether full or partial) or similar event, or an event other than the attainment of any age, performance of any service, receipt or derivation of any compensation, or the occurrence of death or disability. For example, if a plan provides for an unreduced early retirement benefit upon the occurrence of an event other than the attainment of any age, performance of any service, receipt or derivation of any compensation, or the occurrence of death or disability, then that unreduced early retirement benefit is an unpredictable contingent event benefit to the extent of any portion of the benefit that would not be payable but for the occurrence of the event, even if the remainder of the benefit is payable without regard to the occurrence of the event. Similarly, if a plan includes a benefit payable upon the presence (including the absence) of circumstances specified in the plan (other than the attainment of any age, performance of any service, receipt or derivation of any compensation, or the occurrence of death or disability), but not upon a severance from employment that does not include those circumstances, that benefit is an unpredictable contingent event benefit.

Unpredictable contingent event benefits attributable to a plant shutdown or other unpredictable contingent event that occurred within a period during which no limitation under section 436(b) applied to the plan are not

[8] *See also* Notice 2007–14, 2007–1 CB 501 (*see* § 601.601(d)(2) of this chapter), requesting comments on the types of benefits that are permitted to be provided in a qualified defined benefit plan, including benefits payable in the event of a plant shutdown or similar event.

affected by the limitation as it applies in a subsequent period. For example, if a plant shutdown occurs in 2010 and the plan's funded status is such that benefits contingent upon that plant shutdown are not subject to the limitation described in section 436(b) for that calendar plan year, section 436(b) does not apply to restrict payment of those benefits even if another plant shutdown occurs in 2012 that results in the restriction of benefits that are contingent upon that later plant shutdown under section 436(b) (where the plan's adjusted funding target attainment percentage for 2012 would be less than 60 percent taking into account the liability attributable to those shutdown benefits). Conversely, if a plant shutdown occurs in 2010 and a plan's funded status is such that its shutdown benefits are subject to the limitation under section 436(b) for that plan year and cannot be paid, those shutdown benefits related to the 2010 plant shutdown are not permitted to be paid in a later year even if the plan's AFTAP for the later year is at or above 60 percent (subject to the rules permitting plan amendments to reinstate previously restricted benefits, including unpredictable contingent event benefits, as described in section VII.A.5 of this preamble).

To clarify the operation of the rules regarding unpredictable contingent event benefits, the final regulations contain rules of application that were not provided in the proposed regulations. The regulations clarify that the limitations of section 436(b) apply on a participant-by-participant basis. Thus, whether payment or commencement of an unpredictable contingent event benefit under a plan is restricted with respect to a participant is determined based on whether the participant satisfies the plan's eligibility requirements (other than the attainment of any age, performance of any service, receipt or derivation of any compensation, or the occurrence of death or disability) for such a benefit in a plan year in which the limitations of section 436(b) apply. In addition, in the case of a plan that provides for a benefit that depends upon the occurrence of more than one unpredictable contingent event with respect to a participant, the unpredictable contingent event for purposes of section 436(b) occurs upon the last of those unpredictable contingent events. Cessation of a benefit under a plan upon the occurrence of a specified event does not trigger the application of a limitation under section 436(b). Thus, section 436(b) does not prohibit provisions of a plan that provide for cessation, suspension, or reduction of any benefits upon occurrence of any event.

C. Limitations on Plan Amendments Increasing Plan Liabilities

In accordance with section 436(c), the regulations provide that a plan satisfies the limitation on plan amendments increasing liability for benefits only if the plan provides that no amendment to the plan that has the effect of increasing liabilities of the plan by reason of increases in benefits, establishment of new benefits, changing the rate of benefit accrual, or changing the rate at which benefits become nonforfeitable is permitted to take effect if the AFTAP for the plan year is less than 80 percent (or is 80 percent or more but would be less than 80 percent if the AFTAP were redetermined taking into account the benefits attributable to the amendment). However, this prohibition on plan amendments no longer applies for a plan year if the employer makes the contribution specified in section 436(c)(2), as described in section VII.F of this preamble. Thus, an amendment that provides for an increase in benefits under a formula that is based solely on service performed by participants after the amendment is adopted is always permitted to take effect in a plan year because the amount of contribution described in section 436(c)(2) is $0. However, *see* § 1.430(d)–1(d)(2) for a rule that requires such an amendment to be taken into account in determining the funding target and the target normal cost in certain situations.

The final regulations clarify the application of section 436(c) to certain pre-existing plan provisions. Under the regulations, if a plan contains a provision that provides for the automatic restoration of benefit accruals that were not permitted to accrue because of the application of section 436(e), the restoration of those accruals is generally treated as a plan amendment that is subject to section 436(c). However, the automatic restoration of benefit accruals that were not permitted to accrue because of the application of section 436(e) is not treated as a plan amendment that is subject to section 436(c) if the continuous period of the limitation is 12 months or less and the AFTAP for the plan would not be less than 60 percent taking into account the restored benefit accruals for the prior plan year. The application of section 436(c) to other pre-existing plan provisions that result in benefit increases is expected to be addressed in future proposed regulations.

In accordance with section 436(c)(3), the limitation on amendments increasing liabilities does not apply to any amendment that provides for an increase in benefits under a formula that is not based on a participant's compensation, but only if the rate of increase in benefits does not exceed the contemporaneous rate of increase in average wages of participants covered by the amendment. Like the proposed regulations, the final regulations provide that the determination of the rate of increase in average wages is made by taking into consideration the net increase in average wages from the period of time beginning with the effective date of the most recent benefit increase applicable to all of those participants who are covered by the current amendment and ending on the effective date of the current amendment.

If the participants covered by an amendment include both currently employed participants and terminated participants, all covered participants are included in determining the increase in average wages of the participants covered by the amendment. For this purpose, terminated participants who are not employees at any time during the period from the effective date of the most recent benefit increase applicable to all the participants who are covered by the current amendment and ending on the effective date of the current amendment are treated as having no increase or decrease in wages for the period after severance from employment. Alternatively, the employer can adopt two amendments—one that increases benefits for currently employed participants that is eligible for this exception based solely on the wages of those current employees, and another that increases benefits for terminated participants. However, the amendment that applies only to terminated participants (who received no increase in wages from the employer during the period over which the increase in average wages is determined) would not be eligible for this exception.

As under the proposed regulations, the final regulations exempt a plan amendment (or any pre-existing plan provision) that provides for a mandatory increase in the vesting of benefits under the Code or ERISA (such as vesting rate increases pursuant to statute, plan termination amendments or partial terminations under section 411(d)(3), and vesting increases required by the rules for top-heavy plans under section 416) from the requirements of section 436(c) to the extent the increase in vesting is necessary to enable the plan to continue to satisfy the requirements for qualified plans. In addition, the final

regulations provide that the Commissioner may, in guidance of general applicability, issue additional rules under which other amendments to a plan are not treated as amendments to which section 436(c) applies.

The final regulations contain a rule to clarify when an amendment is considered to take effect for purposes of section 436(c). Under these regulations, in the case of an amendment that increases benefits, the amendment takes effect under a plan on the first date on which any individual who is or could be a participant or beneficiary under the plan would obtain a legal right to the increased benefit if the individual were on that date to satisfy the applicable requirements for entitlement to the benefit (such as the attainment of any age, performance of any service, receipt or derivation of any compensation, or the occurrence of death, disability, or severance from employment). Thus, if a plan's operations change to provide increased benefits so that participants obtain a legal right to the benefit at the time of the change (with the corresponding plan amendment adopted in that year or in a subsequent year that is within the remedial amendment period under section 401(b)), the amendment takes effect at the time of the change and must satisfy the requirements of section 436(c) for that earlier year. By contrast, if an amendment is adopted to provide increased benefits retroactively with respect to a prior year, but no participant's benefits are increased until the amendment is adopted, the amendment takes effect at the time of adoption and must satisfy the requirements of section 436(c) for the plan year the amendment is adopted.

D. Limitations on Prohibited Payments

1. *Funding percentage less than 60 percent.*

In accordance with section 436(d)(1), under the final regulations, a plan must provide that, if the plan's AFTAP for a plan year is less than 60 percent, a participant or beneficiary is not permitted to elect an optional form of benefit that includes a prohibited payment, and the plan will not pay any prohibited payment, with an annuity starting date that is on or after the applicable section 436 measurement date. The proposed regulations would have provided that, if a participant requests such a prohibited payment, the plan must permit the participant to elect another form of benefit available under the plan and this rule is retained in these regulations. Thus, if a participant elects a single-sum payment which is not available because of the section 436 limitations, the participant has to retain the right to elect the annuity forms offered under the plan which do not contain prohibited payments. Similar rules apply in any case in which a beneficiary is entitled to a prohibited payment (for example, where a qualified pre-retirement survivor annuity is offered in an alternative single-sum payment).

The proposed regulations would also have provided that, if a participant requests such a prohibited payment, the plan must permit the participant to elect to defer payment to a later date to the extent permitted under applicable qualification requirements. Questions have arisen regarding whether this deferral right must be provided to a participant who has separated from service and has attained normal retirement age if the plan does not otherwise provide such a participant with the right to defer commencement of benefits. The final regulations clarify that, if a participant requests a prohibited payment at a time when that form of payment cannot be made, the participant retains the right to delay commencement of benefits only if the right to delay commencement is in accordance with the terms of the plan and applicable qualification requirements (such as sections 411(a)(11) and 401(a)(9)). Thus, where payment of an optional form of benefit is restricted pursuant to section 436(d), the plan is not required to provide participants with deferral rights that would not be otherwise available.

Some commenters requested that the regulations permit a plan under which prohibited payments are restricted to handle an election for a prohibited payment by paying the maximum amount permitted under section 436(d) each year, with payments resuming under the originally elected schedule as soon as permitted under section 436(d) (with appropriate catch-up payments). The final regulations do not permit this approach because the IRS and the Treasury Department believe that a plan should pay benefits in accordance with a participant's actual election (with the associated spousal consent, if applicable). However, the final regulations clarify that a plan can offer special optional forms of benefit during the period in which section 436(d)(1) applies to the plan. For example, a plan may permit participants or beneficiaries who commence benefits during this period to elect, within a specified period after the date on which the limitation ceases to apply to the plan, to receive the remaining benefit in the form of a single-sum payment equal to the present value of the remaining benefit to the extent then permitted under section 436(d)(3). Any such optional forms must satisfy section 436(d) and applicable qualification requirements, including satisfaction of section 417(e) and section 415 (at each annuity starting date).

2. *Bankruptcy.*

In accordance with section 436(d)(2), under the final regulations, a plan must provide that a participant or beneficiary is not permitted to elect an optional form of benefit that includes a prohibited payment, and the plan will not pay any prohibited payment, with an annuity starting date that occurs during any period in which the plan sponsor is a debtor in a case under title 11, United States Code, or similar Federal or State law, until the date on which the enrolled actuary of the plan certifies that the plan's AFTAP for the plan year is not less than 100 percent. Participants and beneficiaries can still elect those forms of distribution offered under the plan which do not contain a prohibited payment, as well as the right to defer distribution, as described in section VII.D.1 of this preamble.

3. *Limited payment if percentage at least 60 percent but less than 80 percent.*

In accordance with section 436(d)(3), under the final regulations, a plan must provide that, in any case in which the plan's AFTAP for a plan year is 60 percent or more but is less than 80 percent, a participant or beneficiary is not permitted to elect the payment of an optional form of benefit that includes a prohibited payment, and the plan will not pay any prohibited payment, with an annuity starting date that is on or after the applicable section 436 measurement date, unless the present value, determined in accordance with section 417(e)(3), of the portion of the benefit that is being paid in a prohibited payment does not exceed the lesser of: (A) 50 percent of the present value (determined in accordance with section 417(e)(3)) of the benefit payable in the optional form of benefit that includes the prohibited payment; or (B) 100 percent of the PBGC maximum benefit guarantee amount.

Commenters asked a number of questions about this limitation, including how to determine the portion of the benefit that is being paid in a prohibited payment. Under the final regulations, this determination is made based on the applicable optional form of benefit. If the benefit is being paid in an optional form for which any of the payments is greater than the amount payable under a straight life annuity to the participant or beneficiary (plus any social security supplements described

in the last sentence of section 411(a)(9) payable to the participant or beneficiary) with the same annuity starting date, then the portion of the benefit that is being paid in a prohibited payment is the excess of each payment over the smallest payment during the participant's lifetime under the optional form of benefit (treating a period during the participant's lifetime in which no payments are made as a payment of zero). Thus, for an optional form of benefit in the form of a single sum or in the form of installments over a fixed period of years, the entire optional form of benefit would be a prohibited payment, whereas in the case of a social security leveling optional form of benefit (under which higher payments are made before an assumed social security commencement date, with lower payments thereafter for life), only the amount payable before the assumed social security commencement date that exceeds the ultimate life annuity amount would be a prohibited payment (so that a social security leveling form could go into effect under section 436(d)(3) if the present value of the payments before the assumed social security commencement date that exceed the ultimate life annuity amount does not exceed the present value of 50 percent of the total benefit or, if less, the PBGC maximum benefit guarantee amount). In addition, the PBGC maximum benefit guarantee amount is the present value (determined under guidance prescribed by the Pension Benefit Guaranty Corporation, using the interest and mortality assumptions under section 417(e)) of the maximum benefit guarantee with respect to a participant (based on the participant's age or the beneficiary's age at the annuity starting date) under section 4022 of ERISA for the year in which the annuity starting date occurs.

Like the proposed regulations, the final regulations require that, if an optional form of benefit that is otherwise available under the terms of the plan is not available as of the annuity starting date because of the application of the requirements of section 436(d)(3), the plan must permit a participant or beneficiary to elect to bifurcate the benefit into unrestricted and restricted portions. The plan must also offer the participant or beneficiary any other optional form of benefit otherwise available under the plan at that annuity starting date that would satisfy the 50 percent/PBGC maximum benefit guarantee amount limitation, as well as any general right to defer commencement of benefits under the plan (in the same manner described in section VII.D.1 of this preamble).

Commenters had raised a number of questions concerning calculation of the unrestricted portion of the benefit for purposes of the rule requiring the participant's benefit to be bifurcated into unrestricted and restricted portions. The final regulations clarify that the benefit for the unrestricted portion of the benefit is calculated at the annuity starting date with respect to each optional form of benefit that does not satisfy the 50 percent/PBGC maximum benefit guarantee amount limitation. In general, the unrestricted portion of the benefit with respect to an optional form of benefit is 50 percent of the amount payable under that optional form of benefit. Thus, if a participant elects a single-sum payment of a participant's entire benefit which is not permitted under section 436(d)(3), the bifurcation rule requires the plan to offer the participant half that amount as a single-sum payment (with the remainder being payable as a life annuity or any other optional form available under the plan at that annuity starting date that does not include a prohibited payment).

However, for an optional form of benefit that is a prohibited payment on account of a social security leveling feature or a refund of employee after-tax contributions feature, the unrestricted portion of the benefit is that optional form of benefit applied to only 50 percent of the total benefit. Thus, for a social security leveling option, the unrestricted portion is not equal to half the amount payable before the assumed social security commencement date, plus half the amount payable thereafter, but instead would be a result of applying the plan's social security leveling option provision to half of the participant's total benefit. This may often result in the unrestricted portion being a series of payments ending at the assumed social security commencement date (which, in combination with a life annuity for the restricted portion commencing at the same annuity starting date plus the participant's anticipated social security benefit, would provide level income to the participant to the extent permitted under section 436(d)(3)).

In any event, the unrestricted portion of the benefit must be reduced to the extent necessary so that the present value (determined in accordance with section 417(e)) of the unrestricted portion of that optional form of benefit does not exceed the PBGC maximum benefit guarantee amount.

If the participant or beneficiary elects to bifurcate the benefit, the plan must provide, with respect to the unrestricted portion, the optional form of benefit elected by the participant, treating the unrestricted portion of the benefit as if it were the participant's or beneficiary's entire benefit under the plan. The participant can elect to receive the remainder of his or her benefit in any optional form of benefit available under the plan at that annuity starting date that does not include a prohibited payment. If a plan provides for an optional form of benefit that applies to only a portion of the participant's benefit, that optional form of benefit must be available on a proportionate basis with respect to the unrestricted portion of the benefit. The rules of § 1.417(e)–1 are applied separately to the separate optional forms for the unrestricted and restricted portions of the benefits.

Under the regulations, a plan is permitted to provide for separate elections with respect to the unrestricted and restricted portions of the benefit, without regard to whether the participant or beneficiary elects an optional form of benefit that includes a prohibited payment that is not permitted to be paid under the rules of section 436(d)(3). Like the proposed regulations, the final regulations permit a plan to offer optional forms of benefit that are solely available during a period during which benefits are restricted pursuant to section 436(d)(3). For example, during that period, a plan may offer an optional form of benefit (such as a single sum) that provides for the current payment of the unrestricted portion of the benefit, with a delayed commencement for the restricted portion of the benefit or for an immediate commencement of the restricted portion of the benefit in an annuity form with a right to commute to a single sum offered upon the enrolled actuary's certification that the plan's AFTAP is at least 80 percent. As another example, a plan that offers a subsidized early retirement benefit or a single-sum payment based on the normal retirement benefit may offer an optional form of benefit that combines an unsubsidized single-sum payment for over 50 percent of the accrued benefit with a subsidized early retirement life annuity for the remainder of the accrued benefit, provided that the optional form satisfies the section 436(d)(3) 50 percent/PBGC maximum benefit guarantee limitation. Any such optional forms must also satisfy the applicable qualification requirements, including satisfaction of section 417(e) and, in the case of optional forms of benefit with different annuity starting dates, section 415 at the

later annuity starting date for the restricted portion of the benefit.

The IRS and the Treasury Department anticipate that plan sponsors will use one of several alternative approaches to providing benefit election packages to participants in order to comply with the benefit restrictions of section 436(d). As part of any of these alternatives, as described in the preceding paragraph, the plan may provide special optional forms that are available only when the restrictions of section 436(d) apply.

One approach would be to provide a benefit election package that does not take into account the restrictions under section 436(d), regardless of whether a benefit restriction under section 436(d) applies at the time the package is furnished. In periods during which a restriction applies, the plan must permit the participant either to (1) choose another optional form of benefit that does not have a restriction, (2) defer commencement of the payments to a later annuity starting date, or (3) if the AFTAP is at least 60 percent but less than 80 percent, elect to bifurcate the benefit—that is, to receive the unrestricted portion in the optional form chosen and to make a separate election with respect to the remaining portion of the benefit (the restricted portion). Thus, if a participant elects a form of benefit that is not permitted pursuant to a restriction, then the participant must be informed which benefit options are currently available in order to enable the participant to make a new election among the available forms if the participant so chooses. This approach entails a two-step process.

As an alternative to this approach, the plan may provide for a one-step process which eliminates the need to go back to the participant if the participant elects a form of benefit that is restricted. Under this one-step process, a participant who elects an optional form of benefit that could be subject to restrictions would also elect a backup distribution form which would apply if restrictions are applicable as of the annuity starting date for the distribution. As part of the backup election, this one-step process would also provide the participant with the opportunity to defer commencement and, if the AFTAP is at least 60 percent but less than 80 percent, to bifurcate the benefit.

A third alternative approach, which also eliminates the need to go back to the participant, anticipates the application of the section 436(d) restriction on prohibited payments. Under this approach, with respect to an optional form of benefit that includes a prohibited payment that is not permitted to be paid and for which no additional information is needed to make that determination (such as information regarding a social security leveling optional form of benefit), rather than wait for the participant or beneficiary to elect such optional form, the plan is permitted to provide for separate elections with respect to the restricted and unrestricted portions of that optional form of benefit. However, the alternative described in the preceding sentence is permitted to be applied only if the plan applies the rule to all the optional forms for which no additional information from the participant or beneficiary is needed to make that determination and the plan identifies the option that the bifurcation election replaces. Thus, if section 436(d)(3) applies to a plan during a period and the plan's prohibited payments include a single-sum payment, installments for 10 years, and various life annuities with social security leveling features that depend on information from the participant regarding assumed social security commencement date and social security amount, then during this period the plan can offer 50% of the single-sum payment and 50% of the 10-year installments, without having to offer half of each of the potential life annuities with social security leveling features. Thus, the package presented to a participant would generally present optional forms of benefit that satisfy the requirements of section 436(d) at the annuity starting date (but if the participant were to elect a life annuity with a social security leveling feature that is not permitted to be paid, then the plan would have to follow the two-step approach). If this third approach is used and the plan's benefit restriction status with respect to the participant's annuity starting date changes after the package is furnished, then updated information would be provided to the participant that takes into account the plan's new status. As part of the overall methodology, a plan may provide special optional forms that are available only when the restrictions of section 436(d) apply. Thus, the package presented to a participant would only present optional forms of benefit that satisfy the requirements of section 436(d) at the annuity starting date.

A participant for whom a prohibited payment (or a series of prohibited payments under a single optional form of benefit) is made in accordance with the 50 percent/PBGC maximum benefit guarantee amount limitation cannot receive any additional payment that would be a prohibited payment during any period of consecutive plan years to which any of the limitations under section 436(d) apply. Benefits provided to a participant and any beneficiary of that participant are aggregated for purposes of determining whether the distribution complies with the limitations under section 436(d)(3). The final regulations also reflect the rules of section 436(d)(3)(B)(ii), which describe how this limited distribution is allocated among the beneficiaries of a participant. The final regulations include two special rules for beneficiaries. First, while generally the annuity starting date for the payments to the participant is also the annuity starting date for payments to the beneficiary, a new annuity starting date occurs if the amount payable to the beneficiary can exceed the monthly amount that would have been paid to the participant had he or she not died (such as where a plan offers to pay the death benefit in a single sum). Second, if a beneficiary is not an individual, the prohibited payment amount is determined based on the monthly amount payable in installments over 20 years (instead of the monthly amount paid under a straight life annuity).

4. *Exception for certain frozen plans.*

In accordance with section 436(d)(4), the limitations under section 436(d) do not apply to a plan for any plan year if the terms of the plan, as in effect for the period beginning on September 1, 2005, provide for no benefit accruals with respect to any participants. However, if such a plan provides for any benefit accruals thereafter, this exception ceases to apply for the plan as of the date those accruals start.

5. *Prohibited payment.*

In accordance with section 436(d)(5), the final regulations provide that the term *prohibited payment* means any payment for a month that is in excess of the monthly amount paid under a single life annuity (plus any social security supplements described in the last sentence of section 411(a)(9)) to a participant or beneficiary whose annuity starting date occurs during any period that a limitation on prohibited payments is in effect, as well as any payment for the purchase of an irrevocable commitment from an insurer to pay benefits. The final regulations also include in this definition any transfer of assets and liabilities to another plan maintained by the same employer (or by any member of the employer's controlled group) that is made in order to avoid or terminate the application of section 436 benefit limitations. In addition, the Commissioner may provide for other amounts to be identified as prohibited

payments in revenue rulings and procedures, notices, and other guidance published in the Internal Revenue Bulletin.

Commenters raised several concerns regarding the definition of the term *annuity starting date* as applied to various types of benefits restricted under section 436(d). The final regulations generally adopt the definition of annuity starting date set forth in § 1.401(a)–20, Q&A–10(b), modified to cover retroactive annuity starting dates, as well as transactions that are restricted under section 436(d) even though they do not constitute distributions to any participant. Thus, the final regulations provide that, for purposes of applying the limitations on prohibited payments under section 436(d), the term *annuity starting date* is defined as the first day of the first period for which an amount is payable as an annuity as described in section 417(f)(2)(A)(i) if the benefit is being paid in the form of an annuity. In the case of a benefit not payable in the form of an annuity, the annuity starting date is the annuity starting date for the qualified joint and survivor annuity that is payable under the plan at the same time as the benefit that is not payable as an annuity, and, in the case of an amount payable under a retroactive annuity starting date, the annuity starting date is the benefit commencement date. The effect of the change in the definition of annuity starting date will be to provide plan administrators with some additional time to adjust their administrative practices to take into account a newly issued certification of the plan's AFTAP. The definition of annuity starting date also includes the date of the purchase of an irrevocable commitment from an issuer to pay benefits under the plan and the date of any transfer of assets and liabilities to another plan maintained by the same employer (or by any member of the employer's controlled group) that is made in order to avoid or terminate the application of section 436 benefit limitations.

The final regulations include rules to clarify how the limitations apply with respect to any prohibited payment that is in the form of a purchase of an irrevocable commitment from an insurer or a transfer of assets and liabilities. In the case of a purchase of insurance, the annuity starting date is the date of the purchase of the irrevocable commitment from the insurer and the present value (for purposes of the section 436(d)(3) limitation regarding the lesser of 50 percent of the present value of the benefit and the PBGC maximum benefit guarantee amount) is based on the cost to the plan (which is generally the insurance premium). Where a prohibited payment is in the form of a plan-to-plan transfer of assets and liabilities, the annuity starting date is the date of the transfer to the other qualified plan and the present value is based on the present value of the liabilities transferred (determined in accordance with section 414(l)). However, any such transfer would have to independently satisfy section 414(l), which generally would not be possible where only a portion of a participant's or beneficiary's accrued benefit is being transferred.

The regulations do not address the change made by section 101(c)(2)(C) of WRERA '08, under which the limitations of section 436 do not apply to distributions permitted without consent of the participant under section 411(a)(11) (that is, distributions where the total present value of the benefit is not in excess of $5,000). That change is expected to be addressed in future proposed regulations. Those proposed regulations are also expected to address issues regarding plan loans.

E. Limitation on Benefit Accruals

In accordance with section 436(e), the final regulations require a plan to provide that, in any case in which the plan's AFTAP for a plan year is less than 60 percent, benefit accruals under the plan will cease as of the applicable section 436 measurement date. If a plan must cease benefit accruals under this limitation, then the plan is also not permitted to be amended in a manner that would increase the liabilities of the plan by reason of an increase in benefits or establishment of new benefits. This rule applies regardless of whether an amendment would otherwise be permissible under section 436(c)(3) (involving certain amendments to increase benefits under a formula not based on a participant's compensation). This prohibition on additional benefit accruals no longer applies for a plan year if the plan sponsor makes the contribution specified in section 436(e)(2), as described in section VII.F of this preamble.

The regulations do not reflect the provisions of section 203 of WRERA '08 under which, for the first plan year beginning during the period beginning on October 1, 2008 and ending on September 30, 2009, the plan's AFTAP for purposes of the benefit limitation under section 436(e) is equal to the larger of the AFTAP for the plan year and the AFTAP for the prior plan year. That change is expected to be addressed in future proposed regulations.

F. Rules Relating to Techniques To Avoid Benefit Limitations

The final regulations provide rules regarding techniques that the plan sponsor may utilize to avoid or terminate benefit limitations under section 436 that are largely unchanged from the rules in the proposed regulations. For example, under the final regulations, an employer sponsoring a plan that would otherwise be subject to the limitations of section 436 can avoid the application of those limits by reducing the funding standard carryover balance and prefunding balance by an amount sufficient to avoid the limitations or, if the deadline for making contributions for the prior plan year has not passed, by making additional contributions for a prior plan year that are not added to the prefunding balance. Either of these techniques will have the effect of increasing the adjusted plan assets that form the numerator of the AFTAP calculation, which will increase the AFTAP. In addition, a plan sponsor could make the specific contributions described in section 436(b)(2), 436(c)(2), or 436(e)(2) or provide security to the plan as described in section 436(f)(1). These latter two techniques for avoiding or terminating the application of the benefit limitations of section 436 are described in § 1.436–1(f).

The regulations provide that the plan sponsor is permitted to make additional contributions that are specifically designated at the time of the contribution as a contribution used to avoid the application of a limitation under section 436(b), 436(c), or 436(e). To address questions raised with respect to the proposed regulations, the final regulations provide general rules that apply to all contributions pursuant to section 436(f) (referred to as section 436 contributions) and also separately state the rules with respect to the amount of contributions needed to avoid each type of benefit limitation.

Section 436 contributions must be separate from any minimum required contributions under section 430 and are disregarded in determining the maximum addition to the prefunding balance under section 430(f)(6) and § 1.430(f)–1(b)(1)(i)(B). The designation of a contribution as a section 436 contribution must be made at the time the contribution is used to avoid or terminate the applicable benefit limitations and, except as specifically provided, cannot subsequently be recharacterized with respect to any plan year as a contribution to satisfy a minimum required contribution obligation, or otherwise. Thus, if a plan

sponsor makes a section 436 contribution for a plan year but does not make the minimum required contribution for the plan year, the plan will fail to satisfy the minimum funding requirements under section 430 for the plan year. The designation must be made in accordance with the rules and procedures that otherwise apply to elections under the regulations (at § 1.430(f)–1(f)) with respect to funding balances. The deductibility of a section 436 contribution is determined pursuant to the rules of section 404 (including the rules of section 404(a) and (o)). For this purpose, the section 436 contribution is considered to be made for the plan year during which it is made.

Any section 436 contribution made on a date other than the valuation date for the plan year must be adjusted with interest at the plan's effective interest rate under section 430(h)(2)(A) for the plan year. If the plan's effective interest rate for the plan year has not been determined at the time of the contribution, then this interest adjustment must be made using the highest rate of the three segment rates as applicable for the plan year under section 430(h)(2)(C). In such a case, if the effective interest rate for the year under section 430(h)(2)(A) is subsequently determined to be less than that highest rate, the excess is recharacterized as an employer contribution taken into account under section 430 for the current plan year.

Any section 436 contribution must be paid before the unpredictable contingent event benefits are permitted to be paid, the plan amendment is permitted to go into effect, or the benefit accruals are permitted to resume. In addition, any section 436 contribution with respect to a plan year must be paid during the plan year. Furthermore, no prefunding balance or funding standard carryover balance under section 430(f) may be used as a section 436 contribution to avoid benefit limitations.

In the case of a contribution to avoid or terminate the application of the limitation on benefits attributable to an unpredictable contingent event under section 436(b), in the event that the AFTAP for the plan year determined without taking into account the liability attributable to the unpredictable contingent event benefits is less than 60 percent, the amount of the contribution under section 436(b)(2) is equal to the amount of the increase in the funding target of the plan for the plan year if the benefits attributable to the unpredictable contingent event were included in the determination of the funding target. In the event that the AFTAP for the plan year determined without taking into account the liability attributable to the unpredictable contingent event benefits is 60 percent or more, but would be less than 60 percent taking the unpredictable contingent event benefits into account, the amount of the contribution under section 436(b)(2) is the amount that would be sufficient to result in an AFTAP for the plan year of 60 percent if the benefits attributable to the unpredictable contingent event were included in the determination of the funding target and the contribution were included as part of the assets of the plan. In this latter case, the determination of the amount that would be sufficient to result in an AFTAP of 60 percent must take into account all liabilities for benefits attributable to prior unpredictable contingent event benefits that were permitted to be paid, prior plan amendments that were permitted to take effect, and restored benefit accruals (and any associated section 436 contributions).

In the case of a contribution to avoid or terminate the application of the limitation on benefits attributable to a plan amendment under section 436(c), in the event that the AFTAP for the plan year determined without taking into account the liability attributable to the plan amendment is less than 80 percent, the amount of the contribution under section 436(c)(2) is equal to the amount of the increase in the funding target of the plan for the plan year if the liabilities attributable to the amendment were included in the determination of the funding target. In the event that the AFTAP for the plan year determined without taking into account the liability attributable to the plan amendment is 80 percent or more, but would be less than 80 percent taking the amendment into account, the amount of the contribution under section 436(c)(2) is the amount that would be sufficient to result in an AFTAP for the plan year of 80 percent if the liabilities attributable to the plan amendment were included in the determination of the funding target and the contribution were included as part of the assets of the plan. In this latter case, the determination of the amount that would be sufficient to result in an AFTAP of 80 percent must take into account all liabilities for benefits attributable to prior unpredictable contingent event benefits that were permitted to be paid, prior plan amendments that were permitted to take effect, and restored benefit accruals (and any associated section 436 contributions).

In the case of a contribution to avoid or terminate the application of the limitation on accruals under section 436(e), the amount of the contribution under section 436(e)(2) is equal to the amount sufficient to result in an AFTAP for the plan year of 60 percent if the contribution were included as part of the assets of the plan. For this purpose, the determination of the amount that would be sufficient to result in an AFTAP of 60 percent must take into account all liabilities for benefits attributable to prior unpredictable contingent event benefits that were permitted to be paid, prior plan amendments that were permitted to take effect, and restored benefit accruals (and any associated section 436 contributions).

A plan sponsor is treated as making a section 436 contribution to bring the funding level to the applicable threshold only after the plan's enrolled actuary certifies an AFTAP for the plan year that takes into account the increased liability for the unpredictable contingent event benefits, the plan amendments, or accruals, and any associated section 436 contributions.

Another technique for a plan sponsor to avoid the application of the benefit limitations of section 436 is for the plan sponsor to provide security. In such a case, the AFTAP for the plan year is determined by treating as an asset of the plan any security provided by a plan sponsor by the valuation date for the plan year in a form meeting certain specified requirements. However, this security is not taken into account as a plan asset for any other purpose, including section 430. The only security permitted to be provided by a plan sponsor for this purpose is (i) a bond issued by a corporate surety company that is an acceptable surety for purposes of section 412 of ERISA or (ii) cash, or United States obligations that mature in three years or less, held in escrow by a bank or insurance company. The regulations reflect section 436(f)(1)(C) and (D) in specifying when the security is to be contributed to the plan and when it may be released. If the security is turned over to the plan, then that amount is treated as an employer contribution when it is turned over to the plan. The final regulations provide that any such security turned over to the plan pursuant to the enforcement mechanism cannot be treated as a contribution to avoid or terminate the application of a section 436 benefit limitation under section 436(b)(2), 436(c)(2), or 436(e)(2). In response to commenter concerns, the final regulations permit security to be replaced, provided that the new security is in at least the same amount and satisfies certain other requirements.

G. Presumed Underfunding for Purposes of Benefit Limitations

1. *General rules relating to operation of presumptions.*

Section 436(h) sets forth rules under which the limitations of section 436 are applied during the portion of a plan year before the enrolled actuary has certified the plan's AFTAP for the plan year. The regulations set forth rules for the application of the section 436 benefit limitations during the period the presumptions of section 436(h) apply to a plan, and describe the interaction of the application of those presumptions on plan operations with plan operations after the plan's enrolled actuary has issued a certification of the plan's AFTAP for the plan year. The rules in the final regulations have been revised from those in the proposed regulations to reflect comments.

Under the final regulations, a plan must provide that, for any period during which a presumption under section 436(h) applies to the plan, the limitations applicable under section 436 are applied to the plan as if the AFTAP for the year were the presumed AFTAP determined under the applicable rule under section 436(h), in accordance with the rules of operation set forth in the regulations. For example, a plan's prefunding balance and funding standard carryover balance must be reduced under section 436(f)(3) if the reduction would be sufficient to avoid the applicable limitation based on the presumed AFTAP. The final regulations provide rules for determining the amount of the reduction in balances that are similar to those under the proposed regulations.

The final regulations use the presumed AFTAP and the interim value of adjusted plan assets as of a date to calculate a presumed adjusted funding target as of that date. The presumed adjusted funding target is then compared to the interim value of adjusted plan assets in order to determine the amount of any deemed reduction in the funding standard carryover balance and prefunding balance under section 436(f)(3) that is made as of the first day of the plan year (and, in certain circumstances, that may be made later in the plan year).

The interim value of adjusted plan assets is equal to the value of adjusted plan assets as of the first day of the plan year, determined without regard to future contributions and future elections with respect to the plan's prefunding and funding standard carryover balances under section 430(f) (for example, elections to add to the prefunding balance for the prior plan year, elections to use the prefunding and funding standard carryover balances to offset the minimum required contribution for a year, and elections (including deemed elections under section 436(f)(3)) to reduce the prefunding and funding standard carryover balances for the current plan year). The presumed adjusted funding target is equal to the interim value of adjusted plan assets for the plan year divided by the presumed AFTAP.

The final regulations provide that, if the presumed AFTAP for the plan year changes during the year, the rules regarding the deemed election to reduce funding balances must be reapplied based on the new presumed AFTAP. This will typically occur on the first day of the 4th month of a plan year, but could also happen at a different date if the enrolled actuary certifies the AFTAP for the prior plan year during the current plan year. In order to determine the amount of any reduction in prefunding balance and funding standard carryover balance that would apply in such a situation, a new presumed adjusted funding target must be established, which is then compared to the updated interim value of adjusted plan assets. For this purpose, the updated interim value of adjusted plan assets for the plan year is determined as the interim value of adjusted plan assets as of the first day of the plan year updated to take into account contributions for the prior plan year and section 430(f) elections with respect to the plan's prefunding and funding standard carryover balances made before the date of the change in the presumed AFTAP, and the new presumed adjusted funding target is equal to the updated interim value of adjusted plan assets divided by the new presumed AFTAP. The reapplication of the rules regarding the deemed election under section 436(f)(3) may require an additional reduction in funding balances if the amount of the reduction in funding balances that is necessary to reach the applicable threshold to avoid the application of the limitation under section 436(d) or (e) is greater than the amount that was initially reduced. Prior reductions of funding balances continue to apply.

Pursuant to section 436(d)(2), during any period in which the plan sponsor of a plan is a debtor in a case under title 11, United States Code, or any similar Federal or State law, no prohibited payment may be paid if the plan's enrolled actuary has not yet certified the plan's AFTAP for the plan year to be at least 100 percent. The presumption rules of section 436(h) do not apply for purposes of section 436(d)(2).

The regulations also provide special rules that apply when the presumed AFTAP is deemed to be under 60 percent as a result of the application of section 436(h)(2). In such a case, the regulations provide that neither a reduction of the funding standard carryover balance or prefunding balance nor a section 436 contribution can be used to increase the presumed AFTAP to 60 percent. Accordingly, no prohibited payment can be made, no benefit accruals are permitted, and no plan amendment increasing benefits can take effect during the period the plan is deemed to have an AFTAP of less than 60 percent. However, an unpredictable contingent event benefit is permitted to be paid if the plan sponsor makes the contribution described in section 436(b)(2)(B) (that is, a contribution equal to the increase in the funding target attributable to the unpredictable contingent event benefits).

2. *Rules relating to unpredictable contingent event benefits and plan amendments.*

Under the regulations, for purposes of applying the limitations applicable to unpredictable contingent event benefits and plan amendments during the presumption period, the presumed adjusted funding target must be adjusted to take into account the increase in the funding target attributable to the unpredictable contingent event benefits or the plan amendment, as well as the increase in the funding target attributable to any unpredictable contingent event benefits that are permitted to be paid as a result of any unpredictable contingent event that occurred, or plan amendment that has taken effect, in the prior plan year to the extent not taken into account in the prior plan year adjusted funding target attainment percentage, and any other unpredictable contingent event benefits that are permitted to be paid as a result of any unpredictable contingent event that occurred, or plan amendment that has taken effect, in the current plan year to the extent not previously taken into account in the presumed adjusted funding target for the plan year. The final regulations use the term *inclusive presumed adjusted funding target* for this value. The inclusive presumed adjusted funding target is used to calculate an inclusive presumed AFTAP by comparing it to the interim value of adjusted plan assets, updated to take into account contributions for the prior plan year, prior section 436 contributions for the current plan year, and section 430(f) elections with respect to the plan's prefunding and funding standard carryover balances made before the date of the unpredictable

contingent event or the date the plan amendment would take effect.

During the presumption period, the rules relating to the deemed election of a collectively bargained plan to reduce the funding standard carryover balance and the prefunding balance must be applied based on the inclusive presumed adjusted funding target and the updated interim value of adjusted plan assets. Thus, if, based on the comparison of the updated interim value of adjusted plan assets and the inclusive presumed adjusted funding target, a plan amendment with respect to a collectively bargained plan can only take effect if the funding standard carryover balance and prefunding balance are reduced, then those balances must be reduced. A plan sponsor of a plan that is not a collectively bargained plan (and, thus, is not required to reduce the funding standard carryover balance and the prefunding balance) is permitted to reduce those balances in order to increase the updated interim value of adjusted plan assets that is compared to the inclusive presumed adjusted funding target.

Under the final regulations, if the ratio of the updated interim value of adjusted plan assets to the inclusive presumed adjusted funding target is less than the applicable threshold under section 436(b) or 436(c), then the plan is not permitted to provide any benefits attributable to the unpredictable contingent event, nor is the plan amendment permitted to take effect, unless the plan sponsor makes a contribution that would allow payment of unpredictable contingent event benefits or would permit a plan amendment increasing benefit liabilities to take effect under section 436(b)(2) or 436(c)(2). However, if, after application of any reduction in the funding standard carryover balance or prefunding balance (whether mandatory or optional), the ratio of the interim value of adjusted plan assets to the inclusive presumed adjusted funding target is greater than or equal to the applicable threshold under section 436(b) or 436(c), then the plan is not permitted to limit the payment of unpredictable contingent event benefits, nor is the plan permitted to restrict a plan amendment increasing benefit liabilities from becoming effective based on an expectation that the limitations under section 436(b) or 436(c) will apply following the enrolled actuary's certification of the AFTAP for the plan year.

3. *Updated determination of presumed AFTAP.*

If, in accordance with the rules of operation under the final regulations, unpredictable contingent event benefits are permitted to be paid, or a plan amendment takes effect, because the plan sponsor makes a contribution described in section 436(b)(2) or (c)(2), then the presumed adjusted funding target must be adjusted to reflect the increase in the funding target attributable to the unpredictable contingent event benefits or the plan amendment and the present value of the section 436 contribution is included in the updated interim value of adjusted plan assets. For example, if a plan amendment would have caused the ratio of the updated interim value of adjusted plan assets to the inclusive presumed AFTAP to be less than 80 percent, then, after the contribution described in section 436(c)(2)(B) is made, the presumed AFTAP would be 80 percent. The adjustment to the presumed adjusted funding target is made on the date the contribution is made, and that date is a section 436 measurement date.

Similar rules apply to a contribution described in section 436(e)(2). Thus, if benefit accruals are permitted to resume in a plan year because the plan sponsor makes the contribution described in section 436(e)(2), then the presumed AFTAP will be increased to 60 percent. In this case, the adjustment to the presumed adjusted funding target is made on the date the contribution is made, and that date is a section 436 measurement date.

The regulations also provide that if a plan's funding standard carryover balance or prefunding balance is reduced as a result of applying the presumption rules, then the presumed AFTAP for the plan year is increased to reflect the higher interim value of adjusted plan assets resulting from the reduction in the funding standard carryover balance or prefunding balance. For example, if a reduction in the prefunding balance is made in an amount necessary to increase the presumed AFTAP to 60 percent, then the presumed AFTAP is changed to 60 percent. The date of the event that causes the reduction is a section 436 measurement date.

4. *Periods for which no presumptions apply to the plan.*

Under the regulations, if no presumptions under section 436(h) apply to a plan during a period and the plan's enrolled actuary has not yet issued the certification of the plan's actual AFTAP for the plan year, the plan is not permitted to limit the payment of prohibited payments under section 436(d) or the accrual of benefits under section 436(e) based on an expectation that those sections will apply to the plan once an actuarial certification is issued. However, the limitations on unpredictable contingent event benefits under section 436(b) and plan amendments increasing benefit liabilities under section 436(c) must be applied during that period by treating the preceding year's certified AFTAP as if it were a presumed AFTAP and applying the rules for the presumption period as described in this preamble. Thus, an inclusive presumed adjusted funding target must be determined that takes into account prior events (including the unpredictable contingent event or plan amendment, any other unpredictable contingent event benefits that were permitted to be paid as a result of any unpredictable contingent event that occurred, and any other plan amendment that took effect, earlier during the plan year to the extent not taken into account in the certified AFTAP for the plan year, and any earlier section 436 contributions made for the plan year to the extent those contributions were not taken into account in the certified AFTAP).

If after application of those rules the plan would be treated as having an AFTAP below the applicable threshold (taking into account the increase in the funding target attributable to the unpredictable contingent event benefits or the increase in liability attributable to the plan amendment), the unpredictable contingent event benefits are not permitted to be paid, and the plan amendment is not permitted to take effect, unless the plan sponsor makes a contribution that would allow payment of the unpredictable contingent event benefits or would permit the plan amendment to go into effect. In the case where the plan sponsor makes section 436 contributions to avoid the application of the applicable benefit limitations, to the extent those contributions would not be needed to permit the payment of the unpredictable contingent event benefits or for a plan amendment increasing benefits to go into effect based on a subsequent certification of the AFTAP for the current plan year that takes into account the increase in the funding target attributable to those unpredictable contingent event benefits or the increase in liability attributable to that plan amendment, the excess section 436 contributions are recharacterized as employer contributions and taken into account under section 430 for the current plan year.

5. *Periods following certification of AFTAP.*

Under the final regulations, the rules of operation that apply during a period for which a section 436(h) presumption is in effect no longer apply for a plan

year on and after the date the enrolled actuary for the plan issues a certification of the AFTAP of the plan for the current plan year, provided that the certification is issued before the first day of the 10th month of the plan year. For example, the plan must provide that section 436(d) applies for distributions with annuity starting dates on and after the date of that certification using the certified AFTAP of the plan for the plan year. Similarly, the plan must provide that any prohibition on accruals under section 436(e) as a result of the enrolled actuary's certification that the AFTAP of the plan for the plan year is less than 60 percent is effective as of the date of the certification and that any prohibition on accruals ceases to be effective on the date the enrolled actuary issues a certification that the AFTAP of the plan for the plan year is at least 60 percent. In addition, in the case of a plan that has been issued a certification of the plan's AFTAP for a plan year by the plan's enrolled actuary, the plan sponsor must comply with the requirements of sections 436(b) and (c) for an unpredictable contingent event that occurs or a plan amendment that would take effect on or after the date of the enrolled actuary's certification. Thus, the plan administrator must determine if the AFTAP is at or above the applicable threshold, taking into account the increase in the funding target that would be attributable to the unpredictable contingent event or plan amendment, any other unpredictable contingent event benefits that were permitted to be paid as a result of any unpredictable contingent event that occurred (and any other plan amendment that went into effect) earlier during the plan year to the extent not taken into account in the certified AFTAP for the plan year, and any earlier section 436 contributions made for the plan year to the extent those contributions were not taken into account in the certified AFTAP.

After the AFTAP for a plan year is certified by the plan's enrolled actuary, the deemed election to reduce funding balances must be reapplied based on the actual funding target for the year (provided the certification is issued before the first day of the 10th month of the plan year). This reapplication of the deemed election rules may require an additional reduction in funding balances if the amount of the reduction in funding balances that is necessary to reach the applicable threshold to avoid the application of the limitations under section 436(d) or (e) is greater than the amount that was reduced. If the amount of the reduction in funding balances that is necessary to reach the applicable threshold to avoid the application of the benefit limitation is less than the amount that was reduced, then the prior reduction continues to apply. Similarly, if the amount of the reduction in funding balances that is necessary to reach the applicable threshold to avoid the application of the corresponding benefit limitation exceeds the remaining amount of the funding balances, then the prior reduction continues to apply and no further reduction is made.

The enrolled actuary's certification of the AFTAP for the plan for the plan year does not affect unpredictable contingent event benefits that were permitted to be paid for events that occurred during the prior periods for which a presumption under section 436(h) applied. In addition, the enrolled actuary's certification of the AFTAP for the plan for the plan year does not affect a plan amendment that increases the liability for benefits where the amendment was permitted to first take effect during the prior periods for which a presumption under section 436(h) applies. Similarly, the enrolled actuary's certification of the AFTAP for the plan for the plan year does not affect prohibited payment distributions with annuity starting dates before the certification and does not require a cessation of accruals prior to the date of that certification.

However, under the final regulations, if a plan does not pay benefits attributable to an unpredictable contingent event or plan amendment because of the application of a presumption under section 436(h) for a plan year, the plan must provide for benefits that were not previously paid (or accrued) if such benefits would be permitted under the rules of section 436 based on the certified actual AFTAP for that plan year, taking into account the increase in the funding target that would be attributable to the unpredictable contingent event benefits or increase in liability due to the plan amendment.

The final regulations clarify that, for any plan year in which a plan is providing benefits with respect to multiple unpredictable contingent events occurring within the plan year or plan amendments taking effect within the plan year, the section 436(b) restriction on unpredictable contingent event benefits and the section 436(c) restriction on plan amendments are applied with respect to each unpredictable contingent event or amendment by treating the increase in the funding target attributable to that event or amendment as if it included the increase in the funding target attributable to any earlier event or amendment (and including any earlier section 436 contributions for the plan year as plan assets). As applied with respect to the limitation on plan amendments, this rule ensures that the limitation applies in a similar fashion regardless of whether a benefit increase is effectuated through a series of amendments or through a single amendment. In the absence of such a rule, the limitation on plan amendments could be avoided through a series of amendments each of which provides only a small portion of the aggregate increase.

H. Determination of AFTAP and Presumed AFTAP

1. *Determination of presumed AFTAP based on prior plan year's certified AFTAP.*

The final regulations provide rules for the determination of the presumed AFTAP under section 436(h)(1) that are similar to the rules under the proposed regulations. Thus, if a limitation under section 436 applied in the prior plan year based on a certified AFTAP during that plan year, the presumed AFTAP as of the first day of the current plan year is equal to the AFTAP for the prior plan year.

The final regulations modify the rule in the proposed regulations that would have permitted a certified AFTAP that is made on or after the first day of the 10th month of the prior plan year to be used as the basis for the presumed AFTAP in the current plan year (in lieu of using the deemed ''under 60 percent'' AFTAP that applied for the prior plan year in such a case). Under the final regulations, such a late prior plan year certification is permitted to be so used only if the certification took into account any unpredictable contingent event benefits that are permitted to be paid based on unpredictable contingent events that occurred and plan amendments that went into effect prior to that late certification (along with any associated section 436 contributions).

In addition, the regulations provide rules for the application of the presumptions if the plan actuary did not certify the AFTAP in the prior plan year, but that prior plan year ended before the first day of the 10th month of the plan year (so that section 436(h)(2) did not apply in that prior plan year). In such a case, the presumed AFTAP that applied as of the end of the prior plan year is treated as a certified AFTAP for that plan year which is used for purposes of the presumptions in the current year.

2. *Change in presumed AFTAP on first day of the 4th month.*

The final regulations provide rules for the application of section 436(h)(3) that are similar to the proposed regulations. Some comments suggested that section 436(h)(3) applies on a limitation by limitation basis (with the result that a plan could have different presumed AFTAPs among the various limitations). However, the IRS and the Treasury Department believe that applying a single presumed AFTAP for all purposes reflects the statutory language of section 436(h)(3) and provides a consistent set of rules for applying the limitations during the period following the first day of the 4th month of the plan year. This interpretation is also essential for purposes of the rule under which benefits with respect to unpredictable contingent events that previously occurred during the plan year and plan amendments that previously took effect during the plan year are taken into account on a combined basis for purposes of applying the limitations with respect to subsequent events or amendments, such as a subsequent unpredictable contingent event.

Under the final regulations, if the AFTAP for the prior plan year was at least 60 percent but less than 70 percent or was at least 80 percent but less than 90 percent, and the actuary has not certified the AFTAP for the current plan year before the first day of the 4th month of the current plan year, then the presumed AFTAP for the current plan year is 10 percentage points lower than the AFTAP for the prior plan year. As under the proposed regulations, this 10 percentage point reduction will also apply as of the date the actuary certifies the AFTAP for the prior plan year, even if that certification is on or after the first day of the 4th month of the current plan year. In either case, the date of the 10 percentage point reduction is a section 436 measurement date.

The final regulations also provide that the 10 percentage point reduction applies in the first year that section 436 applies to the plan if the AFTAP for the prior plan year was at least 70 percent but less than 80 percent. This rule reflects an interpretation of section 436(h)(3)(A) (providing for a 10 percentage point reduction in the AFTAP if a limitation under section 436 would have applied in the prior plan year) under which the determination of whether a limitation under section 436 would have applied in the prior plan year is made by assuming that section 436 was effective in that prior plan year.

3. *Change in presumed AFTAP on first day of 10th month for plans with no current year certification.*

The final regulations reflect the rules of section 436(h)(2), under which a plan for which the actuary has not issued a certification before the first day of the 10th month of the plan year is conclusively presumed to have an AFTAP of less than 60 percent beginning on that date. These rules are unchanged from the proposed regulations.

4. *Rules regarding certifications and range certifications.*

The proposed regulations would have provided that the enrolled actuary's certification of the AFTAP for a plan year must be made in writing, must be provided to the plan administrator, and must certify the plan's AFTAP for the plan year. The final regulations specify that the certification must also set forth the value of plan assets, the prefunding balance, the funding standard carryover balance, the value of the funding target used in the determination, the aggregate amount of annuity purchases included in the adjusted value of plan assets and the adjusted funding target, the unpredictable contingent event benefits permitted to be paid for unpredictable contingent events that occurred during the current plan year that were taken into account for the current plan year (including with any associated section 436 contribution), the plan amendments that went into effect in the current plan year that were taken into account for the current plan year (including with any associated section 436 contribution), and any other relevant factors. The actuarial assumptions and funding methods used in the calculation for the certification must be the actuarial assumptions and funding methods used for the plan for purposes of determining the minimum required contributions under section 430 for the plan year. Thus, if the actuary who determines the minimum required contributions for the plan year is not the same actuary who certified the AFTAP for the plan year, then the second actuary must either apply the actuarial assumptions and methods used by the first actuary or must issue a revised certification for the plan year. See section VII.H.5 of this preamble for a description of the consequences of a revised certification.

Some commenters requested that an enrolled actuary be permitted to certify the AFTAP for a plan year based on a ''roll forward'' of prior year actuarial results with appropriate adjustments for subsequent changes. The final regulations do not provide for such an alternative to estimate the AFTAP because the AFTAP must be based on the funding target for the current plan year and section 436 does not provide any rules to address discrepancies between an estimated AFTAP and an actual AFTAP for a plan year.

As an alternative to certifying a specific number for the plan's AFTAP, the proposed regulations would have provided that the enrolled actuary is permitted to certify during the first 9 months of a plan year that the plan's AFTAP for that year is within a percentage ''range'' that is either (i) 60 percent or higher, but less than 80 percent, (ii) 80 percent or higher, or (iii) 100 percent or higher. The final regulations adopt this alternative and provide that such a ''range'' certification ends the application of the presumptions, but only if the enrolled actuary follows up with a certification of the specific AFTAP and that the certified specific AFTAP is within the range of the earlier certification. In addition, the final regulations permit a range certification of under 60 percent.

The proposed regulations would have provided that the specific AFTAP must be certified before the first day of the 10th month of that year. In response to concerns raised by commenters, the final regulations provide that, if the plan's enrolled actuary has issued a timely range certification for a plan year, then the specific AFTAP is permitted to be certified at any time prior to the end of the plan year. However, if the plan's enrolled actuary has issued a range certification for the plan year but does not issue a certification of the specific AFTAP for the plan by the last day of that plan year, the AFTAP for the plan is retroactively deemed to be less than 60 percent as of the first day of the 10th month of the plan year.

If this range certification alternative is followed, then the plan is treated as having a certified AFTAP at the smallest value within the applicable range. For example, if the enrolled actuary certified that the AFTAP was more than 60 percent but less than 80 percent, then the plan is treated as having an AFTAP of 60 percent for purposes of applying the limitations of section 436(b) until the date of the specific AFTAP certification. In such a case, if there is an unpredictable contingent event or a plan amendment is adopted that increases liability for benefits, unpredictable contingent event benefits cannot be paid and the plan amendment cannot take effect unless the plan sponsor makes a contribution described in section 436(b)(2) or 436(c)(2). If the plan sponsor makes a contribution under section 436(b)(2) or section 436(c)(2), the final regulations provide that the contribution is recharacterized as a regular employer contribution that is taken into account under section 430 for the current plan year to the extent it is determined that the contribution was

not needed to avoid the application of the benefit limit, based on the subsequent calculation of the specific AFTAP.

The final regulations specify that the enrolled actuary is not permitted to certify the AFTAP based on a value of assets that includes contributions receivable for the prior plan year that have not actually been made as of the date of the certification. However, this rule does not apply to certifications that are made for plan years beginning before January 1, 2009. Thus, for a certification with respect to 2008, the enrolled actuary is permitted to take in account contributions for 2007 that are reasonably expected but have not yet been made by the plan sponsor at the time of the certification. However, if the plan sponsor does not make those contributions, the enrolled actuary's certification will be incorrect.

5. *Change in certified AFTAP.*

If the enrolled actuary for the plan provides a certification of the AFTAP for the plan year (including a range certification) and that certified percentage is superseded by a subsequent determination of the AFTAP for that plan year, that later percentage generally must be applied for the period beginning with the date of the first certification. The subsequent determination could be the correction of a prior incorrect certification (including a certification for a plan year beginning in 2008 which assumed an employer contribution that was not made) or it could be an update of a prior correct certification to take into account subsequent events, such as plan amendments, additional contributions, or elections under section 430(f). The implications of such a change depend on whether the change is a material change or an immaterial change.

For this purpose, the regulations define a change of AFTAP as a material change if plan operations with respect to benefits that are addressed by section 436, taking into account any actual contributions and elections under section 430(f) made by the plan sponsor based on the prior certified percentage, would have been different based on the subsequent determination of the plan's AFTAP for the plan year. A change in a plan's AFTAP for a plan year can be a material change even if the only impact of the change occurs in the following plan year under the rules for determining the presumed AFTAP in that following year.

The regulations specify that a change in an AFTAP that is not a material change as described in the preceding paragraph is an immaterial change. In addition, the regulations provide that if the difference between the AFTAP for a plan year and the later revised determination of that percentage is the result of certain specified actions, then the change in the AFTAP is deemed to be an immaterial change. The proposed regulations would have provided that the specified actions are additional contributions for the preceding year or a plan sponsor's election to reduce the prefunding or funding standard carryover balance after the date of the certification. The final regulations add to this list, including adding a plan sponsor's election to apply the prefunding balance or funding standard carryover balance to offset the prior plan year's minimum required contribution, a change in funding method or actuarial assumptions (where such change required actual approval of the Commissioner, rather than deemed approval), and an unpredictable contingent event or plan amendment for which a section 436 contribution was made.

The final regulations provide rules requiring a recertification of the AFTAP in certain situations. For example, if the plan would have a material change in the AFTAP as a result of one of the changes described in the prior paragraph, the change is deemed immaterial only if the actuary recertifies the AFTAP for the plan year as soon as practicable thereafter, taking into account the relevant event. Similarly, if the plan sponsor is making a section 436 contribution in the amount needed to bring the AFTAP up to a relevant threshold (60 or 80 percent), then the actuary must recertify the AFTAP as 60 or 80 percent. The regulations also provide that the plan administrator is permitted to request an updated certification of AFTAP in other situations, such as where the employer makes a section 436 contribution in the amount of the increase in the funding target attributable to the unpredictable contingent event benefits or the plan amendment.

The regulations provide that a material change will result in the plan not satisfying the qualification rules. If the plan was operated in accordance with the prior certification of the AFTAP for the plan year, the plan will not have satisfied the requirements of section 401(a)(29) and section 436. In the case of a material change where the plan was operated in accordance with the subsequent certification of the AFTAP during the period of time the prior certification applied, then the plan will not have been operated in accordance with its terms. Furthermore, the regulations provide that the rules requiring application of a presumed AFTAP under section 436(h) continue to apply from and after the date of the prior certification until the date of the subsequent certification.

The final regulations provide that, in the case of an immaterial change, the revised percentage applies prospectively. For this purpose, in the case of a change that would be a material change but for the rule deeming it to be an immaterial change, the revised percentage must be applied beginning with the date of the event that gave rise to the need for the updated certification. As under the proposed regulations, an immaterial change does not change the inapplicability of the presumptions under section 436(h) for the plan year prior to the date of the subsequent certification.

I. Determination of Adjusted Funding Target Attainment Percentage

For purposes of section 436, the *funding target* means the funding target under section 430(d) or section 430(i), as applicable to the plan for a plan year, and the FTAP is determined under the same rules that apply under section 430(d).

The AFTAP for any plan year is the fraction (expressed as a percentage), the numerator of which is the adjusted plan assets and the denominator of which is the adjusted funding target. The adjusted plan assets equals the value of plan assets, decreased by the plan's funding standard carryover balance and prefunding balance and increased by the aggregate amount of purchases of annuities for participants and beneficiaries (other than participants who, at the time of the purchase, were highly compensated employees (as defined in section 414(q), which definition includes highly compensated former employees described in § 1.414(q)–1T, Q&A–4)) which were made by the plan during the preceding 2 plan years, to the extent not included in plan assets under section 430. The final regulations provide that the adjusted funding target equals the funding target for the plan year (determined without regard to the at-risk rules under section 430(i)), increased by the same annuity purchases that were added to the assets in determining adjusted plan assets.

If the FTAP for a plan year, determined without regard to the subtraction of the funding standard carryover balance and the prefunding balance from the value of plan assets in accordance with section 436(f), would be 100 percent or more, then, for purposes of section 436, the value of net plan assets used in the determination of the FTAP (and hence the AFTAP) is

determined without regard to any subtraction of funding balances under section 430(f)(4). The final regulations reflect the transition rule of section 436(j)(3)(B) under which a lower percentage is substituted for 100 percent for purposes of the rule described in the preceding sentence. However, this transition is only available if the plan's FTAP for each prior year is above the transition percentage. This latter requirement was unchanged by WRERA.

The final regulations also provide rules for determining the AFTAP for the prior plan year in the case of the first plan year beginning in 2008. These rules are the same as under the proposed regulations, except that the proposed regulations would have allowed the special rules to apply to the first effective plan year (which could be later than 2008 in the case of a plan described in sections 104 through 106 of PPA '06).

Under the rules for determining the AFTAP for the plan year preceding the first plan year beginning in 2008, the FTAP for the preceding plan year is determined by substituting the current liability for the funding target. The transition rules for determining the value of plan assets are the same under section 436 as apply under section 430(d). Thus, the value of plan assets is determined under section 412(c)(2) as in effect for the 2007 plan year (except that the value of plan assets prior to subtraction of the plan's funding standard account credit balance described below can neither be less than 90 percent of the fair market value of plan assets nor greater than 110 percent of the fair market value of plan assets on the valuation date for that plan year). If a plan has a funding standard account credit balance as of the valuation date for the 2007 plan year, that balance must be subtracted from the asset value described in this preamble as of that date (unless the value of plan assets is greater than or equal to 90 percent of the plan's current liability determined under section 412(l)(7) (as in effect prior to PPA '06) on the valuation date for the 2007 plan year). However, if the employer makes an election to reduce some or all of the funding standard carryover balance as of the first day of the first plan year beginning in 2008 in accordance with section 430(f)(5), then the present value (determined as of the valuation date for the prior plan year using the valuation interest rate for that prior year) of the amount so reduced is not treated as part of the funding standard account credit balance when that balance is subtracted from the value of net plan assets.

In any case in which the plan's enrolled actuary has not issued a certification of the AFTAP of the plan for the 2007 plan year using this rule, the AFTAP of the plan for the first plan year beginning in 2008 is presumed to be less than 60 percent until the AFTAP of the plan for the 2007 plan year has been certified or the AFTAP of the plan for the first plan year beginning in 2008 has been certified. This rule applies for purposes of sections 436(b) and 436(c) at the beginning of the first plan year beginning in 2008 and applies for purposes of sections 436(d) and 436(e) as of the first day of the 4th month of the first plan year beginning in 2008. The special rules permitting range certifications for plan years beginning after 2007 do not apply to the 2007 plan year.

The final regulations differ from the proposed regulations in the transition rules that apply for the determination of a plan's AFTAP for the pre-effective plan year in the case of a plan described in sections 104 through 106 of PPA '06. In such a case, the AFTAP is determined for that plan year in the same manner as for a plan to which section 430 applies to determine the plan's minimum required contribution, except that the value of plan assets that forms the FTAP numerator is determined without subtraction of the funding standard carryover balance or the credit balance under the funding standard account.[9]

The regulations do not include any special rules authorized under section 436(k) (relating to the determination of the AFTAP for a plan that uses a valuation date other than the first day of the plan year). Those rules, based on the rules described in Notice 2008–21, will be included in future proposed regulations. See § 601.601(d)(2) relating to objectives and standards for publishing regulations, revenue rulings and revenue procedures in the Internal Revenue Bulletin.

J. Timeliness of Certification of a Plan's AFTAP

A number of comments were received raising issues concerning potential delays in the completion and delivery of a certification of the plan's AFTAP by the plan's enrolled actuary. In particular, commenters asked whether there was any legal obligation to provide a certification, whether an actuary could intentionally delay providing the certification, and whether the plan administrator could direct the certification to be delayed (or delay requesting a certification where the plan's actuary would not provide a certification until so requested by the plan administrator). These final regulations do not include any special rules relating to these comments, but these comments may be considered in connection with future proposed regulations. In addition, the Treasury Department and the IRS will be coordinating with the Department of Labor to consider the circumstances in which the power to delay issuance of a certification may result in fiduciary responsibilities in the administration of the plan, rather than being merely ministerial.

Section 1.411(d)–4, Q&A–4(a) provides generally that a plan that permits the employer, either directly or indirectly, through the exercise of discretion, to deny a participant a section 411(d)(6) protected benefit provided under the plan for which the participant is otherwise eligible violates the requirements of section 411(d)(6). In addition, pursuant to that regulation, a plan that permits employer discretion to deny the availability of a section 411(d)(6) protected benefit violates the definitely determinable requirement of section 401(a). Section 1.411(d)–4, Q&A–4(b) provides an exception to this general rule for limited discretion with respect to the ministerial or mechanical administration of the plan. Section 1.411(d)–4, Q&A–6(b) provides that a plan may not limit the availability of section 411(d)(6) protected benefits permitted under the plan based on objective conditions that are within the employer's discretion. As an example of such a provision, the regulation states that the availability of section 411(d)(6) protected benefits in a plan may not be conditioned on a determination with respect to the level of the plan's funded status because the amount of the plan's funding is within the employer's discretion.

Future proposed regulations are expected to address the interaction of the rules of section 436 and the rules of § 1.411(d)–4 that relate to employer discretion. These future proposed regulations are expected to conform the rules of § 1.411(d)–4, Q&A–6(b), regarding employer discretion in plan funding to the requirements of section 436. These future proposed regulations

[9] Section 436(m) provides for special rules to apply in determining a plan's AFTAP for the preceding plan year only for plan years beginning during 2008. Accordingly, the regulations limit the use of the special rule under which the plan's FTAP is determined based on the plan's current liability to the determination of the plan's FTAP for the 2007 plan year, even for a plan described in sections 104 through 106 of PPA '06 for which section 430 does not apply for purposes of determining a plan's minimum required contribution until a plan year after the 2008 plan year.

are also expected to address the extent to which § 1.411(d)–4, Q&A–4(b) (under which a plan may permit limited discretion with respect to ministerial acts) applies with respect to the certification of the plan's AFTAP.

Effective/Applicability Date

The final regulations under section 430 apply to plan years beginning on or after January 1, 2010, regardless of whether section 430 applies to determine the minimum required contribution for the plan year. For plan years beginning before January 1, 2010, plans are permitted to rely on these final regulations for purposes of satisfying the requirements of section 430. This reliance applies section by section under the final regulations. Alternatively, for plan years beginning before January 1, 2010, plans are permitted to rely on the proposed regulations under section 430(d), (f), (g), (h)(2), and (i) (REG–139236–07, 72 FR 74215; REG–113891–07, 72 FR 50544) for purposes of applying the rules of section 430.

Section 436 generally applies to plan years beginning on or after January 1, 2008. The applicability of section 436 for purposes of determining the minimum required contribution is delayed for certain plans in accordance with sections 104 through 106 of PPA '06. In the case of a collectively bargained plan that is maintained pursuant to one or more collective bargaining agreements between employee representatives and one or more employers ratified before January 1, 2008, section 436 does not apply to plan years beginning before the earlier of January 1, 2010, or the later of the date on which the last such collective bargaining agreement relating to the plan terminates [10] (determined without regard to any extension thereof agreed to after August 17, 2006), or the first day of the first plan year to which section 436 would otherwise apply. In the case of a plan with respect to which a collective bargaining agreement applies to some, but not all, of the plan participants, the plan is considered a collectively bargained plan if it is considered a collectively bargained plan under the rules that apply for purposes of section 436(f)(3)(C) described in section VII.A.7 of this preamble.

The final regulations under section 436 apply to plan years beginning on or after January 1, 2010. For plan years beginning before January 1, 2010, plans are permitted to rely on the provisions set forth in these final regulations for purposes of satisfying the requirements of section 436. Alternatively, for plan years beginning before January 1, 2010, plans are permitted to rely on the proposed regulations under section 436 (REG–113891–07, 72 FR 50544) for purposes of satisfying the requirements of section 436.

Section 1107 of PPA '06 and Code Section 411(d)(6)

Under section 1107 of PPA '06, a plan sponsor is permitted to delay adopting a plan amendment pursuant to the enactment of section 436 (or pursuant to these regulations) until the last day of the first plan year beginning on or after January 1, 2009. If section 1107 of PPA '06 applies to an amendment of a plan, section 1107 provides that the plan does not fail to meet the requirements of section 411(d)(6) by reason of such amendment, except as otherwise provided by the Secretary of the Treasury.[11] For example, section 411(d)(6) relief would be available for plan amendments that would prohibit single sum or other optional forms of benefit that include prohibited payments if the plan's AFTAP was less than 60 percent, in accordance with section 436(d) and § 1.436–1(d) of these regulations. The IRS and the Treasury Department are reviewing whether sample plan amendments should be issued with respect to section 436 and the § 1.436–1 regulations.

Special Analyses

It has been determined that this Treasury Decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. It is hereby certified that the collection of information imposed by these regulations will not have a significant economic impact on a substantial number of small entities. The estimated burden imposed by the collection of information contained in these regulations is 1.5 hours per respondent. Moreover, most of this burden is attributable to the requirement for a qualified defined benefit plan's enrolled actuary to provide a timely certification of the plan's AFTAP for each plan year to avoid certain benefit restrictions, which is imposed by section 436(h) of the Code. In addition, these regulations provide for several written elections to be made by the plan sponsor upon occasion; these written elections will require minimal time to prepare. Accordingly, a regulatory flexibility analysis is not required. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal authors of these regulations are Michael P. Brewer, Lauson C. Green, and Linda S.F. Marshall, Office of Division Counsel/ Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the IRS and the Treasury Department participated in the development of these regulations.

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 602

Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

■ Accordingly, 26 CFR parts 1 and 602 are amended as follows:

PART 1—INCOME TAXES

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

Authority: 26 U.S.C. 7805 * * *

■ **Par. 2.** Section 1.430(d)–1 is added to read as follows:

§ 1.430(d)–1 Determination of target normal cost and funding target.

(a) *In general*—(1) *Overview.* This section sets forth rules for determining a plan's target normal cost and funding target under sections 430(b) and 430(d), including guidance relating to the rules regarding actuarial assumptions under sections 430(h)(1), 430(h)(4), and 430(h)(5). Section 430 and this section

[10] As provided in section 113(b)(2) of PPA '06, any plan amendment made pursuant to a collective bargaining agreement relating to the plan which amends the plan solely to conform to any requirement added by section 436 is not treated as a termination of the collective bargaining agreement.

[11] Except to the extent permitted under section 411(d)(6) and § 1.411(d)–3 or 1.411(d)–4, or under a statutory provision such as section 1107 of PPA '06, section 411(d)(6) prohibits a plan amendment that decreases a participant's accrued benefits or that has the effect of eliminating or reducing an early retirement benefit or retirement-type subsidy, or eliminating an optional form of benefit, with respect to benefits attributable to service before the amendment. However, an amendment that eliminates or decreases benefits that have not yet accrued does not violate section 411(d)(6), provided that the amendment is adopted and effective before the benefits accrue.

apply to single employer defined benefit plans (including multiple employer plans as defined in section 413(c)) that are subject to section 412, but do not apply to multiemployer plans (as defined in section 414(f)). For further guidance on actuarial assumptions, *see* § 1.430(h)(2)–1 (relating to interest rates) and §§ 1.430(h)(3)–1 and 1.430(h)(3)–2 (relating to mortality tables). *See* also § 1.430(i)–1 for the determination of the funding target and the target normal cost for a plan that is in at-risk status.

(2) *Organization of regulation.* Paragraph (b) of this section sets forth certain definitions that apply for purposes of section 430. Paragraph (c) of this section provides rules regarding which benefits are taken into account in determining a plan's target normal cost and funding target. Paragraph (d) of this section sets forth the rules regarding the plan provisions that are taken into account in making these determinations, and paragraph (e) of this section provides rules on the plan population that is taken into account for this purpose. Paragraph (f) of this section provides rules relating to the actuarial assumptions and the plan's funding method that are used to determine present values. Paragraph (g) of this section contains effective/applicability dates and transition rules.

(3) *Special rules for multiple employer plans.* In the case of a multiple employer plan to which section 413(c)(4)(A) applies, the rules of section 430 and this section are applied separately for each employer under the plan, as if each employer maintained a separate plan. Thus, the plan's funding target and target normal cost are computed separately for each employer under such a multiple employer plan. In the case of a multiple employer plan to which section 413(c)(4)(A) does not apply (that is, a plan described in section 413(c)(4)(B) that has not made the election for section 413(c)(4)(A) to apply), the rules of section 430 and this section are applied as if all participants in the plan were employed by a single employer.

(b) *Definitions*—(1) *Target normal cost*—(i) *In general.* For a plan that is not in at-risk status under section 430(i) for a plan year, subject to the adjustments described in paragraph (b)(1)(iii) of this section, the *target normal cost* of the plan for the plan year is the present value (determined as of the valuation date) of all benefits under the plan that accrue during, are earned during, or are otherwise allocated to service for the plan year under the applicable rules of this section, including paragraph (c)(1)(ii)(B), (C), or (D) of this section. *See* § 1.430(i)–1(d) and (e)(2) for the determination of the target normal cost for a plan that is in at-risk status.

(ii) *Benefits allocated to a plan year.* The benefits that accrue, are earned, or are otherwise allocated to service for the plan year are based on the actual benefits accrued, earned, or otherwise allocated to service for the plan year through the valuation date and benefits expected to accrue, be earned, or be otherwise allocated to service for the plan year for the period from the valuation date through the end of the plan year. The benefits that are allocated to the plan year under the rules of paragraph (c) of this section include any increase in benefits during the plan year that is attributable to increases in compensation for the current plan year even if that increase in benefits is with respect to benefits attributable to service performed in a preceding plan year. In addition, the benefits that are allocated to the plan year under the rules of paragraph (c) of this section include any increase in benefits during the plan year that arises on account of mandatory employee contributions (within the meaning of § 1.411(c)–1(c)(4)) that are made during the plan year.

(iii) *Special adjustments*—(A) *In general.* The target normal cost of the plan for the plan year (determined under paragraph (b)(1)(i) of this section) is adjusted (not below zero) by adding the amount of plan-related expenses expected to be paid from plan assets during the plan year and subtracting the amount of mandatory employee contributions (within the meaning of § 1.411(c)–1(c)(4)) that are expected to be made during the plan year.

(B) *Plan-related expenses.* [Reserved]

(2) *Funding target.* For a plan that is not in at-risk status under section 430(i) for a plan year, the funding target of the plan for the plan year is the present value (determined as of the valuation date) of all benefits under the plan that have been accrued, earned, or otherwise allocated to years of service prior to the first day of the plan year under the applicable rules of this section, including paragraph (c)(1)(ii)(B), (C), or (D) of this section. *See* § 1.430(i)–1(c) and (e)(1) for the determination of the funding target for a plan that is in at-risk status.

(3) *Funding target attainment percentage*—(i) *In general.* Except as otherwise provided in this paragraph (b)(3), the funding target attainment percentage of a plan for a plan year is a fraction (expressed as a percentage)—

(A) The numerator of which is the value of plan assets for the plan year (determined under the rules of § 1.430(g)–1) after subtraction of the prefunding balance and the funding standard carryover balance under section 430(f)(4)(B) and § 1.430(f)–1(c); and

(B) The denominator of which is the funding target of the plan for the plan year (determined without regard to the at-risk rules of section 430(i) and § 1.430(i)–1).

(ii) *Determination of funding target attainment percentage for plans with delayed effective dates.* If section 430 does not apply for purposes of determining the plan's minimum required contribution for a plan year that begins on or after January 1, 2008 (as is the case for a plan described in section 104, 105, or 106 of the Pension Protection Act of 2006 (PPA '06), Public Law 109–280 (120 Stat. 780)), then the funding target attainment percentage is determined for that plan year in accordance with the rules of paragraph (b)(3)(i) of this section in the same manner as for a plan to which section 430 applies to determine the plan's minimum required contribution, except that the value of plan assets that forms the numerator under paragraph (b)(3)(i)(A) of this section is determined without subtraction of the funding standard carryover balance or the credit balance under the funding standard account.

(iii) *Special rule for plans with zero funding target.* If the funding target of the plan is equal to zero for a plan year, then the funding target attainment percentage under this paragraph (b)(3) is equal to 100 percent for the plan year.

(4) *Present value.* The present value of a benefit (including a portion of a benefit) with respect to a participant that is taken into account under the rules of paragraph (c) of this section is determined as of the valuation date by multiplying the amount of that benefit by the probability that the benefit will be paid at a future date and then discounting the resulting product using the appropriate interest rate under § 1.430(h)(2)–1. The probability that the benefit will be paid with respect to the participant at such future date is determined using the actuarial assumptions that satisfy the standards of paragraph (f) of this section as to the probability of future service, advancement in age, and other events (such as death, disability, termination of employment, and selection of optional form of benefit) that affect whether the participant or beneficiary will be eligible for the benefit and whether the benefit will be paid at that future date.

(c) *Benefits taken into account*—(1) *In general*—(i) *Benefits earned or accrued.* The benefits taken into account in determining the target normal cost and

the funding target under paragraph (b) of this section are all benefits earned or accrued under the plan that have not yet been paid as of the valuation date, including retirement-type and ancillary benefits (within the meaning of § 1.411(d)–3(g)). The benefits taken into account are based on the participant's or beneficiary's status (such as active employee, vested or partially vested terminated employee, or disabled participant) as of the valuation date, and those benefits are allocated to the funding target or the target normal cost under paragraph (c)(1)(ii) of this section.

(ii) *Allocation of benefits*—(A) *In general.* To the extent that the amount of a participant's benefit that is expected to be paid is a function of the accrued benefit, the allocation of the benefit for purposes of determining the funding target and the target normal cost is made using the rules of paragraph (c)(1)(ii)(B) of this section. To the extent that the amount of a participant's benefit that is expected to be paid is not a function of the accrued benefit, but is a function of the participant's years of service (or is the excess of a function of the participant's years of service over a function of the participant's accrued benefit), the allocation of the benefit for purposes of determining the funding target and the target normal cost is made using the rules of paragraph (c)(1)(ii)(C) of this section. To the extent that the amount of a participant's benefit that is expected to be paid is not allocated under the rules of paragraph (c)(1)(ii)(B) or (C) of this section, the allocation of the benefit for purposes of determining the funding target and the target normal cost is made using the rules of paragraph (c)(1)(ii)(D) of this section.

(B) *Benefits that are based on accrued benefits.* If the allocation of the benefit for purposes of determining the funding target and the target normal cost is made under this paragraph (c)(1)(ii)(B), then the portion of a participant's benefit that is taken into account in the funding target for a plan year is determined by applying the function to the accrued benefit as of the first day of the plan year, and the portion of the benefit that is taken into account in determining the target normal cost for the plan year is determined by applying that function to the increase in the accrued benefit during the plan year. For example, a benefit that is assumed to be payable at a particular early retirement age in the amount of 90 percent of the accrued benefit is taken into account in the funding target in the amount of 90 percent of the accrued benefit as of the beginning of the plan year, and that benefit is taken into account in the target normal cost in the amount of 90 percent of the increase in the accrued benefit during the plan year.

(C) *Benefits that are based on service.* If the allocation of the benefit for purposes of determining the funding target and the target normal cost is made under this paragraph (c)(1)(ii)(C), then the portion of a participant's benefit that is taken into account in determining the funding target for a plan year is determined by applying the function to the participant's years of service as of the first day of the plan year, and the portion of the benefit that is taken into account in determining the target normal cost for the plan year is determined by applying that function to the increase in the participant's years of service during the plan year. For example, if a plan provides a post-retirement death benefit of $500 per year of service, then the funding target is determined based on a death benefit of $500 multiplied by a participant's years of service at the beginning of the year, and if the participant earns or is expected to earn a full year of service during the plan year, the target normal cost is based on the additional $500 in death benefits attributable to that additional year of service.

(D) *Other benefits.* If the allocation of the benefit for purposes of determining the funding target and the target normal cost is made under this paragraph (c)(1)(ii)(D), then the portion of a participant's benefit that is taken into account in determining the funding target for a plan year is equal to the total benefit multiplied by the ratio of the participant's years of service as of the first day of the plan year to the years of service the participant will have at the time of the event that causes the benefit to be payable (whether the benefit is expected to be paid at the time of that decrement or at a future time), and the portion of the benefit that is taken into account in determining the target normal cost for the plan year is the increase in the proportionate benefit attributable to the increase in the participant's years of service during the plan year. For example, if a plan provides a Social Security supplement for a participant who retires after 30 years of service that is equal to a participant's Social Security benefit, the funding target with respect to the benefit payable beginning at a particular age (which reflects the probability of retirement at that age) is determined based on the projected Social Security benefit payable at the particular age multiplied by a fraction, the numerator of which is the participant's years of service as of the first day of the plan year and the denominator of which is the participant's projected years of service at the particular age. In such a case, if the participant earns or is expected to earn a full year of service during the plan year, the target normal cost is determined based on the projected Social Security benefit payable at the particular age multiplied by a fraction, the numerator of which is one and the denominator of which is the participant's projected years of service at the particular age.

(iii) *Application of section 436 limitations to funding target and target normal cost determination*—(A) *Effect of limitation on unpredictable contingent event benefits.* The determination of the funding target and the target normal cost of a plan for a plan year must take into account any limitation on unpredictable contingent event benefits under section 436(b) with respect to unpredictable contingent events which occurred before the valuation date, but must not take into account anticipated funding-based limitations on unpredictable contingent event benefits under section 436(b) with respect to unpredictable contingent events which are expected to occur on or after the valuation date.

(B) *Effect of limitation on applicability of plan amendments.* See paragraph (d) of this section for rules regarding the treatment of plan amendments that take effect during the plan year taking into account the restrictions under section 436(c).

(C) *Effect of limitation on prohibited payments.* The determination of the funding target and the target normal cost of a plan for a plan year must take into account any limitation on prohibited payments under section 436(d) with respect to any annuity starting date that was before the valuation date, but must not take into account any limitation on prohibited payments under section 436(d) for any annuity starting date on or after the valuation date (however, the determination must take into account benefit distributions under plan provisions that allow new annuity starting dates with respect to distributions that were limited under section 436(d)).

(D) *Effect of limitation on benefit accruals.* Except as otherwise provided in this paragraph (c)(1)(iii)(D), the determination of the funding target of a plan for a plan year must take into account any limitation on benefit accruals under section 436(e) applicable before the valuation date. However, if the plan terms provide for the automatic restoration of benefit accruals as permitted under § 1.436–1(a)(4)(ii)(B), and the restoration of benefits as of the valuation date will not be treated as resulting from a plan amendment under

the rules of § 1.436–1(c)(3) (because the period of limitation as of the valuation date does not exceed 12 months and the adjusted funding target attainment percentage for the plan would not be less than 60 percent taking into account the restored benefit accruals), then the determination of the funding target of a plan for a plan year must not take into account the limitation on benefit accruals under section 436(e) for that period. The determination of the target normal cost of a plan for a plan year must not take into account any limitation on benefit accruals under section 436(e). Thus, if an employer wishes to take a plan freeze into account in determining the target normal cost, the plan must be specifically amended to cease accruals.

(iv) *Effect of other limitations of benefits*—(A) *Liquidity shortfalls.* The determination of the funding target and the target normal cost of a plan for a plan year must take into account any restrictions on payments under section 401(a)(32) on account of a liquidity shortfall (as defined in section 430(j)(4)) for periods preceding the valuation date. The determination of the funding target and the target normal cost must not take into account any restrictions on payments under section 401(a)(32) on account of a liquidity shortfall or possible liquidity shortfall for any period on or after the valuation date.

(B) *High 25 limitation.* The determination of the funding target and the target normal cost of a plan for a plan year must take into account any restrictions on payments under § 1.401(a)(4)–5(b) to highly compensated employees to the extent that benefits were not paid or will not be paid because of a limitation that applied prior to the valuation date. If a benefit that was otherwise restricted was paid prior to the valuation date but with suitable security (such as an escrow account) provided to the plan in the event of a plan termination, the benefit is treated as distributed for purposes of section 430 and this section. Accordingly, the funding target does not include any liability for the benefit and the plan assets do not include the security. The determination of the funding target and the target normal cost of a plan for a plan year must not take into account any restrictions on payments under § 1.401(a)(4)–5(b) to highly compensated employees that are anticipated with respect to annuity starting dates on or after the valuation date on account of the funded status of the plan.

(2) *Benefits provided by insurance*—(i) *General rule.* A plan generally is required to reflect in the plan's funding target and target normal cost the liability for benefits that are funded through insurance contracts held by the plan, and to include the corresponding insurance contracts in plan assets. Paragraph (c)(2)(ii) of this section sets forth an alternative to this general approach. A plan's treatment of benefits funded through insurance contracts pursuant to this paragraph (c)(2) is part of the plan's funding method. Accordingly, that treatment can be changed only with the consent of the Commissioner.

(ii) *Separate funding of insured benefits.* As an alternative to the treatment described in paragraph (c)(2)(i) of this section, in the case of benefits that are funded through insurance contracts, the liability for benefits provided under such contracts is permitted to be excluded from the plan's funding target and target normal cost, provided that the corresponding insurance contracts are excluded from plan assets. This treatment is only available with respect to insurance purchased from an insurance company licensed under the laws of a State and only to the extent that a participant's or beneficiary's right to receive those benefits is an irrevocable contractual right under the insurance contracts, based on premiums paid to the insurance company prior to the valuation date. For example, in the case of a retired participant receiving benefits from an annuity contract in pay status under which no premiums are required on or after the valuation date, the liability for benefits provided by the contract is permitted to be excluded from the plan's funding target provided that the value of the contract is also excluded from the value of plan assets. Similarly, in the case of an active or deferred vested participant whose benefits are funded by a life insurance or annuity contract under which further premiums are required on or after the valuation date, the liability for benefits, if any, that would be paid from the contract if no further premiums were to be paid (for example, if the contract were to go on reduced paid-up status) is permitted to be excluded from the plan's funding target and target normal cost, provided that the value of the contract is excluded from the value of plan assets. By contrast, if the plan trustee can surrender a contract to the insurer for its cash value, then the participant's or beneficiary's right to receive those benefits is not an irrevocable contractual right and, therefore, the liability for benefits provided under the contract must be taken into account in determining the plan's funding target and target normal cost and the contracts cannot be excluded from plan assets.

(d) *Plan provisions taken into account*—(1) *General rule*—(i) *Plan provisions adopted by valuation date.* Except as otherwise provided in this paragraph (d), a plan's funding target and target normal cost for a plan year are determined based on plan provisions that are adopted no later than the valuation date for the plan year and that take effect on or before the last day of the plan year. For example, in the case of a plan amendment adopted on or before the valuation date for the plan year that has an effective date occurring in the current plan year, the plan amendment is taken into account in determining the funding target and the target normal cost for the current plan year if it is permitted to take effect under the rules of section 436(c) for the current plan year, but the amendment is not taken into account for the current plan year if it does not take effect until a future plan year.

(ii) *Plan provisions adopted after valuation date.* If a plan administrator makes the election described in section 412(d)(2) with respect to a plan amendment, then the plan amendment is treated as having been adopted on the first day of the plan year for purposes of this paragraph (d). Section 412(d)(2) applies to any plan amendment adopted no later than 2½ months after the close of the plan year, including an amendment adopted during the plan year. Thus, if an amendment is adopted after the valuation date for a plan year (and no later than 2½ months after the close of the plan year), but takes effect by the last day of the plan year, the amendment is taken into account in determining the plan's funding target and target normal cost for the plan year if the plan administrator makes the election described in section 412(d)(2) with respect to such amendment.

(iii) *Determination of when an amendment takes effect.* For purposes of this paragraph (d)(1), the determination of whether an amendment that increases benefits takes effect and when it takes effect is determined in accordance with the rules of section 436(c) and § 1.436–1(c)(5). For purposes of this paragraph (d)(1), in the case of an amendment that decreases benefits, the amendment takes effect under a plan on the first date on which the benefits of any individual who is or could be a participant or beneficiary under the plan would be less than those benefits would be under the pre-amendment plan provisions if the individual were on that date to satisfy the applicable conditions for the benefits. In either case, the

determination of when an amendment takes effect is unaffected by an election under section 412(d)(2).

(2) *Special rule for certain amendments increasing liabilities.* In the case of a plan amendment that is not required to be taken into account under the rules of paragraph (d)(1) of this section because it is adopted after the valuation date for the plan year, the plan amendment must be taken into account in determining a plan's funding target and target normal cost for the plan year if the plan amendment—

(i) Takes effect by the last day of the plan year;

(ii) Increases the liabilities of the plan by reason of increases in benefits, establishment of new benefits, changing the rate of benefit accrual, or changing the rate at which benefits become nonforfeitable; and

(iii) Would not be permitted to take effect under the rules of section 436(c) if those rules were applied—

(A) By treating the increase in the target normal cost for the plan year attributable to the amendment (and all other amendments that must be taken into account solely because of the application of the rules in this paragraph (d)(2)) as if the increase were an increase in the funding target for the plan year; and

(B) By taking into account all unpredictable contingent event benefits permitted to be paid for unpredictable contingent events that occurred during the current plan year and all plan amendments that took effect in the current plan year (including all amendments to which this paragraph (d)(2) applies for the plan year).

(3) *Allocation of benefits attributable to plan amendments.* If a plan amendment is taken into account for a plan year under the rules of this paragraph (d), then the allocation of benefits that is used to determine the funding target and the target normal cost for that plan year is based on the plan as amended. Thus, if an amendment that is taken into account for a plan year increases a participant's accrued benefit for service prior to the beginning of the plan year, then the present value of that increase is included in the funding target for the plan year.

(e) *Plan population taken into account*—(1) *In general.* In making any determination of the funding target or target normal cost under paragraph (b) of this section, the plan population is determined as of the valuation date. The plan population must include three classes of individuals—

(i) Participants currently employed in the service of the employer;

(ii) Participants who are retired under the plan or who are otherwise no longer employed in the service of the employer; and

(iii) All other individuals currently entitled to benefits under the plan.

(2) *Assumption regarding rehiring of former employees*—(i) *Special exclusion for ''rule of parity'' cases.* Certain individuals may be excluded from the class of individuals described in paragraph (e)(1)(ii) of this section. The excludable individuals are those former employees who, prior to the valuation date for the plan year, have terminated service with the employer without vested benefits and whose service might be taken into account in future years because the ''rule of parity'' of section 411(a)(6)(D) does not permit that service to be disregarded. However, if the plan's experience as to separated employees returning to service has been such that the exclusion described in this paragraph (e)(2) would be unreasonable, then no such exclusion is permitted.

(ii) *Application to partially vested participants.* Whether former employees who are terminated with partially vested benefits are assumed to return to service is determined under the same rules that apply to former employees without vested benefits under paragraph (e)(2)(i) of this section.

(3) *Anticipated future participants.* In making any determination of the funding target or target normal cost under paragraph (b) of this section, the actuarial assumptions and funding method used for the plan must not anticipate the affiliation with the plan of future participants not employed in the service of the employer on the plan's valuation date. However, any such determination may anticipate the affiliation with the plan of current employees who have not yet satisfied the participation (age and service) requirements of the plan as of the valuation date.

(f) *Actuarial assumptions and funding method used in determination of present value*—(1) *Selection of actuarial assumptions and funding method*—(i) *General rules.* The determination of any present value or other computation under section 430 and this section must be made on the basis of actuarial assumptions and a funding method. Except as otherwise specifically provided (for example, in § 1.430(h)(2)–1(b)(6) or section 4006(a)(3)(E)(iv) of the Employee Retirement Income Security Act of 1974, as amended (ERISA)), the same actuarial assumptions and funding method must be used for all computations under sections 430 and 436. For example, the actuarial assumptions and the funding method used in making a certification of the adjusted funding target attainment percentage for a plan year must be the same as those disclosed on the actuarial report under section 6059 (Schedule SB, ''Single-Employer Defined Benefit Plan Actuarial Information'' of Form 5500, ''Annual Return/Report of Employee Benefit Plan'').

(ii) *Changes in actuarial assumptions and funding method.* Actuarial assumptions established for a plan year cannot subsequently be changed for that plan year unless the Commissioner determines that the assumptions that were used are unreasonable. Similarly, a funding method established for a plan year cannot subsequently be changed for that plan year unless the Commissioner determines that the use of that funding method for that plan year is impermissible.

(iii) *Procedures for establishing actuarial assumptions and funding method.* For purposes of this paragraph (f)(1), in the case of a plan for which an actuarial report under section 6059 (Schedule SB of Form 5500) is required to be filed for a plan year, actuarial assumptions and the funding method are established by the filing of the actuarial report if it is filed no later than the due date (with extensions) for the report. In the case of a plan for which an actuarial report for a plan year is not required to be filed, actuarial assumptions and the funding method are established by the delivery of the completed report to the employer if it is delivered no later than what would be the due date (with extensions) for filing the actuarial report were such a filing required. If the actuarial report is not filed or delivered by the applicable date described in the two preceding sentences, then the same actuarial assumptions (such as the same interest rate and mortality table elections) and funding method as were used for the preceding plan year apply for all computations under sections 430 and 436 for the current plan year, unless the Commissioner permits or requires other actuarial assumptions or another funding method permitted under section 430 to be used for the current plan year.

(iv) *Scope of funding method.* A plan's funding method includes not only the overall funding method used by the plan but also each specific method of computation used in applying the overall method. However, the choice of which actuarial assumptions are appropriate to the overall method or to the specific method of computation is not a part of the funding method. The assumed earnings rate used for purposes of determining

the actuarial value of assets under section 430(g)(3)(B) is treated as an actuarial assumption, rather than as part of the funding method.

(2) *Interest and mortality rates.* Section 430(h)(2) and § 1.430(h)(2)–1 set forth the interest rates, and section 430(h)(3) and §§ 1.430(h)(3)–1 and 1.430(h)(3)–2 set forth the mortality tables, that must be used for purposes of determining any present value under this section. However, notwithstanding the requirement to use the mortality tables, in the case of a plan which has fewer than 100 participants and beneficiaries who are not in pay status, the actuarial assumptions may assume no pre-retirement mortality, but only if that assumption would be a reasonable assumption.

(3) *Other assumptions.* In the case of actuarial assumptions other than those specified in sections 430(h)(2), 430(h)(3), and 430(i), each of those actuarial assumptions must be reasonable (taking into account the experience of the plan and reasonable expectations). In addition, the actuarial assumptions (other than those specified in sections 430(h)(2), 430(h)(3), and 430(i)) must, in combination, offer the plan's enrolled actuary's best estimate of anticipated experience under the plan based on information determined as of the valuation date. *See* paragraph (f)(4)(iii) of this section for special rules for determining the present value of a single-sum and similar distributions.

(4) *Probability of benefit payments in single sum or other optional forms*—(i) *In general.* This paragraph (f)(4) provides rules relating to the probability that benefit payments will be paid as single sums or other optional forms under a plan and the impact of that probability on the determination of the present value of those benefit payments under section 430.

(ii) *General rules of application.* Any determination of present value or any other computation under this section must take into account—

(A) The probability that future benefit payments under the plan will be made in the form of any optional form of benefit provided under the plan (including single-sum distributions), determined on the basis of the plan's experience and other related assumptions, in accordance with paragraph (f)(3) of this section; and

(B) Any difference in the present value of future benefit payments that results from the use of actuarial assumptions in determining the amount of benefit payments in any such optional form of benefit that are different from those prescribed by section 430(h).

(iii) *Single-sum and similar distributions*—(A) *Distributions using section 417(e) assumptions.* In the case of a distribution that is subject to section 417(e)(3) and that is determined using the applicable interest rates and applicable mortality table under section 417(e)(3), for purposes of applying paragraph (f)(4)(ii) of this section, the computation of the present value of that distribution is treated as having taken into account any difference in present value that results from the use of actuarial assumptions that are different from those prescribed by section 430(h) (as required under paragraph (f)(4)(ii)(B) of this section) if and only if the present value of the distribution is determined in accordance with this paragraph (f)(4)(iii).

(B) *Substitution of annuity form.* Except as otherwise provided in this paragraph (f)(4)(iii), the present value of a distribution is determined in accordance with this paragraph (f)(4)(iii) if that present value is determined as the present value, using special actuarial assumptions, of the annuity (either the deferred or immediate annuity) which is used under the plan to determine the amount of the distribution. Under these special assumptions, for the period beginning with the expected annuity starting date for the distribution, the current applicable mortality table under section 417(e)(3) that would apply to a distribution with an annuity starting date occurring on the valuation date is substituted for the mortality table under section 430(h)(3) that would otherwise be used. In addition, under these special assumptions, the valuation interest rates under section 430(h)(2) are used for purposes of discounting the projected annuity payments from their expected payment dates to the valuation date (as opposed to the interest rates under section 417(e)(3) which the plan uses to determine the amount of the benefit).

(C) *Optional application of generational mortality and phase-in of interest rates.* In determining the present value of a distribution under this paragraph (f)(4)(iii), if a plan uses the generational mortality tables under § 1.430(h)(3)–1(a)(4) or § 1.430(h)(3)–2, the plan is permitted to use a 50–50 male-female blend of the annuitant mortality rates under the § 1.430(h)(3)–1(a)(4) generational mortality tables in lieu of the applicable mortality table under section 417(e)(3) that would apply to a distribution with an annuity starting date occurring on the valuation date. Similarly, a plan is permitted to make adjustments to the interest rates in order to reflect differences between the phase-in of the section 430(h)(2) segment rates under section 430(h)(2)(G) and the adjustments to the segment rates under section 417(e)(3)(D)(iii).

(D) *Distributions subject to section 417(e)(3) using other assumptions.* In the case of a distribution that is subject to section 417(e)(3) but that is determined on a basis other than using the applicable interest rates and the applicable mortality table under section 417(e)(3), for purposes of applying paragraph (f)(4)(ii)(B) of this section, the computation of present value must take into account the extent to which the present value of the distribution is different from the present value determined using the rules of paragraph (f)(4)(iii)(B) of this section, based on actuarial assumptions that satisfy the requirements of paragraph (f)(3) of this section. If the plan provides that the amount of the benefit is based on a comparison of the section 417(e)(3) benefit (that is, the benefit determined using the applicable interest rates and the applicable mortality table under section 417(e)(3)) with another benefit determined using some other basis, then paragraph (f)(4)(ii)(B) of this section is applied as of the valuation date by comparing the present value of the section 417(e)(3) benefit determined under the rules of paragraph (f)(4)(iii)(B) of this section with the present value of the other benefit. The rule of this paragraph (f)(4)(iii)(D) applies, for example, where a distribution that is subject to section 417(e)(3) is determined as the greater of the benefit determined using the applicable interest rates and the applicable mortality table under section 417(e)(3) and the benefit determined using some other basis, or where the amount of a distribution that is subject to section 417(e)(3) is determined using an interest rate other than the applicable interest rates as required under section 415(b)(2)(E)(ii) (*see* § 1.417(e)–1(d)(1)).

(5) *Distributions from applicable defined benefit plans under section 411(a)(13)(C)*—(i) *In general.* In the case of an applicable defined benefit plan described in section 411(a)(13)(C), if the amount of a future distribution is based on an interest adjustment applied to the current accumulated benefit, then the amount of that distribution is determined by projecting the future interest credits or equivalent amount under the plan's interest crediting rules using actuarial assumptions that satisfy the requirements of paragraph (f)(3) of this section. Thus, if a plan provides for a single-sum distribution equal to the balance of a participant's hypothetical account under a cash balance plan, then the amount of that future distribution is equal to the projected account balance

at the expected date of payment determined using actuarial assumptions that satisfy the requirements of paragraph (f)(3) of this section.

(ii) *Annuity distributions*—(A) *General rule.* In the case of an applicable defined benefit plan described in section 411(a)(13)(C), if the amount of an annuity distribution is based on either the balance of a hypothetical account maintained for a participant or the accumulated percentage of a participant's final average compensation, then the amount of that annuity distribution is calculated by converting the projected account balance (or accumulated percentage of final average compensation), in accordance with paragraph (f)(5)(i) of this section, to an annuity by applying the plan's annuity conversion provisions using the rules of this paragraph (f)(5)(ii).

(B) *Use of current annuity factors.* Except as otherwise provided in paragraph (f)(5)(ii)(C) of this section, if the plan bases the conversion of the projected account balance (or accumulated percentage of final average compensation) to an annuity using the applicable interest rates and applicable mortality table under section 417(e)(3), then the amount of the annuity distribution is determined by dividing the projected account balance (or accumulated percentage of final average compensation) by an annuity factor corresponding to the assumed form of payment using, for the period beginning with the annuity starting date, the current applicable mortality table under section 417(e)(3) that would apply to a distribution with an annuity starting date occurring on the valuation date (in lieu of the mortality table under section 430(h)(3) that would otherwise be used) and the valuation interest rates under section 430(h)(2) (as opposed to the interest rates under section 417(e)(3) which the plan uses to determine the amount of the annuity).

(C) *Optional application of generational mortality and phase-in of segment rates.* In determining the amount of an annuity distribution under paragraph (f)(5)(ii)(B) of this section, a plan is permitted to apply the options described in paragraph (f)(4)(iii)(C) of this section.

(D) *Distributions using assumptions other than assumptions under section 417(e)(3).* In applying this paragraph (f)(5)(ii), in the case of a plan that determines an annuity using a basis other than the applicable interest rates and applicable mortality table under section 417(e)(3), the amount of the annuity distribution must be based on actuarial assumptions that satisfy the requirements of paragraph (f)(3) of this section.

(6) *Unpredictable contingent event benefits.* Any determination of present value or any other computation under this section must take into account, based on information as of the valuation date, the probability that future benefits (or increased benefits) will become payable under the plan due to the occurrence of an unpredictable contingent event (as described in § 1.436–1(j)(9)). For this purpose, this probability with respect to an unpredictable contingent event may be assumed to be zero if there is not more than a de minimis likelihood that the unpredictable contingent event will occur.

(7) *Reasonable techniques permitted*—(i) *Determination of benefits to be paid during the plan year.* Any reasonable technique can be used to determine the present value of the benefits expected to be paid during a plan year, based on the interest rates and mortality assumptions applicable for the plan year. For example, the present value of a monthly retirement annuity payable at the beginning of each month can be determined—

(A) Using the standard actuarial approximation that reflects 13/24ths of the discounted expected payments for the year as of the beginning of the year and 11/24ths of the discounted expected payments for the year as of the end of the year;

(B) By assuming a uniform distribution of death during the year; or

(C) By assuming that the payment is made in the middle of the year.

(ii) *Determination of target normal cost.* In the case of a participant for whom there is a less than 100 percent probability that the participant will terminate employment during the plan year, for purposes of determining the benefits expected to accrue, be earned, or otherwise allocated to service during the plan year which are used to determine the target normal cost, it is permissible to assume the participant will not terminate during the plan year, unless using this method of calculation would be unreasonable.

(8) *Approval of significant changes in actuarial assumptions for large plans*—(i) *In general.* Except as otherwise provided in paragraph (f)(8)(iii) of this section, any actuarial assumptions used to determine the funding target of a plan for a plan year during which the plan is described in paragraph (f)(8)(ii) of this section cannot be changed from the actuarial assumptions that were used for the preceding plan year without the approval of the Commissioner if the changes in assumptions result in a decrease in the plan's funding shortfall (within the meaning of section 430(c)(4)) for the current plan year (disregarding the effect on the plan's funding shortfall resulting from changes in interest and mortality assumptions under sections 430(h)(2) and (h)(3)) that either exceeds $50,000,000, or exceeds $5,000,000 and is 5 percent or more of the funding target of the plan before such change.

(ii) *Affected plans.* A plan is described in this paragraph (f)(8)(ii) for a plan year if—

(A) The plan is a defined benefit plan (other than a multiemployer plan) to which Title IV of ERISA applies; and

(B) The aggregate unfunded vested benefits used to determine variable-rate premiums for the plan year (as determined under section 4006(a)(3)(E)(iii) of ERISA) of the plan and all other plans maintained by the contributing sponsors (as defined in section 4001(a)(13) of ERISA) and members of such sponsors' controlled groups (as defined in section 4001(a)(14) of ERISA) which are covered by Title IV of ERISA (disregarding multiemployer plans and disregarding plans with no unfunded vested benefits) exceed $50,000,000.

(iii) *Automatic approval to resume use of previously used assumptions upon exiting at-risk status during phase-in.* A plan that is not in at-risk status for the current plan year and that was in at-risk status for the prior plan year (but not for a period of 5 or more consecutive plan years) is granted automatic approval to use the actuarial assumptions that were applied before the plan entered at-risk status and that were used in combination with the required at-risk assumptions during the period the plan was in at-risk status.

(9) *Examples.* The following examples illustrate the rules of this section. Unless otherwise indicated, these examples are based on the following assumptions: The normal retirement age is 65, the minimum required contribution for the plan is determined under the rules of section 430 starting in 2008, the plan year is the calendar year, the valuation date is January 1, no plan-related expenses are paid or expected to be paid from plan assets, and the plan does not provide for mandatory employee contributions. The examples are as follows:

Example 1. (i) Plan P provides an accrued benefit equal to 1.0% of a participant's highest 3-year average compensation for each year of service. Plan P provides that an early retirement benefit can be received at age 60 equal to the participant's accrued benefit reduced by 0.5% per month for early commencement. On January 1, 2010,

Participant A is age 60 and has 12 years of past service. Participant A's compensation for the years 2007 through 2009 was $47,000, $50,000, and $52,000, respectively. Participant A's rate of compensation at December 31, 2009, is $54,000 and A's rate of compensation for 2010 is assumed not to increase at any point during 2010. Decrements are applied at the beginning of the plan year.

(ii) Participant A's annual accrued benefit as of January 1, 2010, is $5,960 [0.01 × 12 × ($47,000 + $50,000 + $52,000) ÷ 3]. Participant A's expected benefit accrual for 2010 is $800 [0.01 × 13 × ($50,000 + $52,000 + $54,000) ÷ 3 − $5,960], to the extent that Participant A is expected to continue in employment for the full 2010 plan year.

(iii) Because the early retirement benefit is a function of the participant's accrued benefit, the allocation of the benefit for purposes of determining the target normal cost and funding target is made under paragraph (c)(1)(ii)(B) of this section. Accordingly, for Participant A, the early retirement benefit that is taken into account with respect to the decrement at age 60 when determining the 2010 funding target is $4,172 [$5,960 accrued benefit × (1 − 0.005 × 60 months)]. The expected accrual of the early retirement benefit during 2010 that is taken into account for Participant A with respect to the decrement at age 60 when determining the 2010 target normal cost is zero, because in this example the age-60 decrement would be applied as of January 1, 2010, before Participant A would earn any additional benefits. (But see paragraph (f)(7)(ii) of this section for an alternative approach for determining the expected accrual with respect to the decrement at age 60.)

(iv) The early retirement benefit for Participant A with respect to the decrement at age 61 that is taken into account in determining the funding target for the 2010 plan year is $4,529.60 [$5,960 accrued benefit × (1 − 0.005 × 48 months)]. The portion of the early retirement benefit that is taken into account for Participant A with respect to the decrement at age 61 that is taken into account in determining the target normal cost for the 2010 plan year is $608 [$800 expected annual accrual × (1 − 0.005 × 48 months)].

Example 2. (i) The facts are the same as in *Example 1.* In addition, the plan offers a $500 temporary monthly supplement to participants who complete 15 years of service and retire from active employment after attaining age 60. The temporary supplement is payable until the participant turns age 62. In addition, the supplement is limited so that it does not exceed the participant's Social Security benefit payable at age 62. On January 1, 2010, Participant B is age 55 and has 20 years of past service, and Participant C is age 60 and has 14 years of past service. For Participants B and C, the projected Social Security benefit is greater than $500 per month.

(ii) Because the temporary supplement is not a function of the participant's accrued benefit or service, the allocation of the benefit for purposes of determining the target normal cost and funding target is made under paragraph (c)(1)(ii)(D) of this section. The portion of the annual temporary supplement for Participant B with respect to the early retirement decrement occurring at age 60 that is taken into account in determining the funding target for the 2010 plan year is $4,800 [($500 × 12 months) × 20 years of past service ÷ 25 years of service at assumed early retirement age]. The portion of the annual temporary supplement for Participant B with respect to the early retirement decrement occurring at age 61 that is taken into account in determining the funding target for the 2010 plan year is $4,615 [($500 × 12 months) × 20 years of past service ÷ 26 years of service at assumed early retirement age]. In each case, the allocable portion of the benefit is assumed to be payable until age 62 (or the participant's death, if earlier).

(iii) For Participant B, the portion of the annual temporary supplement with respect to the early retirement decrement occurring at age 60 that is taken into account in determining the target normal cost for the 2010 plan year is $240 [($500 × 12 months) × 1 year of service expected to be earned during the plan year ÷ 25 years of service at assumed early retirement age]. The portion of the annual temporary supplement with respect to the early retirement decrement occurring at age 61 that is taken into account in determining the target normal cost for the 2010 plan year is $230.77 [($500 × 12 months) × 1 year of service expected to be earned during the plan year ÷ 26 years of service at assumed early retirement age]. The present value of these amounts reflects a payment period beginning with the decrement at age 60 or 61, as applicable, until age 62 (or assumed death, if earlier).

(iv) For Participant C, the portion of the annual temporary supplement with respect to the early retirement decrement occurring at age 61 (when the participant is first eligible for the benefit) that is taken into account in determining the funding target for the 2010 plan year is $5,600 [($500 × 12 months) × 14 years of past service ÷ 15 years of service at assumed early retirement age]. The present value of this amount reflects a payment period beginning with the decrement at age 61 until age 62 (or death if earlier).

Example 3. (i) The facts are the same as in *Example 1.* The plan also provides a single-sum death benefit (in addition to the qualified pre-retirement spouse's benefit) equal to the greater of the participant's annual accrued benefit at the time of death, or $10,000. The benefit is limited as necessary to ensure that the plan meets the incidental death benefit requirements of section 401(a).

(ii) The determination of the portion of the death benefit that is taken into account in determining the target normal cost and funding target is made under paragraph (c)(1)(ii)(B) of this section to the extent that it is a function of the participant's accrued benefit and under paragraph (c)(1)(ii)(D) of this section to the extent that it relates to the part of the death benefit that is not a function of the participant's accrued benefit.

(iii) The portion of the single-sum death benefit corresponding to the accrued benefit, or $5,960, is taken into account when determining the 2010 funding target for Participant A.

(iv) The excess of the death benefit over Participant A's accrued benefit is $4,040 (that is, $10,000 − $5,960). Because this part of the death benefit is not a function of the participant's accrued benefit nor is it a function of service, the determination of the corresponding portion of the death benefit taken into account in determining the target normal cost and funding target for 2010 is made under paragraph (c)(1)(ii)(D) of this section. For example, for Participant A, the portion of this benefit with respect to the death decrement occurring at age 64 that is taken into account for purposes of determining the funding target for the 2010 plan year is $3,030 ($4,040 × 12 years of past service ÷ 16 years of service at assumed age of death).

(v) The total single-sum death benefit for Participant A with respect to the death decrement at age 64 that is taken into account in determining the funding target for the 2010 plan year is $8,990 ($5,960 + $3,030).

(vi) Similarly, the portion of the single-sum death benefit for Participant A that is taken into account in determining the target normal cost for the 2010 plan year is equal to the sum of the expected increase in the accrued benefit during 2010, and the expected change in the allocable portion of the excess death benefit attributable to service during 2010 as determined in accordance with paragraph (c)(1)(ii)(D) of this section. As described in *Example 1,* the expected increase in Participant A's accrued benefit during 2010 is $800, to the extent that Participant A is expected to continue in employment for the full 2010 plan year.

(vii) At the end of 2010, Participant A's accrued benefit is expected to be $6,760 ($5,960 + $800). The excess portion of the single-sum death benefit to be allocated in accordance with paragraph (c)(1)(ii)(D) of this section is $3,240 ($10,000 − $6,760), and the allocable portion of the excess benefit for Participant A as of December 31, 2010, with respect to the death decrement at age 64, is $2,632.50 ($3,240 × 13 years of service as of December 31, 2010 ÷ 16 years of service at assumed age of death). The change in the allocable portion of Participant A's excess death benefit due to an additional year of service, with respect to the death decrement at age 64, is a decrease of $397.50. Therefore, the target normal cost for the 2010 plan year attributable to Participant A, with respect to the death decrement at age 64, will reflect a single-sum death benefit of $402.50 ($800 expected increase in Participant A's accrued benefit minus a $397.50 expected decrease in the allocable portion of the death benefit in excess of the accrued benefit).

Example 4. (i) The facts are the same as in *Example 3,* except that the plan provides a single-sum death benefit equal to the greater of the present value of the qualified pre-retirement survivor annuity or 100 times the amount of the participant's monthly retirement benefit with service projected to normal retirement age. The valuation is based on the assumption that all surviving spouses choose to receive their benefit in the form of a single sum. For Participant A, the value of the qualified pre-retirement survivor annuity is less than 100 times Participant A's projected monthly retirement benefit.

(ii) The allocation of the death benefit that is a function of Participant A's accrued benefit is based on service and compensation to the first day of the plan year for purposes of determining the funding target, and the allocation of the death benefit that is a function of the increase in Participant A's accrued benefit during the plan year for purposes of determining the target normal cost is made in accordance with paragraph (c)(1)(ii)(B) of this section. As described in *Example 1,* Participant A's accrued benefit based on service and compensation as of January 1, 2010, is $5,960, or $496.67 per month. Accordingly, the portion of the single-sum death benefit corresponding to the accrued benefit, or $49,667 (100 times $496.67), is taken into account when determining the 2010 funding target for Participant A.

(iii) In addition, the funding target and the target normal cost reflect a portion of Participant A's death benefit in excess of the amount based on Participant A's accrued benefit. Based on Participant A's average compensation as of the first day of the plan year, Participant A's accrued benefit with service projected to normal retirement is $8,443 [.01 × 17 years of service at age 65 × ($47,000 + $50,000 + $52,000) ÷ 3], or $703.61 per month. The corresponding death benefit is $70,361.

(iv) The excess of the death benefit over Participant A's accrued benefit as of January 1, 2010, is $20,694 (that is, $70,361 − $49,667). Because this part of the death benefit is not a function of Participant A's accrued benefit or service, the portion that is taken into account in determining the funding target is determined under paragraph (c)(1)(ii)(D) of this section. For Participant A, the portion of this benefit with respect to the death decrement occurring at age 64 that is taken into account when determining the funding target for the 2010 plan year is $15,521 ($20,694 × 12 years of past service ÷ 16 years of service at assumed age of death). The total single-sum death benefit for Participant A with respect to the death decrement at age 64 reflected in the funding target for the 2010 plan year is $65,188 ($49,667 + $15,521).

(v) Similarly, the portion of the single-sum death benefit for Participant A that is taken into account when determining the target normal cost for 2010 is equal to the sum of the death benefit based on the expected increase in the accrued benefit during 2010 and the expected change in the allocable portion of the excess death benefit attributable to service during 2010 as determined in accordance with paragraph (c)(1)(ii)(D) of this section.

(vi) At the end of 2010, Participant A's accrued benefit is expected to be $6,760 ($5,960 + $800), or $563.33 per month, and the associated death benefit is $56,333. The expected increase in the amount of the death benefit attributable to the increase in Participant A's accrued benefit is therefore $6,666 ($56,333 − $49,667).

(vii) Participant A's projected accrued benefit at normal retirement based on average compensation as of the end of 2010 is $8,840 [.01 × 17 years of service at age 65 × ($50,000 + $52,000 + $54,000) ÷ 3], or $736.67 per month. The corresponding death benefit is $73,667. The excess portion of the single-sum death benefit to be allocated in accordance with paragraph (c)(1)(ii)(D) of this section is $17,334 ($73,667 − $56,333), and the allocable portion of the excess benefit for Participant A as of December 31, 2010, with respect to the death decrement at age 64, is $14,084 ($17,334 × 13 years of service as of December 31, 2010 ÷ 16 years of service at assumed age of death).

(viii) The change in the allocable portion of Participant A's excess death benefit during 2010, with respect to the death decrement at age 64, is a decrease of $1,437 ($14,084 − $15,521). Therefore, the target normal cost for the 2010 plan year attributable to Participant A, with respect to the death decrement at age 64, will reflect a single-sum death benefit of $5,229 ($6,666 expected increase in Participant A's death benefit based on the expected increase in the accrued benefit, minus an expected decrease of $1,437 in the amount of the death benefit in excess of the amount attributable to the accrued benefit).

Example 5. (i) The facts are the same as in *Example 1.* In addition, the plan provides a disability benefit to participants who become disabled after completing 15 years of service. The disability benefit is payable at normal retirement age or an earlier date if elected by a participant. For purposes of calculating the disability benefit, service continues to accrue until normal retirement age (unless recovery or commencement of retirement benefits occurs earlier). Further, compensation is deemed to continue at the same rate as when the disability began.

(ii) Participant A will be eligible for the disability benefit at age 63 after completion of 15 years of service. Participant A's annual disability benefit at normal retirement age is $9,180 (that is, 1% of highest 3-year average compensation of $54,000 multiplied by 17 years of deemed service at normal retirement age).

(iii) The portion of the disability benefit based on the participant's accrued benefit as of the valuation date that is taken into account in determining the target normal cost and funding target is determined in accordance with paragraph (c)(1)(ii)(B) of this section. Accordingly, the portion of the disability benefit corresponding to Participant A's accrued benefit as of January 1, 2010, or $5,960, is taken into account when determining the 2010 funding target.

(iv) The excess of Participant A's disability benefit over the accrued benefit as of January 1, 2010, is $3,220 ($9,180 − $5,960). Because this portion of the disability benefit is not based on Participant A's accrued benefit or service, the portion that is taken into account in determining the funding target is determined under paragraph (c)(1)(ii)(D) of this section. The portion of Participant A's excess disability benefit with respect to the disability decrement occurring at age 63 that is taken into account when determining the 2010 funding target is $2,576 [$3,220 × (12 years of past service ÷ 15 years of service at assumed date of disability)]. The total disability benefit for Participant A, with respect to the disability decrement occurring at age 63, that is taken into account in determining the funding target for the 2010 plan year is $8,536 ($5,960 + $2,576).

(v) The portion of Participant A's disability benefit with respect to the disability decrement occurring at age 64 that is taken into account when determining the 2010 funding target is $8,375 [$5,960 + $3,220 × (12 years of past service ÷ 16 years of service at assumed date of disability)].

(vi) If in fact Participant A becomes disabled at age 63, the funding target will reflect the full disability benefit to which Participant A will be entitled at normal retirement age, based on service projected to normal retirement age (17 years) and final average compensation reflecting compensation projected to normal retirement age at the rate Participant A was earning at the time of disablement.

Example 6. (i) The facts are the same as in *Example 5,* except that the disability benefit is based on the accrued benefit calculated using service and compensation earned to the date of disability.

(ii) Because the disability benefit is a function of the participant's accrued benefit, the portion of Participant A's disability benefit that is taken into account when determining the funding target for the 2010 plan year is Participant A's annual accrued benefit as of January 1, 2010, or $5,960, as determined in *Example 1.* This amount is taken into account for both the disability decrement occurring at age 63 and the disability decrement occurring at age 64.

(iii) Similarly, the benefit accrual for Participant A with respect to the disability decrements occurring at age 63 and age 64 that is taken into account when determining the target normal cost for the 2010 plan year is equal to Participant A's expected benefit accrual for 2010 determined in *Example 1,* or $800.

Example 7. (i) Retiree D, a participant in Plan P, is a male age 72 and is receiving a $100 monthly straight life annuity. The 2009 actuarial valuation is performed using the segment rates applicable for September 2008 (determined without regard to the transition rule of section 430(h)(2)(G)), and the 2009 annuitant and nonannuitant (male and female) mortality tables (published in Notice 2008–85). See § 601.601(d)(2) relating to objectives and standards for publishing regulations, revenue rulings and revenue procedures in the Internal Revenue Bulletin.

(ii) The present value of Retiree D's straight life annuity on the valuation date is $10,535.79. This is equal to the sum of: $5,029.99, which is the present value of payments expected to be made during the first 5 years, using the first segment interest rate of 5.07%; $5,322.26, which is the present value of payments expected to be made during the next 15 years, using the second segment interest rate of 6.09%; and $183.54, which is the present value of payments expected to be made after 20 years, using the third segment interest rate of 6.56%.

Example 8. (i) The facts are the same as in *Example 7.* Plan P does not provide for early retirement benefits or single-sum distributions. The actuary assumes that no participants terminate employment prior to age 50 (other than by death), there is a 5% probability of withdrawal at age 50, and that those participants who withdraw receive a deferred annuity starting at age 65.

Participant E is a male age 46 on January 1, 2009, and has an annual accrued benefit of $23,000 beginning at age 65.

(ii) Before taking into account the 5% probability of withdrawal, the funding target associated with Participant E's assumed age 50 withdrawal benefit in the 2009 actuarial valuation is $68,396.75. This is equal to the sum of: $6,925.29, which is the present value of payments expected to be made during the year the participant turns age 65 (the 20th year after the valuation date), using the second segment interest rate of 6.09%; and $61,471.46, which is the present value of payments expected to be made after the 20th year, using the third segment interest rate of 6.56%.

(iii) Taking the 5% probability of withdrawal into account, the funding target for the 2009 plan year associated with Participant E's assumed age 50 withdrawal benefit is $3,419.84 ($68,396.75 × 5%).

Example 9. (i) The facts are the same as in *Example 8,* except the plan offers a single-sum distribution payable at normal retirement age (age 65) determined based on the applicable interest rates and the applicable mortality table under section 417(e)(3). The actuary assumes that 70% of the participants will elect a single sum upon retirement and the remaining 30% will elect a straight life annuity.

(ii) Before taking into account the 5% probability of withdrawal or the 70% probability of electing a single-sum payment, the portion of the 2009 funding target that is attributable to Participant E's assumed single-sum payment, deferred to age 65, is $70,052.30. This is calculated in the same manner as the present value of annuity payments, except that, for the period after the annuity starting date, the 2009 applicable mortality rates are substituted for the 2009 male annuitant mortality rates. This portion of the funding target for the 2009 plan year is equal to the sum of: $6,929.00, which is the present value of annuity payments expected to be made between age 65 and 66 (during the 20th year after the valuation date), using the second segment interest rate of 6.09%; and $63,123.30, which is the present value of annuity payments expected to be made after the 20th year following the valuation date, using the third segment interest rate of 6.56%. These present value amounts reflect the 2009 male nonannuitant mortality rates prior to the assumed commencement of benefits at age 65 and the 100% probability of retiring at age 65.

(iii) Taking the 5% probability of withdrawal and the 70% probability of electing a single-sum payment into account, the portion of the 2009 funding target attributable to Participant E's assumed single-sum payment based on withdrawal at age 50 is $2,451.83 ($70,052.30 × 5% × 70%). After taking into account the 5% probability of withdrawal and the 30% probability of electing a straight life annuity, the portion of the 2009 funding target that is attributable to Participant E's assumed straight life annuity (based on assumed withdrawal at age 50), deferred to age 65, is equal to 30% of the result obtained in *Example 8.*

Example 10. (i) The facts are the same as in *Example 9,* except the plan offers an immediate single sum upon withdrawal at age 50 determined based on the applicable interest rates and the applicable mortality table under section 417(e)(3). The actuary assumes that 70% of the participants will elect to receive a single-sum distribution upon withdrawal.

(ii) Before taking into account the 5% probability of withdrawal and the 70% probability of electing a single-sum payment, the portion of the funding target for the 2009 plan year that is attributable to Participant E's assumed single-sum payment based on withdrawal at age 50 is $68,908.39. This is calculated in the same manner as the present value of annuity payments, except that the 2009 applicable mortality rates are substituted for the 2009 male annuitant and nonannuitant mortality rates after the annuity starting date. This portion of the 2009 funding target is equal to the sum of $6,815.85, which is the present value of annuity payments expected to be made between age 65 and 66 (during the 20th year after the valuation date), using the second segment interest rate of 6.09%, and $62,092.54, which is the present value of annuity payments expected to be made after the 20th year following the valuation date, using the third segment interest rate of 6.56%. These present value amounts reflect the 2009 male nonannuitant mortality rates prior to the assumed single-sum distribution age of 50.

(iii) Applying the 5% probability of withdrawal at age 50 and the 70% probability of electing a single-sum payment, the portion of the funding target for the 2009 plan year that is attributable to Participant E's assumed single-sum payment (based on withdrawal at age 50) is $2,411.79 ($68,908.39 × 5% × 70%).

Example 11. (i) The facts are the same as in *Example 8,* except that the plan sponsor elects under section 430(h)(2)(D)(ii) to use the monthly corporate bond yield curve instead of segment rates. The enrolled actuary assumes payments are made monthly throughout the year and uses the interest rate from the middle of the monthly corporate bond yield curve because this mid-year yield rate most closely matches the average timing of benefits paid. In accordance with § 1.430(h)(2)–1(e)(4), the applicable monthly corporate bond yield curve is the yield curve derived from December 2008 rates.

(ii) Before taking into account the 5% probability of withdrawal, the funding target associated with Participant E's assumed age 50 withdrawal benefit in the 2009 actuarial valuation is $67,394.12. This reflects the sum of each year's expected payments, discounted at the yield rates described in paragraph (i) of this *Example 11,* as shown below:

Age	Maturity	Yield rate	Present value
65	19.5	6.97%	$5,897.88
66	20.5	6.90%	5,524.69
67	21.5	6.84%	5,164.63
68 and over	Varies	Varies	50,806.92
Total			67,394.12

(iii) Applying the 5% probability of withdrawal, the portion of the funding target for the 2009 plan year attributable to Participant E's assumed withdrawal at age 50 is $3,369.71 ($67,394.12 × 5%).

Example 12. (i) The facts are the same as in *Example 10,* except that the plan determines the amount of the immediate single-sum distribution upon withdrawal at age 50 based on the applicable interest rates under section 417(e)(3) or an interest rate of 6.25%, whichever produces the higher amount. The applicable mortality table under section 417(e)(3) is used for both calculations.

(ii) Before taking into account the 5% probability of withdrawal and the 70% probability of electing a single-sum payment, the present value of Participant E's single-sum distribution as of January 1, 2009, using an interest rate of 6.25%, based on withdrawal at age 50, is $77,391.88. This amount is determined by calculating the projected single-sum distribution at age 50 using the applicable mortality rate under section 417(e)(3) and an interest rate of 6.25%, or $94,789.10, and discounting the result to the January 1, 2009, valuation date using the first segment rate of 5.07% (because the single-sum distribution is assumed to be paid 4 years after the valuation date) and the male non-annuitant mortality rates for 2009.

(iii) Before taking into account the 5% probability of withdrawal and the 70% probability of electing a single-sum payment, the present value as of January 1, 2009, of Participant E's age-50 single-sum distribution using the applicable interest rates and applicable mortality table under section 417(e)(3) is $68,908.39, as developed in *Example 10.* Corresponding to plan provisions, the present value reflected in the funding target is the larger of this amount or the present value of the amount based on a 6.25% interest rate, or $77,391.88.

(iv) Applying the 5% probability of withdrawal at age 50 and the 70% probability of electing a single-sum payment, the portion of the funding target for the 2009 plan year that is attributable to Participant E's assumed single-sum payment (based on withdrawal at

age 50) is $2,708.72 ($77,391.88 × 5% × 70%).

Example 13. (i) Plan Q is a cash balance plan that permits an immediate payment of a single sum equal to the participant's hypothetical account balance upon termination of employment. Plan Q's terms provide that the hypothetical account is credited with interest at a market-related rate, based on a specified index. The January 1, 2009, actuarial valuation is performed using the 24-month average segment rates applicable for September 2008 (determined without regard to the transition rule of section 430(h)(2)(G)). Participant F is a male age 61 on January 1, 2009, and has a hypothetical account balance equal to $150,000 on that date. In the 2009 actuarial valuation, the enrolled actuary assumes that the hypothetical account balances will increase with annual interest credits of 7% until the participant commences receiving his or her benefit, corresponding to the actuary's best estimate of future interest rates credited under the terms of the plan. The actuary also assumes that all participants will retire on the first day of the plan year in which they attain age 65 (that is, no participant will terminate employment prior to age 65 other than by death), and that 100% of participants will elect a single sum upon retirement.

(ii) Participant F's hypothetical account balance projected to January 1, 2013 (the plan year in which F attains age 65) is $196,619.40 based on the assumed annual interest crediting rate of 7%. The funding target for the 2009 plan year attributable to Participant F's benefit at age 65 is $158,525.81, which is calculated by discounting the projected hypothetical account balance of $196,619.40 using the first segment rate of 5.07% and the male non-annuitant mortality rates.

Example 14. (i) The facts are the same as in *Example 13,* except that the actuary assumes that 10% of the participants will choose to collect their benefits in the form of a straight life annuity. The plan provides that the participant's account balance at retirement is converted to an annuity using the applicable interest rates and applicable mortality table under section 417(e)(3).

(ii) Participant F's hypothetical account balance projected to January 1, 2013 (the plan year in which F attains age 65) is $196,619.40, as outlined in *Example 13.* This amount is converted to an annuity payable commencing at age 65 by dividing the projected account balance by an annuity factor based on the applicable mortality table for 2009 under section 417(e)(3) (corresponding to the valuation date) and the interest rates used for the valuation. The resulting annuity factor is 10.8321, reflecting one year of interest at the first segment rate (5.07%) corresponding to the first year of the expected annuity payments (the fifth year after the valuation date), 15 years of interest at the second segment rate (6.09%) and all remaining years at the third segment rate (6.56%). The projected future annuity is therefore $196,619.40 divided by 10.8321, or $18,151.55 per year.

(iii) Before taking into account the 10% probability that the participant will elect to take the distribution in the form of a lifetime annuity, the funding target associated with the future annuity payout for Participant F is $149,120.41. This is equal to the sum of $14,242.79, which is the present value of the annuity payment expected to made during the year the participant turns age 65 (the 5th year after the valuation date), using the first segment interest rate of 5.07%; $116,321.72, which is the present value of payments expected to be made during the 6th through the 20th years following the valuation date, using the second segment interest rate of 6.09%; and $18,555.90, which is the present value of payments expected to be made after the 20th year following the valuation date, using the third segment interest rate of 6.56%.

(iv) Applying the 10% probability of electing a lifetime annuity, the portion of the 2009 funding target attributable to Participant F's assumed lifetime annuity payable at age 65 is $14,912.04. The portion of the 2009 funding target attributable to Participant F's assumed single-sum payment is 90% of the result obtained in *Example 13.*

Example 15. (i) Plan H provides a monthly benefit of $50 times service for all participants. Plan H has a funding target of $1,000,000 and an actuarial value of assets of $810,000 as of January 1, 2010. No annuity contracts have been purchased, and Plan H has no funding standard carryover balance or prefunding balance as of January 1, 2010. The enrolled actuary certifies that the January 1, 2010, AFTAP is 81%. Effective July 1, 2010, Plan H is amended on June 14, 2010, to increase the plan's monthly benefit to $55 for years of service earned on or after July 1, 2010. The present value of the increase in plan benefits during 2010 (reflecting benefit accruals attributable to the six months between July 1, 2010, and December 31, 2010) is $25,000.

(ii) The amendment increases benefits for future service only, and so the funding target is unaffected. Since section 436(c) only restricts plan amendments that increase plan liabilities, the plan amendment can take effect.

(iii) If the $25,000 present value of the increase in plan benefits during 2010 were included in Plan H's funding target of $1,000,000, the total would be $1,025,000, and the AFTAP would be 79.02% (that is, $810,000/$1,025,000). Since this is less than 80%, the amendment would not have been permitted to take effect if the 2010 increase were included in the funding target instead of target normal cost.

(iv) Because the amendment was adopted after the January 1, 2010, valuation date, the plan sponsor would generally have the option of deciding whether to reflect this amendment in the January 1, 2010, valuation or defer recognition of the amendment to the January 1, 2011, valuation. However, under paragraph (d)(2) of this section, because the plan amendment would not have been permitted to take effect under the provisions of section 436 if the increase in the target normal cost for the plan year had been taken into account in the funding target, the actuary must take into account the amendment in the January 1, 2010, valuation for purposes of section 430. Thus, the target normal cost for the plan year includes the $25,000 that results from the plan amendment.

(g) *Effective/applicability dates and transition rules*—(1) *Statutory effective date/applicability date*—(i) *In general.* Section 430 generally applies to plan years beginning on or after January 1, 2008. The applicability of section 430 for purposes of determining the minimum required contribution is delayed for certain plans in accordance with sections 104 through 106 of PPA '06.

(ii) *Applicability of special adjustments.* The special adjustments of paragraph (b)(1)(iii) of this section (relating to adjustments to the target normal cost for plan-related expenses and mandatory employee contributions) apply to plan years beginning after December 31, 2008. In addition, a plan sponsor may elect to make the special adjustments of paragraph (b)(1)(iii) of this section for a plan year beginning in 2008. This election must take into account both adjustments described in paragraph (b)(1)(iii) of this section. This election is subject to the same rules that apply to an election to add an amount to the plan's prefunding balance pursuant to § 1.430(f)–1(f), and it must be made in the same manner as the election made under § 1.430(f)–1(f). Thus, the election can be made no later than the last day for making the minimum required contribution for the plan year to which the election relates.

(2) *Effective date/applicability date of regulations.* This section applies to plan years beginning on or after January 1, 2010, regardless of whether section 430 applies to determine the minimum required contribution for the plan year. For plan years beginning before January 1, 2010, plans are permitted to rely on the provisions set forth in this section for purposes of satisfying the requirements of section 430.

(3) *Approval for changes in funding method*—(i) *2008 plan year.* Any changes in a plan's funding method that are made for the first plan year beginning in 2008 that are not inconsistent with the requirements of section 430 are treated as having been approved by the Commissioner and do not require the Commissioner's specific prior approval.

(ii) *Application of this section*—(A) *First plan year for which regulations are effective.* Except as otherwise provided in paragraph (g)(3)(ii)(B) of this section, any change in a plan's funding method for the first plan year that begins on or after January 1, 2010, is treated as having been approved by the Commissioner and does not require the Commissioner's specific prior approval.

(B) *Optional earlier application of regulations.* For the first plan year that a plan applies all the provisions of this section, §§ 1.430(f)–1, 1.430(g)–1, 1.430(i)–1, and 1.436–1, any change in a plan's funding method for that plan year is treated as having been approved by the Commissioner and does not require the Commissioner's specific prior approval. For example, if the change in funding method includes a change in the valuation software, the change in the valuation software is treated as having been approved by the Commissioner and does not require the Commissioner's specific prior approval. If that plan year begins before January 1, 2010, the automatic approval for a change in funding method under paragraph (g)(3)(ii)(A) of this section does not apply to the plan.

(C) *Special rule for changes in allocation.* Any change in a plan's funding method for a plan year earlier than the first plan year beginning on or after January 1, 2010, that is necessary to apply the rules of paragraph (c)(1)(ii) of this section is treated as having been approved by the Commissioner and does not require the Commissioner's specific prior approval.

(iii) *First plan year for which section 430 applies to determine minimum funding.* For a plan for which the minimum required contribution is not determined under section 430 for the first plan year that begins on or after January 1, 2008, pursuant to sections 104 through 106 of PPA '06, any change in a plan's funding method for the first plan year to which section 430 applies to determine the plan's minimum required contribution is treated as having been approved by the Commissioner and does not require the Commissioner's specific prior approval.

(4) *Approval for changes in actuarial assumptions.* The Commissioner's specific prior approval is not required with respect to any actuarial assumptions that are adopted for the first plan year for which section 430 applies to determine the minimum required contribution for the plan and that are not inconsistent with the requirements of section 430.

(5) *Transition rule for determining funding target attainment percentage for the 2007 plan year*—(i) *In general.* For purposes of the first plan year beginning on or after January 1, 2008, the funding target attainment percentage for the plan's prior plan year (the 2007 plan year) is determined as the fraction (expressed as a percentage), the numerator of which is the value of plan assets determined under paragraph (g)(5)(ii) of this section, and the denominator of which is the plan's current liability determined pursuant to section 412(l)(7) (as in effect prior to amendment by PPA '06) as of the valuation date for the 2007 plan year.

(ii) *Determination of value of plan assets*—(A) *In general.* The value of plan assets for the 2007 plan year under this paragraph (g)(5)(ii)(A) is determined as the value of plan assets as described in paragraph (g)(5)(ii)(B) of this section, reduced by the plan's funding standard account credit balance for the 2007 plan year as described in paragraph (g)(5)(iii)(A) of this section except to the extent provided in paragraph (g)(5)(iii)(B) of this section.

(B) *Value of plan assets.* The value of plan assets for the 2007 plan year under this paragraph (g)(5)(ii)(B) is determined under section 412(c)(2) as in effect for the 2007 plan year, except that the value of plan assets prior to subtracting the plan's funding standard account credit balance described in paragraph (g)(5)(iii)(A) of this section must be adjusted so that it is neither less than 90 percent of the fair market value of plan assets nor greater than 110 percent of the fair market value of plan assets on the valuation date for that plan year. If the value of plan assets prior to adjustment under this paragraph (g)(5)(ii)(B) is less than 90 percent of the fair market value of plan assets on the valuation date, then the value of plan assets under this paragraph (g)(5)(ii)(B) is equal to 90 percent of the fair market value of plan assets. If the value of plan assets determined under this paragraph (g)(5)(ii)(B) is greater than 110 percent of the fair market value of plan assets on the valuation date, then the value of plan assets under this paragraph (g)(5)(ii)(B) is equal to 110 percent of the fair market value of plan assets.

(iii) *Subtraction of credit balance*—(A) *In general.* If a plan has a funding standard account credit balance as of the valuation date for the 2007 plan year, then, except as described in paragraph (g)(5)(iii)(B) of this section, that balance is subtracted from the value of plan assets described in paragraph (g)(5)(ii)(B) of this section as of that valuation date to determine the value of plan assets for the 2007 plan year. However, the value of plan assets is not reduced below zero.

(B) *Effect of funding standard carryover balance reduction for the 2008 plan year.* Notwithstanding the rules of paragraph (g)(5)(iii)(A) of this section, for the first plan year beginning in 2008, if the employer has made an election to reduce some or all of the funding standard carryover balance as of the first day of that year in accordance with § 1.430(f)–1(e), then the present value (determined as of the valuation date for the 2007 plan year using the valuation interest rate for that 2007 plan year) of the amount so reduced is not treated as part of the funding standard account credit balance when that balance is subtracted from the value of plan assets pursuant to paragraph (g)(5)(iii)(A) of this section.

■ **Par. 3.** Section 1.430(f)–1 is added to read as follows:

§ 1.430(f)–1 Effect of prefunding balance and funding standard carryover balance.

(a) *In general*—(1) *Overview.* This section provides rules relating to the application of prefunding and funding standard carryover balances under section 430(f). Section 430 and this section apply to single employer defined benefit plans (including multiple employer plans) that are subject to section 412, but do not apply to multiemployer plans (as defined in section 414(f)). Paragraph (b) of this section sets forth rules regarding a plan's prefunding balance and a plan sponsor's election to maintain a funding standard carryover balance. Paragraph (c) of this section provides rules under which those balances must be subtracted from plan assets. Paragraph (d) of this section describes a plan sponsor's election to use those balances to offset the minimum required contribution. Paragraph (e) of this section describes a plan sponsor's election to reduce those balances (which will affect the determination of the value of plan assets for purposes of sections 430 and 436). Paragraph (f) of this section sets forth rules regarding elections under this section. Paragraph (g) of this section contains examples. Paragraph (h) of this section contains effective/applicability dates and transition rules.

(2) *Special rules for multiple employer plans.* In the case of a multiple employer plan to which section 413(c)(4)(A) applies, the rules of this section are applied separately for each employer under the plan, as if each employer maintained a separate plan. Thus, each employer under such a multiple employer plan may have a separate funding standard carryover balance and a prefunding balance for the plan. In the case of a multiple employer plan to which section 413(c)(4)(A) does not apply (that is, a plan described in section 413(c)(4)(B) that has not made the election for section 413(c)(4)(A) to apply), the rules of this section are applied as if all participants in the plan were employed by a single employer.

(b) *Maintenance of balances*—(1) *Prefunding balance*—(i) *In general.* A plan sponsor is permitted to elect to

maintain a prefunding balance for a plan. A prefunding balance maintained for a plan consists of a beginning balance of zero, increased by the amount of excess contributions to the extent the employer elects to do so as described in paragraph (b)(1)(ii) of this section, and decreased to the extent provided in paragraph (b)(1)(iii) of this section. The plan sponsor's initial election to add to the prefunding balance under paragraph (b)(1)(ii) of this section constitutes an election to maintain a prefunding balance. The prefunding balance is adjusted further for investment return and interest as provided in paragraphs (b)(3) and (b)(4) of this section.

(ii) *Increases*—(A) *In general.* If the plan sponsor of a plan elects to add to the plan's prefunding balance, as of the first day of a plan year following the first effective plan year for the plan, the prefunding balance is increased by the amount so elected by the plan sponsor for the plan year. The amount added to the prefunding balance cannot exceed the present value of the excess contributions for the preceding plan year determined under paragraph (b)(1)(ii)(B) of this section, increased for interest in accordance with paragraph (b)(1)(iv)(A) of this section.

(B) *Present value of excess contribution.* The present value of the excess contribution for the preceding plan year is the excess, if any, of—

(*1*) The present value (determined under the rules of paragraph (b)(1)(iv)(B) of this section) of the employer contributions (other than contributions to avoid or terminate benefit limitations described in § 1.436–1(f)(2)) to the plan for such preceding plan year; over

(*2*) The minimum required contribution for such preceding plan year.

(C) *Treatment of unpaid minimum required contributions.* For purposes of this paragraph (b)(1)(ii), a contribution made during a plan year to correct an unpaid minimum required contribution (within the meaning of section 4971(c)(4)) for a prior plan year is not treated as a contribution for the current plan year.

(iii) *Decreases.* As of the first day of each plan year, the prefunding balance of a plan is decreased (but not below zero) by the sum of—

(A) Any amount of the prefunding balance that was used under paragraph (d) of this section to offset the minimum required contribution of the plan for the preceding plan year; and

(B) Any reduction in the prefunding balance under paragraph (e) of this section for the plan year.

(iv) *Adjustments for interest*—(A) *Adjustment of excess contribution.* The present value of the excess contribution for the preceding year (as determined under paragraph (b)(1)(ii)(B) of this section) is increased for interest accruing for the period between the valuation date for the preceding plan year and the first day of the current plan year. For this purpose, interest is determined by using the plan's effective interest rate under section 430(h)(2)(A) for the preceding plan year, except to the extent provided in paragraph (b)(3)(iii) of this section.

(B) *Determination of present value.* The present value of the contributions described in paragraph (b)(1)(ii)(B)(*1*) of this section is determined as of the valuation date for the preceding plan year, using the plan's effective interest rate under section 430(h)(2)(A) for the preceding plan year.

(2) *Funding standard carryover balance*—(i) *In general.* A funding standard carryover balance is automatically established for a plan that had a positive balance in the funding standard account under section 412(b) (as in effect prior to amendment by the Pension Protection Act of 2006 (PPA '06), Public Law 109–280 (120 Stat. 780)) as of the end of the pre-effective plan year for the plan. The funding standard carryover balance as of the beginning of the first effective plan year for the plan is the positive balance in the funding standard account under section 412(b) (as in effect prior to amendment by PPA '06) as of the end of the pre-effective plan year for the plan. After that date, the funding standard carryover balance is decreased to the extent provided in paragraph (b)(2)(ii) of this section and adjusted further for investment return and interest as provided in paragraphs (b)(3) and (b)(4) of this section.

(ii) *Decreases.* As of the first day of each plan year, the funding standard carryover balance of a plan is decreased (but not below zero) by the sum of—

(A) Any amount of the funding standard carryover balance that was used under paragraph (d) of this section to offset the minimum required contribution of the plan for the preceding plan year; and

(B) Any reduction in the funding standard carryover balance under paragraph (e) of this section for the plan year.

(3) *Adjustments for investment experience*—(i) *In general.* A plan's prefunding balance under paragraph (b)(1) of this section and a plan's funding standard carryover balance under paragraph (b)(2) of this section as of the first day of a plan year must be adjusted to reflect the actual rate of return on plan assets for the preceding plan year. For this purpose, the actual rate of return on plan assets for the preceding plan year is determined on the basis of fair market value and must take into account the amount and timing of all contributions, distributions, and other plan payments made during that period.

(ii) *Ordering rules for adjustments.* In general, the adjustment for actual rate of return on plan assets is applied to the balance after any reduction of prefunding and funding standard carryover balances for that preceding plan year under paragraph (e) of this section and after subtracting amounts used to offset the minimum required contribution for the preceding plan year pursuant to paragraph (d) of this section. However, see paragraph (d)(1)(ii)(D) of this section for a special ordering rule when adjusting for investment experience.

(iii) *Special rule for excess contributions attributable to use of funding balances.* Notwithstanding paragraph (b)(1)(iv)(A) of this section, to the extent that a contribution is included in the present value of excess contributions solely because the minimum required contribution has been offset under paragraph (d) of this section, the contribution is adjusted for investment experience under the rules of this paragraph (b)(3).

(4) *Valuation date other than the first day of the plan year*—(i) *In general.* If a plan's valuation date is not the first day of the plan year, then, solely for purposes of applying paragraphs (c), (d), and (e) of this section, the plan's prefunding and funding standard carryover balances (if any) determined under this paragraph (b) are increased from the first day of the plan year to the valuation date using the plan's effective interest rate under section 430(h)(2)(A) for the plan year.

(ii) *Special rule for adjustments for investment experience.* In the case of a plan with a valuation date that is not the first day of the plan year, for purposes of applying the subtraction under paragraph (b)(3)(ii) of this section for amounts used to offset the minimum required contribution for the preceding plan year and the decreases under paragraphs (b)(1)(iii) and (b)(2)(ii) of this section, the amount of the prefunding balance or funding standard carryover balance that is used to offset the minimum required contribution under paragraph (d) of this section or reduced under paragraph (e) of this section is discounted from the valuation date to the first day of the plan year using the

effective interest rate under section 430(h)(2)(A) for the plan year.

(5) *Special rule for quarterly contributions*—(i) *Quarterly contributions due on or after the valuation date.* For purposes of applying a prefunding balance or funding standard carryover balance to required installments described in section 430(j)(3) that are due on or after the valuation date for the plan year for which they are due, the respective balances are increased from the beginning of the year to the date of the election (using the plan's effective interest rate for the plan year) to determine the amount available to offset the required quarterly installment. The amounts used to offset required quarterly installments are then discounted from that date to the first day of the plan year for purposes of the subtraction under paragraph (b)(3)(ii) of this section and the decreases under paragraphs (b)(1)(iii) and (b)(2)(ii) of this section, using the effective interest rate for the plan year. However, see paragraph (d)(1)(i)(B) of this section for a special rule regarding late quarterly installments when determining the amount that is used to offset the minimum required contribution for the plan year.

(ii) *Quarterly contributions due before the valuation date.* [Reserved.]

(c) *Effect of balances on the value of plan assets*—(1) *In general.* In the case of any plan with a prefunding balance or a funding standard carryover balance, the amount of those balances is subtracted from the value of plan assets for purposes of sections 430 and 436, except as otherwise provided in paragraphs (c)(2), (c)(3), and (d)(3) of this section and § 1.436–1(j)(1)(ii)(B).

(2) *Subtraction of balances in determining new shortfall amortization base*—(i) *Prefunding balance.* For purposes of determining whether a plan is exempt from the requirement to establish a new shortfall amortization base under section 430(c)(5), the amount of the prefunding balance is subtracted from the value of plan assets only if an election under paragraph (d) of this section to use the prefunding balance to offset the minimum required contribution is made for the plan year.

(ii) *Funding standard carryover balance.* For purposes of determining whether a plan is exempt from the requirement to establish a new shortfall amortization base under section 430(c)(5), the funding standard carryover balance is not subtracted from the value of plan assets regardless of whether any portion of either the funding standard carryover balance or the prefunding balance is used to offset the minimum required contribution for the plan year under paragraph (d) of this section.

(3) *Special rule for certain binding agreements with PBGC.* If there is in effect for a plan year a binding written agreement with the Pension Benefit Guaranty Corporation (PBGC) which provides that all or a portion of the prefunding balance or funding standard carryover balance (or both balances) is not available to offset the minimum required contribution for a plan year, that specified amount is not subtracted from the value of plan assets for purposes of determining the funding shortfall under section 430(c)(4). For example, if a plan has no prefunding balance and a $20 million funding standard carryover balance, a PBGC agreement provides that $5 million of a plan's funding standard carryover balance is unavailable to offset the minimum required contribution for a plan year, and the plan's assets are $100 million, then the value of plan assets for purposes of determining the funding shortfall under section 430(c)(4) is reduced by $15 million ($20 million less $5 million) to $85 million. For purposes of this paragraph (c)(3), an agreement with the PBGC is taken into account with respect to a plan year only if the agreement was executed prior to the valuation date for the plan year.

(d) *Election to apply balances against minimum required contribution*—(1) *In general*—(i) *Amount of offset to minimum required contribution*—(A) *Effect of use of balances.* Subject to the limitations provided in this paragraph (d), in the case of any plan year with respect to which the plan sponsor elects to use all or a portion of the prefunding balance or the funding standard carryover balance to offset the minimum required contribution for the plan year, the minimum required contribution for the plan year (determined after taking into account any waiver under section 412(c)) is offset as of the valuation date for the plan year by the amount so used.

(B) *Special rule for late quarterly contributions*—(*1*) *Quarterly contributions due on or after the valuation date.* Notwithstanding paragraph (d)(1)(i)(A) of this section, if the plan sponsor elects to use all or a portion of the prefunding balance or the funding standard carryover balance to satisfy a required installment under section 430(j)(3) that is due on or after the valuation date, the amount used to offset the minimum required contribution for the plan year is the portion of the balance so used, discounted in accordance with the rules of paragraph (b)(5) of this section, unless the date of the election is after the due date of the required installment. If the election to use all or a portion of the prefunding balance or the funding standard carryover balance to satisfy the required installments under section 430(j)(3) is made after the due date for the required installment, then the amount used to offset the minimum required contribution for the plan year is the portion of the balance so used, discounted from the date of the election to the due date of the required installment at the effective interest rate plus 5 percentage points, and then further discounted from the installment due date to the valuation date at the effective interest rate. For example, if a quarterly installment of $20,250 is due on April 15 for a calendar year plan with a valuation date on January 1 and an effective interest rate of 6 percent, and the installment is satisfied by an election to apply the funding standard carryover balance that is made on July 1 (2½; months after the April 15 due date), then the amount used to offset the minimum required contribution under this paragraph (d)(1)(i) is $19,481 (that is, $\$20,250 \div 1.11^{(2.5/12)} \div 1.06^{(3.5/12)}$). However, the amount by which the funding standard carryover balance is reduced under paragraph (b)(2)(ii) of this section is $19,669 (that is, $\$20,250 \div 1.06^{(6/12)}$).

(*2*) *Quarterly contributions due before the valuation date.* [Reserved.]

(ii) *Maximum amount of available balances and coordination of elections*—(A) *General requirement to follow chronology.* In general, the amount of prefunding and funding standard carryover balances that may be used to offset the minimum required contribution for a plan year must take into account any decrease in those balances which results from a prior election either to use the prefunding balance or funding standard carryover balance under section 430(f)(3) and this paragraph (d) or to reduce those balances under section 430(f)(5) and paragraph (e) of this section (including deemed elections under section 436(f)(3) and § 1.436–1(a)(5)). For example, for a calendar plan year with a January 1 valuation date, a deemed election under section 436(f)(3) and § 1.436–1(a)(5) on April 1, 2010 (the first day of the 4th month of the plan year) will reduce the available prefunding balance or funding standard carryover balance that can be used with respect to an election made after April 1, 2010.

(B) *Exception to chronological rule.* Notwithstanding the general rule of paragraph (d)(1)(ii)(A) of this section, all elections under section 430(f)(5) and paragraph (e) of this section to reduce the prefunding balance or funding

standard carryover balance for the current plan year (including deemed elections under section 436(f)(3) and § 1.436–1(a)(5)) are deemed to occur on the valuation date for the plan year and before any election under section 430(f)(3) and this paragraph (d) to offset the minimum required contribution for the current plan year. Accordingly, if an election to use the prefunding balance or funding standard carryover balance to offset the minimum required contribution for the plan year (including an election to satisfy the quarterly contribution requirement) has been made prior to the election to reduce the prefunding balance or funding standard carryover balance, then the amount available for use to offset the otherwise applicable minimum required contribution for the plan year under this paragraph (d) will be retroactively reduced. However, an election to reduce a prefunding balance or funding standard carryover balance for a plan year does not affect a prior election to use a prefunding balance or funding standard carryover balance to offset a minimum required contribution for a prior plan year.

(C) *Investment experience.* In addition to reflecting any decrease in the prefunding balance or the funding standard carryover balance which results from a prior election for the previous year either to use the prefunding balance or funding standard carryover balance under section 430(f)(3) and this paragraph (d) to offset the minimum required contribution for such prior plan year or to reduce those balances under section 430(f)(5) and paragraph (e) of this section (including deemed elections under section 436(f)(3) and § 1.436–1(a)(5)), the prior plan year's prefunding and funding standard carryover balances must be adjusted under the rules of paragraph (b)(3) of this section for investment experience for that prior plan year before determining the amount of those balances available for such an election for the current plan year.

(D) *Special rule for current year elections that are made before prior year elections.* This paragraph (d)(1)(ii)(D) sets forth a special rule that applies if, for the current plan year, a plan sponsor makes an election under this paragraph (d) or paragraph (e) of this section (including a deemed election under section 436(f)(3) and § 1.436–1(a)(5)), and then subsequently makes an election under this paragraph (d) to offset the minimum required contribution for the prior plan year. This special rule applies solely for purposes of determining the amount of prefunding and funding standard carryover balances available for that subsequent election. Under this special rule, in lieu of decreasing the funding standard carryover balance or prefunding balance as of the valuation date for the current year to take into account the current year election, the funding standard carryover balance or prefunding balance as of the valuation date for the prior plan year is decreased by the amount of the prior year equivalent of the current year election. The prior year equivalent of the current year election is determined by dividing the amount of the current year election (as of the first day of the current plan year) by a number equal to 1 plus the rate of investment return for the prior plan year determined under paragraph (b)(3) of this section. If this paragraph (d)(1)(ii)(D) applies for a plan year, then the funding standard carryover balance and prefunding balance are nonetheless adjusted in accordance with the rules of paragraph (b) of this section, after the application of the rules of this paragraph (d)(1)(ii)(D). Thus, the amount used to offset the minimum required contribution for the earlier plan year is subtracted from the prefunding balance or funding standard carryover balance as of the valuation date for that year prior to the adjustment for investment return under paragraph (b)(3) of this section for that plan year, and the amount by which the prefunding balance or funding standard carryover balance is decreased for the second year is based on the elections made for the second year.

(2) *Requirement to use funding standard carryover balance before prefunding balance.* To the extent that a plan has a funding standard carryover balance greater than zero, no amount of the plan's prefunding balance may be used to offset the minimum required contribution. Thus, a plan's funding standard carryover balance must be exhausted before the plan's prefunding balance may be applied under paragraph (d)(1) of this section to offset the minimum required contribution.

(3) *Limitation for underfunded plans*—(i) *In general.* An election to use the prefunding balance or funding standard carryover balance to offset the minimum required contribution under this paragraph (d) is not available for a plan year if the plan's prior plan year funding ratio is less than 80 percent. For purposes of this paragraph (d)(3), except as otherwise provided in this paragraph (d)(3) or paragraph (h)(3) of this section, the plan's prior plan year funding ratio is the fraction (expressed as a percentage)—

(A) The numerator of which is the value of plan assets on the valuation date for the preceding plan year, reduced by the amount of any prefunding balance (but not the amount of any funding standard carryover balance); and

(B) The denominator of which is the funding target of the plan for the preceding plan year (determined without regard to the at-risk rules of section 430(i)(1)).

(ii) *Special rule for second year of a new plan with no past service.* In the case of a new plan that was neither the result of a merger nor involved in a spinoff, if the prior plan year was the first year of the plan and the funding target for the prior plan year was zero, then the plan's prior plan year funding ratio is deemed to be 80 percent for purposes of this paragraph (d)(3).

(iii) *Special rule for plans that are the result of a merger.* [Reserved]

(iv) *Special rules for plans that are involved in a spinoff.* [Reserved]

(e) *Election to reduce balances*—(1) *In general.* A plan sponsor may make an election for a plan year to reduce any portion of a plan's prefunding and funding standard carryover balances under this paragraph (e). If such an election is made, the amount of those balances that must be subtracted from the value of plan assets pursuant to paragraph (c)(1) of this section will be smaller and, accordingly, the value of plan assets taken into account for purposes of sections 430 and 436 will be larger. Thus, this election to reduce a plan's prefunding and funding standard carryover balances is taken into account in the determination of the value of plan assets for the plan year and applies for all purposes under sections 430 and 436, including for purposes of determining the plan's prior plan year funding ratio under paragraph (d)(3) of this section for the following plan year. *See also* section 436(f)(3) and § 1.436–1(a)(5) for a rule under which the plan sponsor is deemed to make the election described in this paragraph (e). The rules of paragraph (d)(1)(ii) of this section also apply for purposes of determining the maximum amount of prefunding balance or funding standard carryover balance that is available for an election under this paragraph (e).

(2) *Requirement to reduce funding standard carryover balance before prefunding balance.* To the extent that a plan has a funding standard carryover balance greater than zero, no election under paragraph (e)(1) of this section is permitted to be made that reduces the plan's prefunding balance. Thus, a plan must exhaust its funding standard carryover balance before it is permitted to make an election under paragraph

(e)(1) of this section with respect to its prefunding balance.

(f) *Elections*—(1) *Method of making elections*—(i) *In general.* Any election under this section by the plan sponsor must be made by providing written notification of the election to the plan's enrolled actuary and the plan administrator. The written notification must set forth the relevant details of the election, including the specific dollar amount involved in the election (except as provided in paragraph (f)(1)(ii) of this section). Thus, except as provided in paragraph (f)(1)(ii) of this section, a conditional or formula-based election generally does not satisfy the requirements of this paragraph (f).

(ii) *Standing elections to increase or use balances.* A plan sponsor may provide a standing election in writing to the plan's enrolled actuary to use the funding standard carryover balance and the prefunding balance to offset the minimum required contribution for the plan year to the extent needed to avoid an unpaid minimum required contribution under section 4971(c)(4) taking into account any contributions that are or are not made. In addition, a plan sponsor may provide a standing election in writing to the plan's enrolled actuary to add the maximum amount possible each year to the prefunding balance. Any election made pursuant to a standing election under this paragraph (f)(1)(ii) is deemed to occur on the last day available to make the election for the plan year as provided under paragraph (f)(2)(i) of this section. Any standing election under this paragraph (f)(1)(ii) remains in effect for the plan with respect to the enrolled actuary named in the election, unless—

(A) The standing election is revoked under the rules of paragraph (f)(3) of this section; or

(B) The enrolled actuary who signs the actuarial report under section 6059 (Schedule SB, ''Single-Employer Defined Benefit Plan Actuarial Information'' of Form 5500, ''Annual Return/Report of Employee Benefit Plan'') for the plan for the plan year is not the enrolled actuary named in the standing election.

(2) *Timing of elections*—(i) *General rule.* Except as otherwise provided in paragraph (f)(2)(ii) or (iii) of this section, any election under this section with respect to a plan year must be made no later than the last date for making the minimum required contribution for the plan year as described in section 430(j)(1). For this purpose, an election to add to the prefunding balance relates to the plan year for which excess contributions were made. For example, an election to add to the prefunding balance as of the first day of the plan year that begins on January 1, 2010 (in an amount not in excess of the present value of the excess contribution as of the valuation date in 2009, adjusted for interest under the rules of paragraph (b)(1)(ii) of this section), must be made no later than September 15, 2010, even though the election is reported on the 2010 Schedule SB of Form 5500, which is not due until 2011. Except for the standing elections covered by paragraph (f)(1)(ii) of this section, an election under this section may not be made prior to the first day of the plan year to which the election relates.

(ii) *Special rule for standing election revoked by a change in enrolled actuary.* If there is a change in enrolled actuary for the plan year which would result in a revocation of the standing election under the rule of paragraph (f)(1)(ii)(B) of this section, then the plan sponsor may reinstate the revoked standing election by providing a replacement to the new enrolled actuary by the due date of the Schedule SB of Form 5500.

(iii) *Election to reduce balances.* Any election under paragraph (e) of this section to reduce the prefunding balance or funding standard carryover balance for a plan year (for example, in order to avoid or terminate a benefit restriction under section 436) must be made by the end of the plan year to which the election relates.

(iv) *Earlier elections.* This paragraph (f)(2) sets forth the latest date that an election can be made. A plan sponsor is permitted to make an earlier election, and in certain circumstances may need to make such an election in order to timely satisfy a quarterly contribution requirement under section 430(j)(3).

(3) *Irrevocability of elections*—(i) *In general.* Except as otherwise provided in this paragraph (f)(3), a plan sponsor's election under this section with respect to the plan's prefunding balance or funding standard carryover balance is irrevocable (and must be unconditional). A standing election by the plan sponsor may be revoked by providing written notification of the revocation to the plan's enrolled actuary and the plan administrator on or before the date the corresponding election is deemed to occur pursuant to paragraph (f)(1)(ii) of this section.

(ii) *Exception for certain elections.* An election to use the prefunding balance or funding standard carryover balance to offset the minimum required contribution for a plan year (including an election to satisfy the quarterly contribution requirements for a plan year) is permitted to be revoked to the extent the amount the plan sponsor elected to use to offset the minimum contribution requirements (including an election used to satisfy the quarterly contribution requirements) exceeds the minimum required contribution for a plan year (determined without regard to the election under paragraph (d) of this section) if and only if the election is revoked by providing written notification of the revocation to the plan's enrolled actuary and the plan administrator by the deadline set forth in paragraph (f)(3)(iii) of this section. If no such revocation is made, then, under paragraph (b) of this section, the funding standard carryover balance or prefunding balance is decreased by the entire amount that the plan sponsor elected to use to offset the minimum required contribution for a plan year (including an election to satisfy the quarterly contribution requirements for a plan year).

(iii) *Deadline for revoking election.* The deadline for revoking the election described in paragraph (f)(3)(ii) of this section is generally the end of the plan year. However, for plans with a valuation date other than the first day of the plan year, the deadline for the revocation is the deadline for contributions for the plan year as described in section 430(j)(1). In addition, for the first plan year beginning in 2008, the deadline for the revocation for all plans is deferred to the due date (including extensions) of the Schedule SB, ''Single-Employer Defined Benefit Plan Actuarial Information'' of Form 5500, ''Annual Return/Report of Employee Benefit Plan''.

(4) *Plan sponsor*—(i) *In general.* For purposes of the elections described in this section, except as otherwise provided in paragraph (f)(4)(ii) of this section, any reference to the plan sponsor means the employer or employers responsible for making contributions to or under the plan.

(ii) *Certain multiple employer plans.* For purposes of the elections described in this section, in the case of plans that are multiple employer plans to which section 413(c)(4)(A) does not apply, any reference to the plan sponsor means the plan administrator within the meaning of section 414(g).

(g) *Examples.* The following examples illustrate the rules of this section:

Example 1. (i) Plan P is a defined benefit plan with a plan year that is the calendar year and a valuation date of January 1. The funding standard carryover balance of Plan P is $25,000 and the prefunding balance is zero as of the beginning of the 2010 plan year. The sponsor of Plan P, Sponsor S, does not elect to use any portion of the balance to offset the minimum required contribution for 2010 pursuant to paragraph (d)(1) of this section, or to reduce any portion of the funding

standard carryover balance prior to the determination of the value of plan assets for 2010, pursuant to paragraph (e)(1) of this section. The actual rate of return on Plan P's assets for 2010 is 2%. Plan P's effective interest rate for 2010 is 6%. The minimum required contribution for Plan P under section 430 for 2010 is $100,000, and no quarterly installments are required for Plan P for the 2010 plan year. As of January 1, 2010, the value of plan assets is $1,100,000 and the funding target is $1,000,000. Therefore, the prior plan year funding ratio for Plan P for 2010, as determined under paragraph (d)(3) of this section, is 110%.

(ii) Sponsor S makes a contribution to Plan P of $150,000 on December 1, 2010, for the 2010 plan year and makes no other contributions for the 2010 plan year. Because this contribution was made on a date other than the valuation date for the 2010 plan year, the contribution must be adjusted to reflect interest that would otherwise have accrued between the valuation date and the date of the contribution, at the effective interest rate for the 2010 plan year. The amount of the contribution after adjustment is $142,198, determined as $150,000 discounted for 11 months of compound interest at an effective annual interest rate of 6%.

(iii) The excess of employer contributions for 2010 over the minimum required contribution for 2010, as of the valuation date, is $42,198 ($142,198 less $100,000). Accordingly, the increase in Plan P's prefunding balance as of January 1, 2011, cannot exceed $44,730 (which is the present value of the excess contribution of $42,198 adjusted for 12 months of interest at an effective interest rate of 6%).

(iv) Plan P's funding standard carryover balance as of January 1, 2011, is $25,500 (which is the funding standard carryover balance as of January 1, 2010, adjusted for investment experience during 2010 at a rate of 2%).

Example 2. (i) The facts are the same as in *Example 1,* except that the contribution of $150,000 is made on February 1, 2011, for the 2010 plan year.

(ii) The amount of the contribution after adjustment is $140,824, which is determined as $150,000 discounted for 13 months of interest at an effective interest rate of 6%. Accordingly, the increase in Plan P's prefunding balance as of January 1, 2011, cannot exceed $43,273 (which is the present value of the excess contribution of $40,824 adjusted for 12 months of interest at an effective interest rate of 6%).

(iii) Plan P's funding standard carryover balance as of January 1, 2011, is $25,500, as developed in *Example 1* of this section. If Sponsor S elects to increase the prefunding balance as of January 1, 2011, by the present value of the excess contribution adjusted for interest, or $43,273, the total of the funding standard carryover balance and prefunding balance as of January 1, 2011, is $68,773.

Example 3. (i) The facts are the same as in *Example 1,* except that Sponsor S contributes $90,539 to Plan P on February 1, 2011, for the 2010 plan year and makes no other contributions to Plan P for the 2010 plan year. In addition, on February 1, 2011, Sponsor S elects to use $15,000 of the funding standard carryover balance to offset P's minimum required contribution for 2010, pursuant to paragraph (d)(1) of this section. This is permitted because Plan P's prior-year funding ratio determined under paragraph (d)(3) of this section is 110%, and is therefore not less than 80%.

(ii) Because the contribution was made on a date other than the valuation date for the 2010 plan year, the contribution must be adjusted to reflect interest that would otherwise have accrued between the valuation date and the date of the contribution, at the effective interest rate for the 2010 plan year. The amount of the contribution after adjustment is $85,000, determined as $90,539 discounted for 13 months of compound interest at an effective interest rate of 6%. The adjusted contribution of $85,000 plus the $15,000 of the funding standard carryover balance used to offset the minimum required contribution equals the minimum required contribution for the 2010 plan year of $100,000. Therefore, no excess contributions are available to increase the prefunding balance, and the prefunding balance as of January 1, 2011, remains zero.

(iii) The funding standard carryover balance as of January 1, 2011, is adjusted for investment experience during the 2010 plan year, in accordance with paragraph (b)(3) of this section. The amount of the adjustment is $200, determined as the actual rate of return on plan assets for 2010 as applied to the 2010 funding standard carryover balance after reduction for the amount of that balance used under paragraph (d)(1) of this section (that is, $25,000 less $15,000, multiplied by the actual rate of return of 2%).

(iv) The funding standard carryover balance, as of January 1, 2011, is $10,200, determined as the 2010 funding standard carryover balance less the amount used to offset the 2010 minimum required contribution, adjusted for investment experience during the 2010 year ($25,000 less $15,000 plus $200).

Example 4. (i) The facts are the same as in *Example 3,* except that Sponsor S contributes $150,000 (instead of $90,539) to Plan P on February 1, 2011, for the 2010 plan year.

(ii) Because the contribution was made on a date other than the valuation date for the 2010 plan year, the contribution must be adjusted to reflect interest that would otherwise have accrued between the valuation date and the date of the contribution, at the effective interest rate for the 2010 plan year. The amount of the contribution after adjustment is $140,824, determined as $150,000 discounted for 13 months of interest at an effective interest rate of 6%.

(iii) Because Sponsor S elected to use $15,000 of the funding standard carryover balance to offset the minimum required contribution for 2010 of $100,000, the cash contribution requirement for 2010, adjusted with interest to January 1, 2010, is $85,000. The adjusted contribution of $140,824 exceeds this amount by $55,824. Of this amount, $15,000 exceeds the minimum required contribution only because of Sponsor S's election to use the funding standard carryover balance to offset the minimum required contribution as provided in paragraph (d)(1) of this section. The remaining $40,824 ($140,824 minus $100,000) results from cash contributions made in excess of the minimum required contribution before offset by the funding standard carryover balance.

(iv) The portion of the excess contribution resulting solely because the minimum required contribution was offset by a portion of the funding standard carryover balance is adjusted for investment experience during 2009, pursuant to paragraph (b)(3)(iii) of this section. Accordingly, this portion of the present value of the excess contribution adjusted for interest as of January 1, 2011, is $15,300 ($15,000 adjusted for investment experience during 2010 at a rate of 2%).

(v) The excess contribution resulting from cash contributions in excess of the minimum required contribution before offset by the funding standard carryover balance is adjusted for interest at the effective interest rate for 2010, pursuant to paragraph (b)(1)(iv)(A) of this section. Accordingly, this portion of the present value of the excess contribution adjusted for interest as of January 1, 2011, is $43,273 ($40,824 increased by the effective interest rate of 6%). The increase in Plan P's prefunding balance as of January 1, 2011, cannot exceed the total present value of the excess contribution adjusted for interest of $58, 573 ($15,300 plus $43,273).

(vi) The funding standard carryover balance as of January 1, 2011, is $10,200, determined as the 2010 funding standard carryover balance less the $15,000 used to offset the 2010 minimum required contribution, adjusted for investment experience during the 2010 plan year as developed in *Example 3* ($25,000 less $15,000 plus $200).

(vii) Sponsor S elects to increase the prefunding balance by the maximum amount of the present value of the excess contribution adjusted for interest of $58,573, resulting in a total of the funding standard carryover balance and the prefunding balance as of January 1, 2011, of $68,773, the same amount as that developed in *Example 2.*

Example 5. (i) Plan Q is a defined benefit plan with a plan year that is the calendar year and a valuation date of July 1. The funding standard carryover balance of Plan Q is $50,000 as of January 1, 2010, the beginning of the 2010 plan year. The prefunding balance of Plan Q as of the beginning of the 2010 plan year is $0. The actual rate of return on Plan Q's assets for 2010 is 10%. Plan Q's effective interest rate for 2010 is 6.25%. The funding ratio for Plan Q for 2009 (the prior plan year funding ratio with respect to 2010, as determined under paragraph (d)(3) of this section) is 85%, which is not less than 80%. The minimum required contribution for Plan Q for 2010 is $200,000. Sponsor T makes a contribution to Plan Q of $190,000 on July 1, 2010, for the 2010 plan year, and makes no other contributions for the 2010 plan year. Sponsor T elects to use $10,000 of the funding standard carryover balance to offset Plan Q's minimum required contribution in 2010.

(ii) Pursuant to paragraph (b)(4) of this section, the funding standard carryover

balance is increased to $51,539 as of July 1, 2010 (that is, an increase to reflect 6 months of interest at an effective interest rate of 6.25%) for the purpose of adjusting plan assets under paragraph (c) of this section, and for applying any election to use or reduce Plan Q's funding standard carryover balance under paragraph (d) or (e) of this section. However, Sponsor T does not elect in 2010 to reduce any portion of the funding standard carryover balance pursuant to paragraph (e) of this section. The funding standard carryover balance ($51,539) is subtracted from the value of plan assets, as of July 1, 2010, prior to the determination of the minimum funding contribution, and $51,539 is the maximum amount that may applied against the minimum required contribution.

(iii) The value of the funding standard carryover balance as of January 1, 2011, is determined by first discounting the amount used to offset the minimum required contribution for 2010 from July 1, 2010, to January 1, 2010, using the effective interest rate of 6.25%, and subtracting the discounted amount from the January 1, 2010, funding standard carryover balance. The resulting amount is adjusted for investment experience to January 1, 2011, using a rate equal to the actual rate of return on plan assets of 10% during 2010. Thus, the $10,000 used to offset Plan Q's minimum required contribution as of July 1, 2010, is discounted for 6 months of interest, at an effective interest rate of 6.25%, to obtain an amount of $9,701 as of January 1, 2010. The remaining funding standard carryover balance as of January 1, 2010, solely for purposes of determining the adjustment for investment experience during 2010, is $40,299 ($50,000—$9,701), and the adjustment for investment experience is $4,030 ($40,299 × 10%). The value of the funding standard carryover balance as of January 1, 2011, is $44,329 (that is, $50,000 − $9,701 + $4,030).

Example 6. (i) The facts are the same as in *Example 5,* except that Sponsor T contributes $200,000 on July 1, 2010, for the 2010 plan year.

(ii) The cash contribution required for 2010, after offsetting the minimum required contribution by $10,000 of the funding standard carryover balance in accordance with T's election, is $190,000. The difference, or $10,000, must be adjusted to January 1, 2011, to determine the maximum amount that can be added to the prefunding balance as of that date.

(iii) The excess contribution is first adjusted to January 1, 2010, by discounting for 6 months of interest using the effective interest rate for 2010 of 6.25%. This results in an excess contribution of $9,701 ($10,000 ÷ $1.0625^{0.5}$). Because this amount is an excess contribution solely because of Sponsor T's election to offset the minimum required contribution for 2010 by a portion of the funding standard carryover balance, the amount is then adjusted for investment experience during 2010 at a rate of 10%, in accordance with paragraph (b)(3)(iii) of this section, for a present value of the excess contribution adjusted for interest of $10,671 ($9,701 × 1.10) as of January 1, 2011.

Example 7. (i) The facts are the same as in *Example 4.* Plan P's effective interest rate for 2011 is 6.5%, and the rate of return on investments during 2011 is 7%. All required quarterly installments for the 2011 plan year were made by the applicable due dates. On February 1, 2012, Sponsor S elects to use $50,000 of Plan P's prefunding and funding standard carryover balances to offset the minimum required contribution for the 2011 plan year. On April 15, 2012, Sponsor S elects to use Plan P's prefunding and funding standard carryover balances to offset the 2012 minimum required contribution by $20,000, in accordance with paragraph (d) of this section, in order to offset the required quarterly installment then due.

(ii) When adjusting Plan P's prefunding and funding standard carryover balances to reflect Sponsor S's election to use them to offset the 2011 minimum required contribution, the remaining $10,200 in the funding standard carryover balance as of January 1, 2011, must be used before any portion of the prefunding balance. The prefunding balance is reduced by the remaining $39,800 ($50,000 total election minus $10,200 from the funding standard carryover balance).

(iii) The amount available for Sponsor S's election to use Plan P's prefunding and funding standard carryover balances to offset the 2012 minimum required contribution is determined by reducing the January 1, 2011, prefunding and funding standard carryover balances to reflect the election to use the prefunding and funding standard carryover balances to offset the 2011 minimum required contribution, and by adjusting the resulting amount to January 1, 2012, using the rate of investment return for Plan P during 2011. Accordingly, the available amount in Plan P's funding standard carryover balance as of January 1, 2012, is zero. The available amount in Plan P's prefunding balance as of January 1, 2012, is $20,087 ($58,573 minus $39,800, increased by 7%). Therefore, Sponsor S has $20,087 available to offset the minimum required contribution for the 2012 plan year.

Example 8. (i) The facts are the same as in *Example 7,* except that based on the enrolled actuary's certification of the AFTAP on July 1, 2012, Sponsor S is deemed to elect to reduce the January 1, 2012, prefunding balance by $15,000 under section 436(f)(3).

(ii) In accordance with paragraph (d)(1)(ii)(B) of this section, the deemed election to reduce the prefunding balance is deemed to occur on the first day of the plan year, and before the date of any election to offset the minimum required contribution for the 2012 plan year. The deemed election does not affect Sponsor S's election to offset the 2011 minimum contribution because that election was made on February 1, 2012, before the date of the deemed election, July 1, 2012.

(iii) As shown in *Example 7,* the available prefunding balance as of January 1, 2012, after reflecting the February 1, 2012, election to offset the 2011 minimum required contribution but before reflecting the April 15, 2012, election to offset the 2012 minimum required contribution, is $20,087. Adjusting this amount to reflect the deemed election to reduce the prefunding balance by $15,000 leaves a balance of $5,087 available to offset the minimum required contribution for 2012.

(iv) The portion of the quarterly installment due April 15, 2012 that was not covered by the remaining $5,087 prefunding balance is considered unpaid retroactive to April 15, 2012.

Example 9. (i) The facts are the same as in *Example 8,* except that Sponsor S does not make the election to offset the 2011 minimum required contribution until August 1, 2012, and the deemed election as of July 1, 2012, reduces Plan P's prefunding and funding standard carryover balances as of January 1, 2012, by $68,500. Sponsor S does not elect to use Plan P's prefunding and funding standard carryover balances to offset the 2012 minimum contribution.

(ii) In accordance with paragraph (d)(1)(ii)(A) of this section, the July 1, 2012, deemed election to reduce Plan P's prefunding and funding standard carryover balances must be taken into account before determining the amount available to offset the 2011 minimum required contribution because the election to offset the 2011 minimum required contribution was made after the date of the deemed election, July 1, 2012.

(iii) Pursuant to paragraph (d)(1)(ii)(C) of this section, the January 1, 2011, prefunding and funding standard carryover balances are adjusted to January 1, 2012, using Plan P's rate of investment return for 2011 of 7%. This results in an available funding standard carryover balance of $10,914 ($10,200 × 1.07) and an available prefunding balance of $62,673 (58,573 × 1.07) as of January 1, 2012.

(iv) Paragraph (d)(2) of this section requires that the funding standard carryover balance must be used before reducing Plan P's prefunding balance. Accordingly, the funding standard carryover balance is eliminated, and the prefunding balance is reduced by the remaining $57,586 ($68,500 − $10,914), resulting in an available prefunding balance of $5,087 ($62,673 − $57,586) as of January 1, 2012.

(v) In accordance with paragraph (d)(1)(ii)(D) of this section, the remaining balance is adjusted to January 1, 2011, to determine the amount available to offset the 2011 minimum required contribution. This adjustment is done by dividing the remaining balance by 1 plus the rate of investment return for 2011. Accordingly, the amount available to offset the 2011 minimum required contribution is $4,754 ($5,087 ÷ 1.07).

(vi) If the plan sponsor elects to use the $4,754 available balance to offset the 2011 minimum required contribution, the funding standard carryover balance as of January 1, 2012 (prior to the deemed reduction under section 436(f)(3)) is $5,827 ($10,200 less $4,754, plus $381 for investment experience at a rate of 7%). The prefunding balance as of January 1, 2012 (prior to the deemed reduction under section 436(f)(3)) is $62,673 (that is, $58,573 × 1.07). The deemed election to reduce Plan P's balance is first applied to eliminate the funding standard carryover balance, and the remaining $62,673 ($68,500 less $5,827) reduces the January 1, 2012, prefunding balance to zero.

Example 10. (i) Plan V is a defined benefit plan with a plan year that is the calendar year and a valuation date of December 31. The valuation is based on the fair market value of plan assets, which amounts to $1,000,000 as of December 31, 2010, before any adjustments. As of January 1, 2010, Plan V's funding standard carryover balance is $0 and its prefunding balance is $125,000. Plan V's effective interest rate for 2010 is 5.5%. The enrolled actuary's certification of AFTAP for 2010 on March 31, 2010, results in a deemed reduction of $15,000 in the plan's prefunding balance as of January 1, 2010. Plan V's sponsor elected to use the prefunding balance to offset any portion of the minimum required contribution for 2010 not covered by cash contributions.

(ii) In accordance with paragraph (b)(4)(i) of this section, the amount of the prefunding balance subtracted from plan assets is increased from the first day of the plan year to the valuation date using the effective interest rate of 5.5% for 2009. Accordingly, the prefunding balance used for this purpose is $116,050 [($125,000 − $15,000 deemed reduction) × 1.055].

(iii) The fair market value of plan assets used for the December 31, 2010, valuation is $883,950 ($1,000,000 − $116,050).

Example 11. (i) The facts are the same as in *Example 10.* The minimum contribution for Plan V for the 2010 plan year is $45,000; no quarterly installments are required for Plan V for 2010. Plan V's sponsor makes a contribution of $20,000 for the 2010 plan year on July 1, 2011. The actual rate of return on assets for Plan V during 2010 is 10%.

(ii) The contribution of $20,000 is discounted to December 31, 2010, using the effective interest rate of 5.5% to determine the remaining balance of the 2010 minimum required contribution. Accordingly, the contribution is adjusted to $19,472 ($20,000 ÷ $1.055^{0.5}$) as of December 31, 2010, and the balance of the minimum required contribution is $25,528 ($45,000 − $19,472). This balance will be covered by the plan sponsor's election to use the prefunding balance to offset any portion of the minimum required contribution not covered by cash contributions.

(iii) Under section (b)(4)(ii) of this section, the amount used to offset the 2010 minimum required contribution for the purpose of adjusting the prefunding balance is discounted to January 1, 2010, using the effective interest rate for 2010. This amount is calculated as $24,197 ($25,528 ÷ 1.055).

(iv) The prefunding balance as of January 1, 2011, is reduced by the deemed election of $15,000 and the discounted amount used to offset the 2010 minimum required contribution ($24,197), and adjusted for investment experience for 2010 using the actual rate of return of 10%. Accordingly, the prefunding balance as of January 1, 2011 is $94,383 [($125,000 − $15,000 − $24,197) × 1.10].

Example 12. (i) The facts are the same as in *Example 11,* except that the enrolled actuary's certification of the AFTAP as of March 31, 2011, results in a deemed reduction of the prefunding balance as of January 1, 2011, of $75,000.

(ii) Under paragraph (d)(1)(ii) of this section, the deemed reduction of the prefunding balance is applied before the election to use the prefunding balance to offset the balance of the minimum required contribution for 2010. To determine the amount of the prefunding balance available to cover the remaining minimum required contribution for 2010, the deemed reduction is adjusted for investment experience to January 1, 2010, using the actual rate of return of 10% for 2010. Accordingly, the adjusted deemed reduction is $68,182 ($75,000 ÷ 1.10) and the available prefunding balance as of January 1, 2010, is $41,818 ($125,000 − $15,000 adjusted deemed reduction for 2010 − $68,182 adjusted deemed reduction for 2011).

(iii) This amount is then adjusted to December 31, 2010, using the effective interest rate of 5.5%. The amount of the prefunding balance available to offset the 2009 minimum required contribution as of December 31, 2010, is $44,118 ($41,818 × 1.055). This amount is larger than the election made by Plan V's sponsor to offset the minimum required contribution for 2010 ($25,528) and so the election remains valid.

(h) *Effective/applicability date and transition rules*—(1) *Statutory effective date/applicability date.* Section 430 generally applies to plan years beginning on or after January 1, 2008. The applicability of section 430 for purposes of determining the minimum required contribution is delayed for certain plans in accordance with sections 104 through 106 of PPA '06.

(2) *Effective date/applicability date of regulations.* This section applies to plan years beginning on or after January 1, 2010. For plan years beginning before January 1, 2010, plans are permitted to rely on the provisions set forth in this section for purposes of satisfying the requirements of section 430.

(3) *Special lookback rule for 2007 plan year's funding ratio*—(i) *Plan assets.* For purposes of determining a plan's prior plan year funding ratio under paragraph (d)(3) of this section with respect to the first plan year beginning on or after January 1, 2008, the value of plan assets on the valuation date of the preceding plan year (the ''2007 plan year'') is determined under section 412(c)(2) as in effect for the 2007 plan year, except that, for this purpose—

(A) If the value of plan assets is less than 90 percent of the fair market value of plan assets for the 2007 plan year on that date, such value is considered to be 90 percent of the fair market value; and

(B) If the value of plan assets is greater than 110 percent of the fair market value of plan assets for the 2007 plan year on that date, such value is considered to be 110 percent of the fair market value.

(ii) *Funding target.* For purposes of determining a plan's prior plan year funding ratio under paragraph (d)(3) of this section with respect to the first plan year beginning on or after January 1, 2008, the funding target of the plan for the preceding plan year is equal to the plan's current liability under section 412(l)(7) (as in effect prior to amendment by PPA '06) on the valuation date for the 2007 plan year.

(iii) *Special rules for new plans, mergers, and spinoffs.* In the case of a plan described in paragraph (d)(3)(ii), (d)(3)(iii), or (d)(3)(iv) of this section, the plan's prior plan year funding ratio with respect to the first plan year beginning on or after January 1, 2008 is determined using rules similar to the rules of paragraphs (d)(3)(ii), (d)(3)(iii), and (d)(3)(iv) of this section.

(4) *First effective plan year.* For purposes of this section, the term *first effective plan year* means the first plan year beginning on or after the date section 430 applies for purposes of determining the minimum required contribution for the plan.

(5) *Pre-effective plan year.* For purposes of this section, the term *pre-effective plan year* means the plan year immediately preceding the first effective plan year.

■ **Par. 4.** Section 1.430(g)–1 is added to read as follows:

§ 1.430(g)–1 Valuation date and valuation of plan assets.

(a) *In general*—(1) *Overview.* This section provides rules relating to a plan's valuation date and the valuation of a plan's assets for a plan year under section 430(g). Section 430 and this section apply to single employer defined benefit plans (including multiple employer plans as defined in section 413(c)) that are subject to the rules of section 412, but do not apply to multiemployer plans (as defined in section 414(f)). Paragraph (b) of this section describes valuation date rules. Paragraph (c) of this section describes rules regarding the determination of the asset value for purposes of a plan's actuarial valuation. Paragraph (d) of this section contains rules for taking employer contributions into account in the determination of the value of plan assets. Paragraph (e) of this section contains examples. Paragraph (f) of this section sets forth effective/applicability dates and transition rules.

(2) *Special rules for multiple employer plans.* In the case of a multiple employer plan to which section 413(c)(4)(A) applies, the rules of section 430 and this section are applied separately for each employer under the plan as if each employer maintained a separate plan. Thus, in such a case, the value of plan assets is determined separately for each employer under the plan. In the case of a multiple employer

plan to which section 413(c)(4)(A) does not apply (that is, a plan described in section 413(c)(4)(B) that has not made the election for section 413(c)(4)(A) to apply), the rules of section 430 and this section are applied as if all participants in the plan were employed by a single employer.

(b) *Valuation date*—(1) *In general.* The determination of the funding target, target normal cost, and value of plan assets for a plan year is made as of the valuation date for that plan year. Except as otherwise provided in paragraph (b)(2) of this section, the valuation date for any plan year is the first day of the plan year.

(2) *Exception for small plans*—(i) *In general.* If, on each day during the preceding plan year, a plan had 100 or fewer participants determined by applying the rules of § 1.430(d)–1(e)(1) and (2) (including active and inactive participants and all other individuals entitled to future benefits), then the plan may designate any day during the plan year as its valuation date for that plan year and succeeding plan years. For purposes of this paragraph (b)(2)(i), all defined benefit plans (other than multiemployer plans as defined in section 414(f)) maintained by an employer are treated as one plan, but only participants with respect to that employer are taken into account.

(ii) *Employer determination.* For purposes of this paragraph (b)(2), the employer includes all members of the employer's controlled group determined pursuant to section 414(b), (c), (m), and (o) and includes any predecessor of the employer that, during the prior year, employed any employees of the employer who are covered by the plan.

(iii) *Application of exception in first plan year.* In the case of the first plan year of any plan, the exception for small plans under paragraph (b)(2)(i) of this section is applied by taking into account the number of participants that the plan is reasonably expected to have on each day during the first plan year.

(iv) *Valuation date is part of funding method.* The selection of a plan's valuation date is part of the plan's funding method and, accordingly, may only be changed with the consent of the Commissioner. A change of a plan's valuation date that is required by section 430 is treated as having been approved by the Commissioner and does not require the Commissioner's prior specific approval. Thus, if a plan that ceases to be eligible for the small plan exception under this paragraph (b)(2) for a plan year because the number of participants exceeded 100 in the prior plan year, then the resulting change in the valuation date to the first day of the plan year is automatically approved by the Commissioner.

(c) *Determination of asset value*—(1) *In general*—(i) *General use of fair market value.* Except as otherwise provided in this paragraph (c), the value of plan assets for purposes of section 430 is equal to the fair market value of plan assets on the valuation date. Prior year contributions made after the valuation date and current year contributions made before the valuation date are taken into account to the extent provided in paragraph (d) of this section.

(ii) *Fair market value.* The fair market value of an asset is determined as the price at which the asset would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts. Except as otherwise provided by the Commissioner, any guidance on the valuation of insurance contracts under Subchapter D of Chapter 1 the Internal Revenue Code applies for purposes of this paragraph (c)(1)(ii).

(2) *Averaging of fair market values*—(i) *In general.* Subject to the plan asset corridor rules of paragraph (c)(2)(iii) of this section, a plan is permitted to determine the value of plan assets on the valuation date as the average of the fair market value of assets on the valuation date and the adjusted fair market value of assets determined for one or more earlier determination dates (adjusted using the method described in paragraph (c)(2)(ii) of this section). The method of determining the value of assets is part of the plan's funding method and, accordingly, may only be changed with the consent of the Commissioner.

(ii) *Adjusted fair market value*—(A) *Determination dates.* The period of time between each determination date (treating the valuation date as a determination date) must be equal and that period of time cannot exceed 12 months. In addition, the earliest determination date with respect to a plan year cannot be earlier than the last day of the 25th month before the valuation date of the plan year (or a similar period in the case of a valuation date that is not the first day of a month). In a typical situation, the earlier determination dates will be the two immediately preceding valuation dates. However, these rules also permit the use of more frequent determination dates. For example, monthly or quarterly determination dates may be used.

(B) *Adjustments for contributions and distributions.* The adjusted fair market value of plan assets for a prior determination date is the fair market value of plan assets on that date, increased for contributions included in the plan's asset balance on the valuation date that were not included in the plan's asset balance on the earlier determination date, reduced for benefits and all other amounts paid from plan assets during the period beginning with the prior determination date and ending immediately before the valuation date, and adjusted for expected earnings as described in paragraph (c)(2)(ii)(D) of this section. For this purpose, the fair market value of assets as of a determination date includes any contribution for a plan year that ends with or prior to the determination date that is receivable as of the determination date (but only if the contribution is actually made within 8½ months after the end of the applicable plan year). If the contribution that is receivable as of the determination date is for a plan year beginning on or after January 1, 2008, then only the present value as of the determination date (determined using the effective interest rate under section 430(h)(2)(A) for the plan year for which the contribution is made) is included in the fair market value of assets.

(C) *Treatment of spin-offs and plan-to-plan transfers.* For purposes of determining the adjusted fair market value of plan assets, assets spun-off from a plan as a result of a spin-off described in § 1.414(l)–1(b)(4) are treated as an amount paid from plan assets. Except as otherwise provided by the Commissioner, for purposes of determining the adjusted fair market value of plan assets, assets that are added to a plan as a result of a plan-to-plan transfer described in § 1.414(l)–1(b)(3) are treated in the same manner as contributions.

(D) *Adjustments for expected earnings.* [Reserved]

(E) *Assumed rate of return.* [Reserved]

(F) *Limitation on the assumed rate of return for periods within plan years for which the three segment rates were used.* [Reserved]

(G) *Limitation on the assumed rate of return for periods within plan years for which the full yield curve was used.* [Reserved]

(iii) *Restriction to 90–110 percent corridor*—(A) *In general.* This paragraph (c)(2)(iii) provides rules for applying the 90 to 110 percent corridor set forth in section 430(g)(3)(B)(iii). The rules for accounting for contribution receipts under paragraphs (d)(1) and (d)(2) of this section are applied prior to the application of the 90 to 110 percent corridor under this paragraph (c)(2)(iii).

(B) *Asset value less than 90 percent of fair market value.* If the value of plan

assets determined under paragraph (c)(2)(i) of this section is less than 90 percent of the fair market value of plan assets, then the value of plan assets under this paragraph (c)(2) is equal to 90 percent of the fair market value of plan assets.

(C) *Asset value greater than 110 percent of fair market value.* If the value of plan assets determined under paragraph (c)(2)(i) of this section is greater than 110 percent of the fair market value of plan assets, then the value of plan assets under this paragraph (c)(2) is equal to 110 percent of the fair market value of plan assets.

(3) *Qualified transfers to health benefit accounts.* In the case of a qualified transfer (as defined in section 420), any assets so transferred are not treated as plan assets for purposes of section 430 and this section.

(d) *Accounting for contribution receipts*—(1) *Prior year contributions*—(i) *In general.* For purposes of determining the value of plan assets under paragraph (c) of this section, if an employer makes a contribution to the plan after the valuation date for the current plan year and the contribution is for an earlier plan year, then the present value of the contribution determined as of that valuation date is taken into account as an asset of the plan as of the valuation date, but only if the contribution is made before the deadline for contributions as described in section 430(j)(1) for the plan year immediately preceding the current plan year. For this purpose, the present value is determined using the effective interest rate under section 430(h)(2)(A) for the plan year for which the contribution is made.

(ii) *Special rule for contributions for the 2007 plan year*—(A) *Timely contributions.* Notwithstanding paragraph (d)(1)(i) of this section, if the employer makes a contribution to the plan after the valuation date for the first plan year that begins on or after January 1, 2008, and the contribution is for the immediately preceding plan year and is made by the deadline for contributions for that preceding plan year under section 412(c)(10) (as in effect before amendment by the Pension Protection Act of 2006 (PPA '06), Public Law 109–280 (120 Stat. 780)), then the contribution is taken into account as a plan asset under paragraph (d)(1)(i) of this section without applying any present value discount.

(B) *Late contributions.* If a contribution is for the plan year that immediately precedes the first plan year that begins on or after January 1, 2008, and is not described in paragraph (d)(1)(ii)(A) of this section, then the rules of paragraph (d)(1)(i) apply to the contribution except that the present value is determined using the valuation interest rate under section 412(c)(2) for that plan year.

(iii) *Ordering rules.* For purposes of this paragraph (d)(1), the ordering rules of section 4971(c)(4)(B) apply for purposes of determining the plan year for which a contribution is made.

(2) *Current year contributions made before valuation date.* In the case of a plan with a valuation date that is not the first day of the plan year, for purposes of determining the value of plan assets under paragraph (c) of this section, if an employer makes a contribution for a plan year before that year's valuation date, that contribution (and any interest on the contribution for the period between the contribution date and the valuation date, determined using the effective interest rate under section 430(h)(2)(A) for the plan year) must be subtracted from plan assets in determining the value of plan assets as of the valuation date. If the result of this subtraction is a number less than zero, the value of plan assets as of the valuation date is equal to zero.

(e) *Examples.* [Reserved]

(f) *Effective/applicability dates and transition rules*—(1) *Statutory effective date/applicability date.* Section 430 generally applies to plan years beginning on or after January 1, 2008. The applicability of section 430 for purposes of determining the minimum required contribution is delayed for certain plans in accordance with sections 104 through 106 of PPA '06.

(2) *Effective date/applicability date of regulations*—(i) *In general.* This section applies to plan years beginning on or after January 1, 2010, regardless of whether section 430 applies to determine the minimum required contribution for the plan year. For plan years beginning before January 1, 2010, plans are permitted to rely on the provisions set forth in this section for purposes of satisfying the requirements of section 430.

(ii) *Permission to use averaging for 2008.* For purposes of determining the actuarial value of assets for a plan year beginning during 2008 using the averaging rules of paragraph (c)(2) of this section, a plan is permitted to apply an assumed earnings rate of zero under paragraph (c)(2)(ii)(E) of this section (even if zero is not the actuary's best estimate of the anticipated annual rate of return on plan assets).

(3) *Approval for changes in the valuation date and valuation method.* Any change in a plan's valuation date or asset valuation method that satisfies the rules of this section and is made for either the first plan year beginning in 2008, the first plan year beginning in 2009, or the first plan year beginning in 2010 is treated as having been approved by the Commissioner and does not require the Commissioner's specific prior approval. In addition, a change in a plan's valuation date or asset valuation method for the first plan year to which section 430 applies to determine the plan's minimum required contribution (even if that plan year begins after December 31, 2010) that satisfies the rules of this section is treated as having been approved by the Commissioner and does not require the Commissioner's specific prior approval.

■ **Par. 5.** Section 1.430(h)(2)–1 is added to read as follows:

§ 1.430(h)(2)–1 Interest rates used to determine present value.

(a) *In general*—(1) *Overview.* This section provides rules relating to the interest rates to be applied for a plan year under section 430(h)(2). Section 430(h)(2) and this section apply to single employer defined benefit plans (including multiple employer plans as defined in section 413(c)) that are subject to section 412 but do not apply to multiemployer plans (as defined in section 414(f)). Paragraph (b) of this section describes how the segment interest rates are used for a plan year. Paragraph (c) of this section describes those segment rates. Paragraph (d) of this section describes the monthly corporate bond yield curve that is used to develop the segment rates. Paragraph (e) of this section describes certain elections that are permitted to be made under this section. Paragraph (f) of this section describes other rules related to interest rates. Paragraph (g) of this section contains examples. Paragraph (h) of this section contains effective/applicability dates and transition rules.

(2) *Special rules for multiple employer plans.* In the case of a multiple employer plan to which section 413(c)(4)(A) applies, the rules of section 430 and this section are applied separately for each employer under the plan as if each employer maintained a separate plan. Thus, each employer under such a multiple employer plan may make elections with respect to the interest rate rules under this section that are independent of the elections of other employers under the plan. In the case of a multiple employer plan to which section 413(c)(4)(A) does not apply (that is, a plan described in section 413(c)(4)(B) that has not made the election for section 413(c)(4)(A) to apply), the rules of section 430 and this section are applied as if all participants

in the plan were employed by a single employer.

(b) *Interest rates for determining plan liabilities*—(1) *In general.* The interest rates used in determining the present value of the benefits that are included in the target normal cost and the funding target for the plan for a plan year are determined as set forth in this paragraph (b).

(2) *Benefits payable within 5 years*—(i) *Plans with valuation dates at the beginning of the plan year.* If the valuation date is the first day of the plan year, in the case of benefits expected to be payable during the 5-year period beginning on the valuation date for the plan year, the interest rate used in determining the present value of the benefits that are included in the target normal cost and the funding target for the plan is the first segment rate with respect to the applicable month, as described in paragraph (c)(2)(i) of this section.

(ii) *Plans with valuation dates other than the first day of the plan year.* [Reserved]

(3) *Benefits payable after 5 years and within 20 years.* In the case of benefits expected to be payable during the 15-year period beginning after the end of the period described in paragraph (b)(2) of this section, the interest rate used in determining the present value of the benefits that are included in the target normal cost and the funding target for the plan is the second segment rate with respect to the applicable month, as described in paragraph (c)(2)(ii) of this section.

(4) *Benefits payable after 20 years.* In the case of benefits expected to be payable after the period described in paragraph (b)(3) of this section, the interest rate used in determining the present value of the benefits that are included in the target normal cost and the funding target for the plan is the third segment rate with respect to the applicable month, as described in paragraph (c)(2)(iii) of this section.

(5) *Applicable month.* Except as otherwise provided in paragraph (e) of this section, the term *applicable month* for purposes of this paragraph (b) means the month that includes the valuation date of the plan for the plan year.

(6) *Special rule for certain airlines*—(i) *In general.* Pursuant to section 6615 of the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007, Public Law 110–28 (121 Stat. 112), for a plan sponsor that makes the election described in section 402(a)(2) of the Pension Protection Act of 2006 (PPA '06), Public Law 109–280 (120 Stat. 780), the interest rate required to be used to determine the plan's funding target for each of the 10 years under that election is 8.25 percent (rather than the segment rates otherwise described in this paragraph (b) or the full yield curve as permitted under paragraph (e)(4) of this section).

(ii) *Special interest rate not applicable for other purposes.* The special interest rate described in paragraph (b)(6)(i) of this section does not apply for other purposes such as the determination of the plan's target normal cost.

(c) *Segment rates*—(1) *Overview.* This paragraph (c) sets forth rules for determining the first, second, and third segment rates for purposes of paragraph (b) of this section. The first, second, and third segment rates are set forth in revenue rulings, notices, or other guidance published in the Internal Revenue Bulletin. *See* § 601.601(d)(2) relating to objectives and standards for publishing regulations, revenue rulings and revenue procedures in the Internal Revenue Bulletin. *See* paragraph (h)(4) of this section for a transition rule under which the definition of the segment rates is modified for plan years beginning in 2008 and 2009.

(2) *Definition of segment rates*—(i) *First segment rate.* For purposes of this section, except as otherwise provided under the transition rule of paragraph (h)(4) of this section, the *first segment rate* is, with respect to any month, the single rate of interest determined by the Commissioner on the basis of the average of the monthly corporate bond yield curves (described in paragraph (d) of this section) for the 24-month period ending with the month preceding that month, taking into account only the first 5 years of each of those yield curves.

(ii) *Second segment rate.* For purposes of this section, except as otherwise provided under the transition rule of paragraph (h)(4) of this section, the *second segment rate* is, with respect to any month, the single rate of interest determined by the Commissioner on the basis of the average of the monthly corporate bond yield curves (described in paragraph (d) of this section) for the 24-month period ending with the month preceding that month, taking into account only the portion of each of those yield curves corresponding to the 15-year period that follows the end of the 5-year period described in paragraph (c)(2)(i) of this section.

(iii) *Third segment rate.* For purposes of this section, except as otherwise provided under the transition rule of paragraph (h)(4) of this section, the *third segment rate* is, with respect to any month, the single rate of interest determined by the Commissioner on the basis of the average of the monthly corporate bond yield curves (described in paragraph (d) of this section) for the 24-month period ending with the month preceding that month, taking into account only the portion of each of those yield curves corresponding to the 40-year period that follows the end of the 15-year period described in paragraph (c)(2)(ii) of this section.

(d) *Monthly corporate bond yield curve*—(1) *In general.* For purposes of this section, the *monthly corporate bond yield curve* is, with respect to any month, a yield curve that is prescribed by the Commissioner for that month based on yields for that month on investment grade corporate bonds with varying maturities that are in the top three quality levels available.

(2) *Determination and publication of yield curve.* A description of the methodology for determining the monthly corporate bond yield curve is provided in guidance issued by the Commissioner that is published in the Internal Revenue Bulletin. The yield curve for a month will be set forth in revenue rulings, notices, or other guidance published in the Internal Revenue Bulletin. *See* § 601.601(d)(2) relating to objectives and standards for publishing regulations, revenue rulings and revenue procedures in the Internal Revenue Bulletin.

(e) *Elections*—(1) *In general.* This paragraph (e) describes elections for a plan year that a plan sponsor can make to use alternative interest rates under this section. Any election under this paragraph (e) must be made by providing written notification of the election to the plan's enrolled actuary. Any election in this paragraph (e) may be adopted for a plan year without obtaining the consent of the Commissioner, but, once adopted, that election will apply for that plan year and all future plan years and may be changed only with the consent of the Commissioner.

(2) *Election for alternative applicable month.* As an alternative to defining the applicable month as the month that includes the valuation date for the plan year, a plan sponsor that is using segment rates as provided under paragraph (b) of this section may elect to use one of the 4 months preceding that month as the applicable month.

(3) *Election not to apply transition rule.* The plan sponsor may elect not to apply the transition rule in paragraph (h)(4) of this section.

(4) *Election to use full yield curve*—(i) *In general.* For purposes of determining the plan's funding target and target normal cost, and for all other purposes under section 430 (including the determination of shortfall

amortization installments, waiver installments, and the present values of those installments as described in paragraph (f)(2) of this section), the plan sponsor may elect to use interest rates under the monthly corporate bond yield curve described in paragraph (d) of this section for the month preceding the month that includes the valuation date in lieu of the segment rates determined under paragraph (c) of this section. In order to address the timing of benefit payments during a year, reasonable approximations are permitted to be used to value benefit payments that are expected to be made during a plan year.

(ii) *Reasonable techniques permitted.* In the case of a plan sponsor using the monthly corporate bond yield curve under this paragraph (e)(4), if with respect to a decrement the benefit is only expected to be paid for one-half of a year (because the decrement was assumed to occur in the middle of the year), the interest rate for that year can be determined as if the benefit were being paid for the entire year. See § 1.430(d)–1(f)(7) for additional reasonable techniques that can be used in determining present value.

(5) *Plan sponsor.* For purposes of the elections described in this section, any reference to the plan sponsor generally means the employer or employers responsible for making contributions to or under the plan. In the case of plans that are multiple employer plans to which section 413(c)(4)(A) does not apply, any reference to the plan sponsor means the plan administrator within the meaning of section 414(g).

(f) *Interest rates used for other purposes*—(1) *Effective interest rate*—(i) *In general.* Except as otherwise provided in paragraph (f)(2) of this section, the effective interest rate determined under section 430(h)(2)(A) for the plan year is the single interest rate that, if used to determine the present value of the benefits that are taken into account in determining the plan's funding target for the plan year, would result in an amount equal to the plan's funding target determined for the plan year under section 430(d) as described in § 1.430(d)–1(b)(2) (without regard to calculations for plans in at-risk status under section 430(i)).

(ii) *Zero funding target.* If, for the plan year, the plan's funding target is equal to zero, then the effective interest rate determined under section 430(h)(2)(A) for the plan year is the single interest rate that, if used to determine the present value of the benefits that are taken into account in determining the plan's target normal cost for the plan year, would result in an amount equal to the plan's target normal cost determined for the plan year under section 430(b) as described in § 1.430(d)–1(b)(1) (without regard to calculations for plans in at-risk status under section 430(i)).

(2) *Interest rates used for determining shortfall amortization installments and waiver amortization installments.* The interest rates used to determine the amount of shortfall amortization installments and waiver amortization installments and the present value of those installments are determined based on the dates those installments are assumed to be paid, using the same timing rules that apply in determining target normal cost as described in paragraph (b) of this section. Thus, for a plan that uses the segment rates described in paragraph (c) of this section, the first segment rate applies to the installments assumed to be paid during the first 5-year period beginning on the valuation date for the plan year, and the second segment rate applies to the installments assumed to be paid during the subsequent 15-year period. For purposes of this paragraph (f)(2), the shortfall amortization installments for a plan year are assumed to be paid on the valuation date for that plan year. For example, for a plan that uses the segment rates described in paragraph (c) of this section, the shortfall amortization installment for the fifth plan year following the current plan year (the sixth installment) is assumed to be paid on the valuation date for that year so that such shortfall amortization installment will be determined using the second segment rate.

(g) *Examples.* The following examples illustrate the rules of this section:

Example 1. (i) The January 1, 2009, valuation of Plan P is performed using the segment rates applicable for September 2008 (determined without regard to the transition rule of section 430(h)(2)(G)), and the 2009 annuitant and nonannuitant (male and female) mortality tables as published in Notice 2008–85. See § 601.601(d)(2) relating to objectives and standards for publishing regulations, revenue rulings and revenue procedures in the Internal Revenue Bulletin. Plan P provides for early retirement benefits as early as age 50, and offers a single-sum distribution payable immediately at retirement. The single-sum payment is equal to the present value of the participant's accrued benefit, based on the applicable interest rates and the applicable mortality table under section 417(e)(3). Participant E is the only participant in the plan, and is a male age 46 as of January 1, 2009, with an annual accrued benefit of $23,000 payable beginning at age 65. The actuary assumes a 100% probability that Participant E will terminate at age 50 and will elect to receive his benefit in the form of a single-sum payment.

(ii) Plan P's funding target is $68,908 as of January 1, 2009. This figure is based on the male nonannuitant rates for ages prior to age 50, the applicable mortality rates under section 417(e)(3) for ages 50 and later, and segment interest rates of 5.07% for the first 5 years after the valuation date, 6.09% for the next 15 years, and 6.56% for periods more than 20 years after the valuation date. (See § 1.430(d)–1(f)(9), *Example 10,* for additional details.)

(iii) The present value of Participant E's benefits as of January 1, 2009, is $68,908 if a single interest rate of 6.52805% is substituted for the segment interest rates but all other assumptions remain the same. Thus (rounded), the effective interest rate for Plan P is 6.53% for 2009.

Example 2. (i) The facts are the same as for *Example 1,* except that Plan P offers a single-sum distribution equal to the present value of the accrued benefit based on the applicable interest rates under section 417(e)(3) or an interest rate of 6.25%, whichever produces the higher amount. The applicable mortality table under section 417(e)(3) is used for both calculations.

(ii) The present value of Participant E's age-50 single-sum distribution as of January 1, 2009 (when Participant E is age 46) is $77,392. This amount is determined by calculating the projected single-sum distribution at age 50 using the applicable mortality table under section 417(e)(3) and an interest rate of 6.25%, and discounting the result to January 1, 2009, using the first segment rate of 5.07% and male nonannuitant mortality rates for 2009. Because this amount is larger than the present value of Participant E's single-sum payment based on the applicable interest rates under section 417(e)(3) (that is, $68,908), the funding target for Plan P is $77,392 as of January 1, 2009. (See § 1.430(d)–1(f)(9), *Example 12* for additional details.)

(iii) The effective interest rate is the single interest rate that will produce the same funding target if substituted for the segment interest rates keeping all other assumptions the same, including the fixed interest rate used by the plan to determine single-sum payments. The only segment interest rate used to develop the funding target of $77,392 was the first segment rate of 5.07%. Therefore, considering only this calculation, the single interest rate that would produce the same funding target would be 5.07%.

(iv) However, the effective interest rate must also reflect the fact that the single-sum payment under Plan P is equal to the greater of the present value of Participant E's accrued benefit based on the fixed rate of 6.25% or the applicable interest rates under section 417(e)(3). If the single rate of 5.07% is substituted for the segment rates used to calculate the present value of the single-sum payment based on the applicable interest rates, the resulting funding target would be higher than $77,392.

(v) Using a single interest rate of 6.0771%, the January 1, 2009, present value of Participant E's single-sum payment based on the applicable interest rates is $77,392, and the present value of Participant E's single sum payment based on the plan's interest rate of 6.25% is $74,494. Plan P's funding target is the larger of the two, or $77,392,

which is the same as the funding target based on the segment interest rates used for the 2009 valuation. Therefore, Plan P's effective interest rate for 2009 (rounded) is 6.08%.

(h) *Effective/applicability dates and transition rules*—(1) *Statutory effective date/applicability date.* Section 430 generally applies to plan years beginning on or after January 1, 2008. The applicability of section 430 for purposes of determining the minimum required contribution is delayed for certain plans in accordance with sections 104 through 106 of PPA'06.

(2) *Effective date/applicability date of regulations.* This section applies to plan years beginning on or after January 1, 2010, regardless of whether section 430 applies to determine the minimum required contribution for the plan year. For plan years beginning before January 1, 2010, plans are permitted to rely on the provisions set forth in this section for purposes of satisfying the requirements of section 430.

(3) *Approval for changes in interest rate.* Any change to an election under paragraph (e) of this section that is made for the first plan year beginning in 2009 or the first plan year beginning in 2010 is treated as having been approved by the Commissioner and does not require the Commissioner's specific prior approval.

(4) *Transition rule*—(i) *In general.* Notwithstanding the general rules for determination of segment rates under paragraph (c)(2) of this section, for plan years beginning in 2008 or 2009, the first, second, or third segment rate for a plan with respect to any month is equal to the sum of—

(A) The product of that rate for that month determined without regard to this paragraph (h)(4), multiplied by the applicable percentage; and

(B) The product of the weighted average interest rate determined under the rules of paragraph (h)(4)(iii) of this section, multiplied by a percentage equal to 100 percent minus the applicable percentage.

(ii) *Applicable percentage.* For purposes of this paragraph (h)(4), the applicable percentage is 33⅓ percent for plan years beginning in 2008 and 66⅔ percent for plan years beginning in 2009.

(iii) *Weighted average interest rate.* The weighted average interest rate for purposes of paragraph (h)(4)(i)(B) of this section is the weighted average interest rate under section 412(b)(5)(B)(ii)(II) (as that provision was in effect for plan years beginning in 2007) as of—

(A) The month which contains the first day of the plan year;

(B) The month which contains the valuation date (if the applicable month is determined under paragraph (b)(5) of this section); or

(C) The applicable month (if the applicable month is determined under paragraph (e)(2) of this section).

(iv) *New plans ineligible.* The transition rule of this paragraph (h)(4) does not apply if the first plan year of the plan begins on or after January 1, 2008.

■ **Par. 6.** Section 1.430(i)–1 is added to read as follows:

§ 1.430(i)–1 Special rules for plans in at-risk status.

(a) *In general*—(1) *Overview.* This section provides special rules related to determining the funding target and making other computations for certain defined benefit plans that are in at-risk status for the plan year. Section 430(i) and this section apply to single employer defined benefit plans (including multiple employer plans) but do not apply to multiemployer plans (as defined in section 414(f)). Paragraph (b) of this section describes rules for determining whether a plan is in at-risk status for a plan year, including the determination of a plan's funding target attainment percentage and at-risk funding target attainment percentage. Paragraph (c) of this section describes the funding target for a plan in at-risk status. Paragraph (d) of this section describes the target normal cost for a plan in at-risk status. Paragraph (e) of this section describes rules regarding how the funding target and the target normal cost are determined for a plan that has been in at-risk status for fewer than 5 consecutive plan years. Paragraph (f) of this section sets forth effective/applicability dates and transition rules.

(2) *Special rules for multiple employer plans.* In the case of a multiple employer plan to which section 413(c)(4)(A) applies, the rules of section 430 and this section are applied separately for each employer under the plan, as if each employer maintained a separate plan. For example, at-risk status is determined separately for each employer under such a multiple employer plan. In the case of a multiple employer plan to which section 413(c)(4)(A) does not apply (that is, a plan described in section 413(c)(4)(B) that has not made the election for section 413(c)(4)(A) to apply), the rules of section 430 and this section are applied as if all participants in the plan were employed by a single employer.

(b) *Determination of at-risk status of a plan*—(1) *General rule.* Except as otherwise provided in this section, a plan is in at-risk status for a plan year if—

(i) The funding target attainment percentage for the preceding plan year (determined under paragraph (b)(3) of this section) is less than 80 percent; and

(ii) The at-risk funding target attainment percentage for the preceding plan year (determined under paragraph (b)(4) of this section) is less than 70 percent.

(2) *Small plan exception.* If, on each day during the preceding plan year, a plan had 500 or fewer participants (including both active and inactive participants), determined in accordance with the same rules that apply for purposes of § 1.430(g)–1(b)(2)(ii), then the plan is not treated as being in at-risk status for the plan year.

(3) *Funding target attainment percentage.* For purposes of this section, except as otherwise provided in paragraph (b)(5) of this section, the funding target attainment percentage of a plan for a plan year is the funding target attainment percentage as defined in § 1.430(d)–1(b)(3).

(4) *At-risk funding target attainment percentage.* Except as otherwise provided in paragraph (b)(5) of this section, the at-risk funding target attainment percentage of a plan for a plan year is a fraction (expressed as a percentage)—

(i) The numerator of which is the value of plan assets for the plan year after subtraction of the prefunding balance and the funding standard carryover balance under section 430(f)(4)(B); and

(ii) The denominator of which is the at-risk funding target of the plan for the plan year (determined under paragraph (c) of this section, but without regard to the loading factor imposed under paragraph (c)(2)(ii) of this section).

(5) *Special rules*—(i) *Special rule for new plans.* Except as otherwise provided in paragraph (b)(5)(iii) of this section, in the case of a new plan that was neither the result of a merger nor involved in a spinoff, the funding target attainment percentage under paragraph (b)(3) of this section and the at-risk funding target attainment percentage under paragraph (b)(4) of this section are equal to 100 percent for years before the plan exists.

(ii) *Special rule for plans with zero funding target.* Except as otherwise provided in paragraph (b)(5)(iii) of this section, if the funding target of the plan is equal to zero for a plan year, then the funding target attainment percentage under paragraph (b)(3) of this section and the at-risk funding target attainment percentage under paragraph (b)(4) of this section are equal to 100 percent for that plan year.

(iii) *Exception when plan has predecessor plan that was in at-risk status.* [Reserved]

(iv) *Special rules for plans that are the result of a merger.* [Reserved]

(v) *Special rules for plans that are involved in a spinoff.* [Reserved]

(6) *Special rule for determining at-risk status of plans of specified automobile manufacturers.* See section 430(i)(4)(C) for special rules for determining the at-risk status of plans of specified automobile and automobile parts manufacturers.

(c) *Funding target for plans in at-risk status*—(1) *In general.* If the plan has been in at-risk status for 5 consecutive years, including the current plan year, then the funding target for the plan is the at-risk funding target determined under paragraph (c)(2) of this section. See paragraph (e) of this section for the determination of the funding target where the plan is in at-risk status for the plan year but was not in at-risk status for one or more of the 4 preceding plan years.

(2) *At-risk funding target*—(i) *Use of modified actuarial assumptions.* Except as otherwise provided in this paragraph (c)(2), the at-risk funding target of the plan under this paragraph (c)(2) for the plan year is equal to the present value of all benefits accrued or earned under the plan as of the beginning of the plan year, as determined in accordance with § 1.430(d)–1 but using the additional actuarial assumptions described in paragraph (c)(3) of this section.

(ii) *Funding target includes load.* The at-risk funding target is increased by the sum of—

(A) $700 multiplied by the number of participants in the plan (including active participants, inactive participants, and beneficiaries); plus

(B) Four percent of the funding target (determined under § 1.430(d)–1(b)(2) as if the plan was not in at-risk status) of the plan for the plan year.

(iii) *Minimum amount.* Notwithstanding any otherwise applicable provisions of this section, the at-risk funding target of a plan for a plan year is not less than the plan's funding target for the plan year determined without regard to this section.

(3) *Additional actuarial assumptions*—(i) *In general.* The actuarial assumptions used to determine a plan's at-risk funding target for a plan year are the actuarial assumptions that are applied under section 430, with the modifications described in this paragraph (c)(3).

(ii) *Special retirement age assumption*—(A) *Participants eligible to retire and collect benefits within 11 years.* Subject to paragraph (c)(3)(ii)(B) of this section, if a participant would be eligible to commence an immediate distribution by the end of the 10th plan year after the current plan year (that is, the end of the 11th plan year beginning with the current plan year), that participant is assumed to commence an immediate distribution at the earliest retirement age under the plan, or, if later, at the end of the current plan year. The rule of this paragraph (c)(3)(ii)(A) does not affect the application of plan assumptions regarding an employee's termination of employment prior to the employee's earliest retirement age.

(B) *Participants otherwise assumed to retire immediately.* The special retirement age assumption of paragraph (c)(3)(ii)(A) of this section does not apply to a participant to the extent the participant is otherwise assumed to commence benefits during the current plan year under the actuarial assumptions for the plan. For example, if generally applicable retirement assumptions would provide for a 25 percent probability that a participant will commence benefits during the current plan year, the special retirement age assumption of paragraph (c)(3)(ii)(A) of this section requires the plan's enrolled actuary to assume a 75 percent probability that the participant will commence benefits at the end of the plan year.

(C) *Definition of earliest retirement date.* For purposes of this paragraph (c)(3)(ii), a plan's earliest retirement date for an employee is the earliest date on which the employee can commence receiving an immediate distribution of a fully vested benefit under the plan. *See* § 1.401(a)–20, Q&A–17(b).

(iii) *Requirement to assume most valuable benefit.* All participants and beneficiaries who are assumed to retire on a particular date are assumed to elect the optional form of benefit available under the plan that would result in the highest present value of benefits commencing at that date.

(iv) *Reasonable techniques permitted.* The plan's actuary is permitted to use reasonable techniques in determining the actuarial assumptions that are required to be used pursuant to this paragraph (c)(3). For example, the plan's actuary is permitted to use reasonable assumptions in determining the optional form of benefit under the plan that would result in the highest present value of benefits for this purpose.

(d) *Target normal cost of plans in at-risk status*—(1) *General rule.* If the plan has been in at-risk status for 5 consecutive years, including the current plan year, then the target normal cost for the plan is the at-risk target normal cost determined under paragraph (d)(2) of this section. *See* paragraph (e) of this section for the determination of the target normal cost where the plan is in at-risk status for the plan year but was not in at-risk status for one or more of the 4 preceding plan years.

(2) *At-risk target normal cost*—(i) *Use of modified actuarial assumptions*—(A) *In general.* Except as otherwise provided in this paragraph (d)(2), the at-risk target normal cost of a plan for the plan year is equal to the present value (determined as of the valuation date) of all benefits that accrue during, are earned during, or are otherwise allocated to service in the plan year, as determined in accordance with § 1.430(d)–1 but using the additional actuarial assumptions described in paragraph (c)(3) of this section.

(B) *Special adjustments.* The target normal cost of the plan for the plan year (determined under paragraph (d)(2)(i)(A) of this section) is adjusted (not below zero) by adding the amount of plan-related expenses expected to be paid from plan assets during the plan year and subtracting the amount of any mandatory employee contributions expected to be made during the plan year.

(C) *Plan-related expenses.* For purposes of this paragraph (d)(2), plan-related expenses are determined using the rules of § 1.430(d)–1(b)(1)(iii)(B).

(ii) *Loading factor.* The at-risk target normal cost is increased by a loading factor equal to 4 percent of the present value (determined as of the valuation date) of all benefits under the plan that accrue, are earned, or are otherwise allocated to service for the plan year under the applicable rules of § 1.430(d)–1(c)(1)(ii)(B), (C), or (D), determined as if the plan were not in at-risk status.

(iii) *Minimum amount.* The at-risk target normal cost of a plan for a plan year is not less than the plan's target normal cost determined without regard to section 430(i) and this section.

(e) *Transition between applicable funding targets and applicable target normal costs*—(1) *Funding target.* If a plan that is in at-risk status for the plan year has not been in at-risk status for one or more of the preceding 4 plan years, the plan's funding target for the plan year is determined as the sum of—

(i) The funding target determined without regard to section 430(i) and this section; plus

(ii) The phase-in percentage for the plan year multiplied by the excess of—

(A) The at-risk funding target determined under paragraph (c)(2) of this section (determined taking into account paragraph (e)(4) of this section); over

(B) The funding target determined without regard to section 430(i) and this section.

(2) *Target normal cost.* If a plan that is in at-risk status for the plan year has not been in at-risk status for one or more of the preceding 4 plan years, the plan's target normal cost for the plan year is determined as the sum of—

(i) The target normal cost determined without regard to section 430(i) and this section; plus

(ii) The phase-in percentage for the plan year multiplied by the excess of—

(A) The at-risk target normal cost determined under paragraph (d)(2) of this section (determined taking into account paragraph (e)(4) of this section); over

(B) The target normal cost determined without regard to section 430(i) and this section.

(3) *Phase-in percentage.* For purposes of this paragraph (e), the phase-in percentage is 20 percent multiplied by the number of consecutive plan years that the plan has been in at-risk status (including the current plan year) and not taking into account years before the first effective plan year for a plan.

(4) *Transition funding target and target normal cost determined without load.* Notwithstanding paragraph (c)(2)(ii) of this section, if a plan has not been in at-risk status for 2 or more of the preceding 4 plan years (not taking into account years before the first effective plan year for a plan), then the plan's at-risk funding target that is used for purposes of paragraph (e)(1)(ii)(A) of this section (to calculate the plan's funding target where the plan has been in at-risk status for fewer than 5 plan years) is determined without regard to the loading factor set forth in paragraph (c)(2)(ii) of this section. Similarly, if a plan has not been in at-risk status for 2 or more of the preceding 4 plan years (not taking into account years before the first effective plan year for a plan), then the plan's at-risk target normal cost that is used for purposes of paragraph (e)(2)(ii)(A) of this section (to calculate the plan's target normal cost where the plan has been in at-risk status for fewer than 5 plan years) is determined without regard to the loading factor set forth in paragraph (d)(2)(ii) of this section.

(f) *Effective/applicability dates and transition rules*—(1) *Statutory effective date/applicability date*—(i) *General rule.* Section 430 generally applies to plan years beginning on or after January 1, 2008. The applicability of section 430 for purposes of determining the minimum required contribution is delayed for certain plans in accordance with sections 104 through 106 of the Pension Protection Act of 2006 (PPA '06), Public Law 109–280 (120 Stat. 780).

(ii) *Applicability of special adjustments to target normal cost.* The special adjustments of paragraph (d)(2)(i)(B) of this section (relating to adjustments to the target normal cost for plan-related expenses and mandatory employee contributions) apply to plan years beginning after December 31, 2008. In addition, a plan sponsor may elect to make the special adjustments of paragraph (d)(2)(i)(B) of this section for plan years beginning in 2008. This election is made in the same manner and is subject to the same rules as an election to add an amount to the plan's prefunding balance pursuant to § 1.430(f)–1(f). Thus, the election can be made no later than the last day for making the minimum required contribution for the plan year to which the election relates.

(2) *Effective date/applicability date of regulations.* This section applies to plan years beginning on or after January 1, 2010. For plan years beginning before January 1, 2010, plans are permitted to rely on the provisions set forth in this section for purposes of satisfying the requirements of section 430.

(3) *First effective plan year.* For purposes of this section, the first effective plan year for a plan is the first plan year to which section 430 applies to the plan for purposes of determining the minimum required contribution.

(4) *Transition rule for determining at-risk status.* In the case of plan years beginning in 2008, 2009, and 2010, paragraph (b)(1)(i) of this section is applied by substituting the following percentages for ''80 percent''—

(i) 65 percent in the case of 2008;

(ii) 70 percent in the case of 2009; and

(iii) 75 percent in the case of 2010.

■ **Par. 7.** Section 1.436–0 is added to read as follows:

§ 1.436–0 Table of contents.

This section contains a listing of the major headings of § 1.436–1.

§ 1.436–1 Limits on benefits and benefit accruals under single employer defined benefit plans.

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(3) Special rules for certain plans.
(4) Treatment of plan as of close of prohibited or cessation period.
(5) Deemed election to reduce funding balances.
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(1) In general.
(2) Exemption if section 436 contribution is made.
(3) Rules of application.
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(c) Limitations on plan amendments increasing liability for benefits.
(1) In general.
(2) Exemption if section 436 contribution is made.
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(2) Bankruptcy.
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(4) Exception for cessation of benefit accruals.
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(7) Exception for distributions permitted without consent of the participant under section 411(a)(11).
(e) Limitation on benefit accruals for plans with severe funding shortfalls.
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(2) Exemption if section 436 contribution is made.
(3) Special rule under section 203 of the Worker, Retiree, and Employer Recovery Act of 2008. [Reserved]
(f) Methods to avoid or terminate benefit limitations.
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(2) Current year contributions to avoid or terminate benefit limitations.
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(g) Rules of operation for periods prior to and after certification.
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(h) Presumed underfunding for purposes of benefit limitations.
(1) Presumption of continued underfunding.
(2) Presumption of underfunding beginning on first day of 4th month for certain underfunded plans.
(3) Presumption of underfunding beginning on first day of 10th month.
(4) Certification of AFTAP.
(5) Examples of rules of paragraphs (h)(1), (h)(2), and (h)(3) of this section.
(6) Examples of application of paragraph (h)(4) of this section.
(i) [Reserved]
(j) Definitions.
(1) Adjusted funding target attainment percentage.
(2) Annuity starting date.
(3) First effective plan year.
(4) Funding target.
(5) Prior year adjusted funding target attainment percentage.

(6) Prohibited payment.
(7) Section 436 contributions.
(8) Section 436 measurement date.
(9) Unpredictable contingent event.
(10) Examples.
(k) Effective/applicability dates.
(1) Statutory effective date.
(2) Collectively bargained plan exception.
(3) Effective date/applicability date of regulations.

■ **Par. 8.** Section 1.436–1 is added to read as follows:

§ 1.436–1 Limits on benefits and benefit accruals under single employer defined benefit plans.

(a) *General rules*—(1) *Qualification requirement.* Section 401(a)(29) provides that a defined benefit pension plan that is subject to section 412 and that is not a multiemployer plan (within the meaning of section 414(f)) is a qualified plan only if it satisfies the requirements of section 436. This section provides rules relating to funding-based limitations on certain benefits under section 436, and the requirements of section 436 are satisfied only if the plan meets the requirements of this section beginning with the plan's first effective plan year. This section applies to single employer defined benefit plans (including multiple employer plans), but does not apply to multiemployer plans.

(2) *Organization of the regulation.* Paragraph (b) of this section describes limitations on shutdown benefits and other unpredictable contingent event benefits. Paragraph (c) of this section describes limitations on plan amendments increasing liabilities. Paragraph (d) of this section describes limitations on prohibited payments. Paragraph (e) of this section describes limitations on benefit accruals. Paragraph (f) of this section provides rules relating to methods to avoid or terminate benefit limitations. Paragraph (g) of this section provides rules for the operation of the plan in relation to benefit limitations under section 436. Paragraph (h) of this section describes related presumptions regarding underfunding that apply for purposes of the benefit limitations under section 436 and requirements relating to certifications. Paragraph (j) of this section contains definitions. Paragraph (k) of this section contains effective/applicability date provisions.

(3) *Special rules for certain plans*—(i) *New plans.* The limitations described in paragraphs (b), (c), and (e) of this section do not apply to a plan for the first 5 plan years of the plan. Except as otherwise provided by the Commissioner in guidance of general applicability, plan years of the plan include the following (in addition to plan years during which the plan was maintained by the employer or plan sponsor):

(A) Plan years when the plan was maintained by a predecessor employer within the meaning of § 1.415(f)–1(c)(1).

(B) Plan years of another defined benefit plan maintained by a predecessor employer within the meaning of § 1.415(f)–1(c)(2) within the preceding five years if any participants in the plan participated in that other defined benefit plan (even if the plan maintained by the employer is not the plan that was maintained by the predecessor employer).

(C) Plan years of another defined benefit plan maintained by the employer within the preceding five years if any participants in the plan participated in that other defined benefit plan.

(ii) *Application of section 436 after termination of a plan*—(A) *In general.* Except as otherwise provided in paragraph (a)(3)(ii)(B) of this section, any section 436 limitations in effect immediately before the termination of a plan do not cease to apply thereafter.

(B) *Exception for payments pursuant to plan termination.* The limitations under section 436(d) and paragraph (d) of this section do not apply to prohibited payments (within the meaning of paragraph (j)(6) of this section) that are made to carry out the termination of a plan in accordance with applicable law. For example, a plan sponsor's purchase of an irrevocable commitment from an insurer to pay benefit liabilities in connection with the standard termination of a plan in accordance with section 4041(b)(3) of the Employee Retirement Income Security Act of 1974, as amended (ERISA), and in accordance with 29 CFR 4041.28, does not violate section 436(d) or this section.

(iii) *Multiple employer plans.* In the case of a multiple employer plan to which section 413(c)(4)(A) applies, this section applies separately with respect to each employer under the plan, as if each employer maintained a separate plan. Thus, the benefit limitations under section 436 and this section could apply differently to participants who are employees of different employers under such a multiple employer plan. In the case of a multiple employer plan to which section 413(c)(4)(A) does not apply (that is, a plan described in section 413(c)(4)(B) that has not made the election for section 413(c)(4)(A) to apply), this section applies as if all participants in the plan were employed by a single employer.

(4) *Treatment of plan as of close of prohibited or cessation period*—(i) *Application to prohibited payments and accruals*—(A) *Resumption of prohibited payments.* If a limitation on prohibited payments under paragraph (d) of this section applied to a plan as of a section 436 measurement date (as defined in paragraph (j)(8) of this section), but that limit no longer applies to the plan as of a later section 436 measurement date, then the limitation on prohibited payments under the plan does not apply to benefits with annuity starting dates (as defined in paragraph (j)(2) of this section) that are on or after that later section 436 measurement date. Any amendment to eliminate an optional form of benefit that contains a prohibited payment with respect to an annuity starting date during a period in which the limitations of section 436(d) and paragraph (d) of this section do not apply to the plan is subject to the rules of section 411(d)(6).

(B) *Resumption of benefit accruals.* If a limitation on benefit accruals under paragraph (e) of this section applied to a plan as of a section 436 measurement date, but that limit no longer applies to the plan as of a later section 436 measurement date, then that limitation does not apply to benefit accruals that are based on service on or after that later section 436 measurement date, except to the extent that the plan provides that benefit accruals will not resume when the limitation ceases to apply. The plan must comply with the rules relating to partial years of participation and the prohibition on double proration under Department of Labor regulation 29 CFR 2530.204–2(c) and (d).

(ii) *Restoration of options and missed benefit accruals*—(A) *Option to amend plan.* A plan is permitted to be amended to provide participants who had an annuity starting date within a period during which a limitation under paragraph (d) of this section applied to the plan with the opportunity to make a new election under which the form of benefit previously elected is modified, subject to applicable qualification requirements. A participant who makes such a new election is treated as having a new annuity starting date under sections 415 and 417. Similarly, a plan is permitted to be amended to provide that any benefit accruals which were limited under the rules of paragraph (e) of this section are credited under the plan when the limitation no longer applies, subject to applicable qualification requirements. Any such plan amendment with respect to a new annuity starting date or crediting of benefit accruals is subject to the

requirements of section 436(c) and paragraph (c) of this section.

(B) *Automatic plan provisions.* A plan is permitted to provide that participants who had an annuity starting date within a period during which a limitation under paragraph (d) of this section applied to the plan will be provided with the opportunity to have a new annuity starting date (which would constitute a new annuity starting date under sections 415 and 417) under which the form of benefit previously elected may be modified, subject to applicable qualification requirements, once the limitations of paragraph (d) of this section cease to apply. In addition, subject to the rules of paragraph (c)(3) of this section, a plan is permitted to provide for the automatic restoration of benefit accruals that had been limited under section 436(e) as of the section 436 measurement date that the limitation ceases to apply.

(iii) *Shutdown and other unpredictable contingent event benefits.* If unpredictable contingent event benefits with respect to an unpredictable contingent event that occurs during the plan year are not permitted to be paid after the occurrence of the event because of the limitations of section 436(b) and paragraph (b) of this section, but are permitted to be paid later in the plan year as a result of additional contributions under paragraph (f)(2) of this section or pursuant to the enrolled actuary's certification of the adjusted funding target attainment percentage for the plan year that meets the requirements of paragraph (g)(5)(ii)(B) of this section, then those unpredictable contingent event benefits must automatically become payable, retroactive to the period those benefits would have been payable under the terms of the plan (other than plan terms implementing the requirements of section 436(b)). If the benefits do not become payable during the plan year in accordance with the preceding sentence, then the plan is treated as if it does not provide for those benefits. However, all or any portion of those benefits can be restored pursuant to a plan amendment that meets the requirements of section 436(c) and paragraph (c) of this section and other applicable qualification requirements.

(iv) *Treatment of plan amendments that do not take effect.* If a plan amendment does not take effect as of the effective date of the amendment because of the limitations of section 436(c) and paragraph (c) of this section, but is permitted to take effect later in the plan year as a result of additional contributions under paragraph (f)(2) of this section or pursuant to the enrolled actuary's certification of the adjusted funding target attainment percentage for the plan year that meets the requirements of paragraph (g)(5)(ii)(C) of this section, then the plan amendment must automatically take effect as of the first day of the plan year (or, if later, the original effective date of the amendment). If the plan amendment cannot take effect during the plan year, then it must be treated as if it were never adopted, unless the plan amendment provides otherwise.

(v) *Example.* The following example illustrates the rules of this paragraph (a)(4):

Example. (i) Plan T is a non-collectively bargained defined benefit plan with a plan year that is the calendar year and a valuation date of January 1. As of January 1, 2011, Plan T does not have a funding standard carryover balance or a prefunding balance. Plan T's sponsor is not in bankruptcy. Beginning January 1, 2011, Plan T is subject to the restriction on prohibited payments under paragraph (d)(3) of this section based on a presumed adjusted funding target attainment percentage (AFTAP) of 75%.

(ii) U is a participant in Plan T. Participant U retires on February 1, 2011, and elects to receive benefits in the form of a single sum. Plan T may pay only a portion (generally, 50%) of the prohibited payment. Accordingly, U elects in accordance with paragraph (d)(3)(ii) of this section to receive 50% of U's benefit in a single sum (up to the 2011 PBGC maximum benefit guarantee amount described in paragraph (d)(3)(iii)(C) of this section) and the remainder as an immediately commencing straight life annuity.

(iii) On March 1, 2011, the enrolled actuary for the Plan certifies that the AFTAP for 2011 is 80%. Accordingly, beginning March 1, 2011, Plan T is no longer subject to the restriction under paragraph (d)(3) of this section.

(iv) Effective March 1, 2011, Plan T is amended to provide that a participant whose benefits were restricted under paragraph (d)(3) of this section with respect to an annuity starting date between January 1, 2011, and February 28, 2011, may elect, within a specified period on or after March 1, 2011, a new annuity starting date and receive the remainder of his or her pension benefits in an accelerated form of payment. Plan T's enrolled actuary determines that the AFTAP, taking into account the amendment, would still be 80%. The amendment is permitted to take effect because Plan T would have an AFTAP of 80% taking into account the amendment and is therefore neither subject to the restriction on plan amendments in paragraph (c) of this section nor the restrictions on prohibited payments under paragraphs (d)(1) and (d)(3) of this section. Accordingly, Participant U may elect, within the specified period and subject to otherwise applicable qualification rules, including spousal consent, to receive the remainder of U's benefits in the form of a single sum on or after March 1, 2011.

(5) *Deemed election to reduce funding balances*—(i) *Limitations on accelerated benefit payments.* If a benefit limitation under paragraph (d)(1) or (d)(3) of this section would (but for this paragraph (a)(5)) apply to a plan, the employer is treated as having made an election under section 430(f) to reduce the prefunding balance or funding standard carryover balance by such amount as is necessary for the adjusted funding target attainment percentage to be at the applicable threshold (60 or 80 percent, as the case may be) in order for the benefit limitation not to apply to the plan. The determination of whether a benefit limitation under paragraph (d) of this section would apply to a plan is based on whether the plan provides for an optional form of benefit that would be limited under section 436(d) and is not based on whether any participant elects payment of benefits in such a form.

(ii) *Other limitations for collectively bargained plans*—(A) *General rule.* In the case of a collectively bargained plan to which a benefit limitation under paragraph (b), (c), or (e) of this section would (but for this paragraph (a)(5)) apply, the employer is treated as having made an election under section 430(f) to reduce the prefunding balance or funding standard carryover balance by such amount as is necessary for the adjusted funding target attainment percentage to be at the applicable threshold (60 or 80 percent, as the case may be) in order for the benefit limitation not to apply to the plan, taking into account the adjustments described in paragraph (g)(2)(iii)(A), (g)(3)(ii)(A), or (g)(5)(i)(B) of this section, whichever applies.

(B) *Collectively bargained plans.* A plan is considered a collectively bargained plan for purposes of this paragraph (a)(5)(ii) if—

(*1*) At least 50 percent of the employees benefiting under the plan (within the meaning of § 1.410(b)–3(a)) are members of collective bargaining units for which the benefit levels under the plan are specified under a collective bargaining agreement; or

(*2*) At least 25 percent of the participants in the plan are members of collective bargaining units for which the benefit levels under the plan are specified under a collective bargaining agreement.

(iii) *Exception for insufficient funding balances*—(A) *In general.* Paragraphs (a)(5)(i) and (a)(5)(ii) of this section apply with respect to a benefit limitation for any plan year only if the application of those paragraphs would result in the corresponding benefit limitation not applying for such plan

year. Thus, if the plan's prefunding and funding standard carryover balances were reduced to zero and the resulting increase in plan assets taken into account would still not increase the plan's adjusted funding target attainment percentage enough to reach the threshold percentage applicable to the benefit limitation, the deemed election to reduce those balances pursuant to paragraph (a)(5)(i) or (a)(5)(ii) of this section does not apply.

(B) *Presumed adjusted funding target attainment percentage less than 60 percent.* During any period when a plan is presumed to have an adjusted funding target attainment percentage of less than 60 percent as a result of paragraph (h)(3) of this section, the plan is treated as if the prefunding balance and the funding standard carryover balance are insufficient to increase the adjusted funding target attainment percentage to the threshold percentage of 60 percent. Accordingly, the deemed election to reduce those balances pursuant to paragraphs (a)(5)(i) and (a)(5)(ii) of this section does not apply to the plan.

(iv) *Other rules*—(A) *Date of deemed election.* If an election is deemed to be made pursuant to this paragraph (a)(5), then the plan sponsor is treated as having made that election on the date as of which the applicable benefit limitation would otherwise apply.

(B) *Coordination with section 436 contributions.* The determination of whether one of the benefit limitations described in paragraph (a)(5)(ii)(A) of this section would otherwise apply is made without regard to any contribution described in paragraph (f)(2) of this section. Thus, the requirement to reduce the prefunding balance or funding standard carryover balance under paragraph (a)(5)(ii) of this section cannot be avoided through the use of a section 436 contribution.

(C) *Coordination with elections to offset minimum required contribution. See* § 1.430(f)–1(d)(1)(ii) for rules on the coordination of elections to offset the minimum required contribution and the deemed election to reduce the prefunding and funding standard carryover balances under this paragraph (a)(5).

(v) *Example.* The following example illustrates the rules of this paragraph (a)(5):

Example. (i) Plan W is a collectively bargained, single employer defined benefit plan sponsored by Sponsor X, with a plan year that is the calendar year and a valuation date of January 1.

(ii) The enrolled actuary for Plan W issues a certification on March 1, 2010, that the 2010 AFTAP is 81%. Sponsor X adopts an amendment on March 25, 2010, to increase benefits under a formula based on participant compensation, with an effective date of May 1, 2010. (Because the formula is based on compensation, the exception in paragraph (c)(4)(i) of this section does not apply.) The plan's enrolled actuary determines that the plan's AFTAP for 2010 would be 75% if the benefits attributable to the plan amendment were taken into account in determining the funding target.

(iii) Because the AFTAP would be below the 80% threshold if the benefits attributable to the plan amendment were taken into account in determining the funding target, Sponsor X is deemed pursuant to paragraph (a)(5)(ii) of this section to have made an election to reduce Plan W's prefunding and funding standard carryover balances by the amount necessary for the AFTAP to reach the 80% threshold (reflecting the increase in funding target attributable to the plan amendment), provided that the amount of those balances is sufficient for this purpose.

(iv) If the deemed election described in paragraph (iii) of this example occurs, the plan amendment takes effect on its effective date (May 1, 2010). See paragraph (f) of this section for other methods to avoid or terminate benefit limitations (where, for example, the amount necessary for a benefit limitation not to apply for a plan year exceeds the sum of the prefunding balance and the funding standard carryover balance).

(6) *Notice requirements.* See section 101(j) of ERISA for rules requiring the plan administrator of a single employer plan to provide a written notice to participants and beneficiaries within 30 days after certain specified dates, which depend on whether the plan has become subject to a restriction described in the ERISA provisions that are parallel to Internal Revenue Code sections 436(b), 436(d), and 436(e) (ERISA sections 206(g)(1), 206(g)(3), and 206(g)(4), respectively).

(b) *Limitation on shutdown benefits and other unpredictable contingent event benefits*—(1) *In general.* Except as otherwise provided in this paragraph (b), a plan satisfies section 436(b) and this paragraph (b) only if it provides that unpredictable contingent event benefits with respect to any unpredictable contingent events occurring during a plan year will not be paid if the adjusted funding target attainment percentage for the plan year is—

(i) Less than 60 percent; or

(ii) 60 percent or more, but would be less than 60 percent if the adjusted funding target attainment percentage were redetermined applying an actuarial assumption that the likelihood of occurrence of the unpredictable contingent event during the plan year is 100 percent.

(2) *Exemption if section 436 contribution is made.* The prohibition on payment of unpredictable contingent event benefits under paragraph (b)(1) of this section ceases to apply with respect to benefits attributable to an unpredictable contingent event occurring during the plan year upon payment by the plan sponsor of the contribution described in paragraph (f)(2)(iii) of this section with respect to that event. If the prior sentence applies with respect to an unpredictable contingent event, then all benefits with respect to the unpredictable contingent event must be paid, including benefits for periods prior to the contribution. *See* paragraph (f) of this section for additional rules.

(3) *Rules of application*—(i) *Participant-by-participant application.* The limitations of section 436(b) and this paragraph (b) apply on a participant-by-participant basis. Thus, whether payment or commencement of an unpredictable contingent event benefit under a plan is restricted with respect to a participant is determined based on whether the participant satisfies the plan's eligibility requirements (other than the attainment of any age, performance of any service, receipt or derivation of any compensation, or the occurrence of death or disability) for such a benefit in a plan year in which the limitations of section 436(b) and this paragraph (b) apply.

(ii) *Multiple contingencies.* In the case of a plan that provides for a benefit that depends upon the occurrence of more than one unpredictable contingent event with respect to a participant, the unpredictable contingent event for purposes of section 436(b) and this paragraph (b) occurs upon the last to occur of those unpredictable contingent events.

(iii) *Cessation of benefits.* Cessation of a benefit under a plan upon the occurrence of a specified event is not an unpredictable contingent event for purposes of section 436(b) and this paragraph (b). Thus, section 436(b) and this paragraph (b) do not prohibit provisions of a plan that provide for cessation, suspension, or reduction of any benefits upon occurrence of any event. However, upon any subsequent recommencement of benefits (including any restoration of benefits), the rules of section 436 and this section will apply.

(4) *Prior unpredictable contingent event.* Unpredictable contingent event benefits attributable to an unpredictable contingent event that occurred within a period during which no limitation under this paragraph (b) applied to the plan are not affected by the limitation described in this paragraph (b) as it applies in a subsequent period. For example, if a plant shutdown occurs in 2010 and the plan's funded status is such that benefits contingent upon that

plant shutdown are not subject to the limitation described in this paragraph (b) for that calendar plan year, this paragraph (b) does not apply to restrict payment of those benefits even if another plant shutdown occurs in 2012 that results in the restriction of benefits that are contingent upon that later plant shutdown under this paragraph (b) (where the plan's adjusted funding target attainment percentage for 2012 would be less than 60 percent taking into account the liability attributable to those shutdown benefits).

(c) *Limitations on plan amendments increasing liability for benefits*—(1) *In general.* Except as otherwise provided in this paragraph (c), a plan satisfies section 436(c) and this paragraph (c) only if the plan provides that no amendment to the plan that has the effect of increasing liabilities of the plan by reason of increases in benefits, establishment of new benefits, changing the rate of benefit accrual, or changing the rate at which benefits become nonforfeitable will take effect in a plan year if the adjusted funding target attainment percentage for the plan year is—

(i) Less than 80 percent; or

(ii) 80 percent or more, but would be less than 80 percent if the benefits attributable to the amendment were taken into account in determining the adjusted funding target attainment percentage.

(2) *Exemption if section 436 contribution is made*—(i) *General rule.* The limitations on plan amendments in paragraph (c)(1) of this section cease to apply with respect to an amendment upon payment by the plan sponsor of the contribution described in paragraph (f)(2)(iv) of this section, so that the amendment is permitted to take effect as of the later of the first day of the plan year or the effective date of the amendment. *See* paragraph (f) of this section for additional rules.

(ii) *Amendments that do not increase funding target.* If the amount of the contribution described in paragraph (f)(2)(iv) of this section is $0 (because the amendment increases benefits solely for future periods), the amendment is permitted to take effect without regard to this paragraph (c). However, *see* § 1.430(d)–1(d)(2) for a rule that requires such an amendment to be taken into account in determining the funding target and the target normal cost in certain situations.

(3) *Rules of application regarding pre-existing plan provisions.* If a plan contains a provision that provides for the automatic restoration of benefit accruals that were not permitted to accrue because of the application of section 436(e) and paragraph (e) of this section, the restoration of those accruals is generally treated as a plan amendment that is subject to section 436(c). However, such a provision is permitted to take effect without regard to the limits of section 436(c) and this paragraph (c) if—

(i) The continuous period of the limitation is 12 months or less; and

(ii) The plan's enrolled actuary certifies that the adjusted funding target attainment percentage for the plan would not be less than 60 percent taking into account the restored benefit accruals for the prior plan year.

(4) *Exceptions*—(i) *Benefit increases based on compensation*—(A) *In general.* In accordance with section 436(c)(3), section 436(c) and this paragraph (c) do not apply to any amendment that provides for an increase in benefits under a formula that is not based on a participant's compensation, but only if the rate of increase in benefits does not exceed the contemporaneous rate of increase in average wages of participants covered by the amendment. The determination of the rate of increase in average wages is made by taking into consideration the net increase in average wages from the period of time beginning with the effective date of the most recent benefit increase applicable to all of those participants who are covered by the current amendment and ending on the effective date of the current amendment.

(B) *Application to participants who are not currently employed.* If an amendment applies to both currently employed participants and other participants, all participants to whom the amendment applies are included in determining the increase in average wages of the participants covered by the amendment for purposes of this paragraph (c)(4)(i). For this purpose, participants who are not employees at any time during the period from the effective date of the most recent earlier benefit increase applicable to all of the participants who are covered by the current amendment and ending on the effective date of the current amendment are treated as having no increase or decrease in wages for the period after severance from employment.

(C) *Separate amendments for different plan populations.* In lieu of a single amendment that applies to both currently employed participants and other participants as described in paragraph (c)(4)(i)(B) of this section, the employer can adopt multiple amendments—such as one that increases benefits for participants currently employed on the effective date of the current amendment and another one that increases benefits for other participants. In that case, the two amendments are considered separately in determining the increase in average wages, and the exception in this paragraph (c)(4)(i) applies separately to each amendment. Thus, the increase in benefits for currently employed participants takes effect if it satisfies the exception under this paragraph (c)(4), but the amendment increasing benefits for other participants who received no increase in wages from the employer during the period over which the increase in average wages is separately subject to the rules of this paragraph (c) without regard to the rules of this paragraph (c)(4).

(ii) *Plan provisions providing for accelerated vesting.* To the extent that any amendment provides for (or any pre-existing plan provision results in) a mandatory increase in the vesting of benefits under the Code or ERISA (such as vesting rate increases pursuant to statute, plan termination amendments or partial terminations under section 411(d)(3), and vesting increases required by the rules for top-heavy plans under section 416), that amendment (or pre-existing plan provision) does not constitute an amendment that changes the rate at which benefits become nonforfeitable for purposes of section 436(c) and this paragraph (c). However, this paragraph (c)(4)(ii) applies only to the extent the increase in vesting is necessary to enable the plan to continue to satisfy the requirements for qualified plans.

(iii) *Authority for additional exceptions.* The Commissioner may, in guidance of general applicability, issue additional rules under which other amendments to a plan are not treated as amendments to which section 436(c) and this paragraph (c) apply. See § 601.601(d)(2) relating to objectives and standards for publishing regulations, revenue rulings and revenue procedures in the Internal Revenue Bulletin.

(5) *Rule for determining when an amendment takes effect.* For purposes of section 436(c) and this paragraph (c), in the case of an amendment that increases benefits, the amendment takes effect under a plan on the first date on which any individual who is or could be a participant or beneficiary under the plan would obtain a legal right to the increased benefit if the individual were on that date to satisfy the applicable requirements for entitlement to the benefit (such as the attainment of any age, performance of any service, receipt or derivation of any compensation, or the occurrence of death, disability, or severance from employment).

(6) *Treatment of mergers, consolidations, and transfers of plan assets into a plan.* [Reserved]

(d) *Limitations on prohibited payments*—(1) *AFTAP less than 60 percent.* A plan satisfies the requirements of section 436(d)(1) and this paragraph (d)(1) only if the plan provides that, if the plan's adjusted funding target attainment percentage for a plan year is less than 60 percent, a participant or beneficiary is not permitted to elect an optional form of benefit that includes a prohibited payment, and the plan will not pay any prohibited payment, with an annuity starting date on or after the applicable section 436 measurement date.

(2) *Bankruptcy.* A plan satisfies the requirements of section 436(d)(2) and this paragraph (d)(2) only if the plan provides that a participant or beneficiary is not permitted to elect an optional form of benefit that includes a prohibited payment, and the plan will not pay any prohibited payment, with an annuity starting date that occurs during any period in which the plan sponsor is a debtor in a case under title 11, United States Code, or similar Federal or State law, except for payments made within a plan year with an annuity starting date that occurs on or after the date on which the enrolled actuary of the plan certifies that the plan's adjusted funding target attainment percentage for that plan year is not less than 100 percent.

(3) *Limited payment if AFTAP at least 60 percent but less than 80 percent*—(i) *In general.* A plan satisfies the requirements of section 436(d)(3) and this paragraph (d)(3) only if the plan provides that, in any case in which the plan's adjusted funding target attainment percentage for a plan year is 60 percent or more but is less than 80 percent, a participant or beneficiary is not permitted to elect the payment of an optional form of benefit that includes a prohibited payment, and the plan will not pay any prohibited payment, with an annuity starting date on or after the applicable section 436 measurement date, unless the present value, determined in accordance with section 417(e)(3), of the portion of the benefit that is being paid in a prohibited payment (which portion is determined under paragraph (d)(3)(iii)(B) of this section) does not exceed the lesser of—

(A) 50 percent of the present value (determined in accordance with section 417(e)(3)) of the benefit payable in the optional form of benefit that includes the prohibited payment; or

(B) 100 percent of the PBGC maximum benefit guarantee amount described in paragraph (d)(3)(iii)(C) of this section.

(ii) *Bifurcation if optional form unavailable*—(A) *Requirement to offer bifurcation.* If an optional form of benefit that is otherwise available under the terms of the plan is not available as of the annuity starting date because of the application of paragraph (d)(3)(i) of this section, then the plan must permit the participant or beneficiary to elect to—

(*1*) Receive the unrestricted portion of that optional form of benefit (determined under the rules of paragraph (d)(3)(iii)(D) of this section) at that annuity starting date, determined by treating the unrestricted portion of the benefit as if it were the participant's or beneficiary's entire benefit under the plan;

(*2*) Commence benefits with respect to the participant's or beneficiary's entire benefit under the plan in any other optional form of benefit available under the plan at the same annuity starting date that satisfies paragraph (d)(3)(i) of this section; or

(*3*) Defer commencement of the payments to the extent described in paragraph (d)(5) of this section.

(B) *Rules relating to bifurcation.* If the participant or beneficiary elects payment of the unrestricted portion of the benefit as described in paragraph (d)(3)(ii)(A)(*1*) of this section, then the plan must permit the participant or beneficiary to elect payment of the remainder of the participant's or beneficiary's benefits under the plan in any optional form of benefit at that annuity starting date otherwise available under the plan that would not have included a prohibited payment if that optional form applied to the entire benefit of the participant or beneficiary. The rules of § 1.417(e)–1 are applied separately to the separate optional forms for the unrestricted portion of the benefit and the remainder of the benefit (the restricted portion).

(C) *Plan alternative that anticipates election of payment that includes a prohibited payment.* With respect to an optional form of benefit that includes a prohibited payment and that is not permitted to be paid under paragraph (d)(3)(i) of this section, for which no additional information from the participant or beneficiary (such as information regarding a social security leveling optional form of benefit) is needed to make that determination, rather than wait for the participant or beneficiary to elect such optional form of benefit, a plan is permitted to provide for separate elections with respect to the restricted and unrestricted portions of that optional form of benefit. However, the rule in the preceding sentence applies only if—

(*1*) The plan applies the rule to all such optional forms; and

(*2*) The plan identifies the option that the bifurcation election replaces.

(iii) *Definitions applicable to limited payment option*—(A) *In general.* The definitions in this paragraph (d)(3)(iii) apply for purposes of this paragraph (d)(3).

(B) *Portion of benefit being paid in a prohibited payment.* If a benefit is being paid in an optional form for which any of the payments is greater than the amount payable under a straight life annuity to the participant or beneficiary (plus any social security supplements described in the last sentence of section 411(a)(9) payable to the participant or beneficiary) with the same annuity starting date, then the portion of the benefit that is being paid in a prohibited payment is the excess of each payment over the smallest payment during the participant's lifetime under the optional form of benefit (treating a period after the annuity starting date and during the participant's lifetime in which no payments are made as a payment of zero).

(C) *PBGC maximum benefit guarantee amount.* The PBGC maximum benefit guarantee amount described in this paragraph (d)(3)(iii)(C) is the present value (determined under guidance prescribed by the Pension Benefit Guaranty Corporation, using the interest and mortality assumptions under section 417(e)) of the maximum benefit guarantee with respect to a participant (based on the participant's age or the beneficiary's age at the annuity starting date) under section 4022 of ERISA for the year in which the annuity starting date occurs.

(D) *Unrestricted portion of the benefit*—(*1*) *General rule.* Except as otherwise provided in this paragraph (d)(3)(iii)(D), the unrestricted portion of the benefit with respect to any optional form of benefit is 50 percent of the amount payable under the optional form of benefit.

(*2*) *Special rule for forms which include social security leveling or a refund of employee contributions.* For an optional form of benefit that is a prohibited payment on account of a social security leveling feature (as defined in § 1.411(d)–3(g)(16)) or a refund of employee contributions feature (as defined in § 1.411(d)–3(g)(11)), the unrestricted portion of the benefit is the optional form of benefit that would apply if the participant's or beneficiary's accrued benefit were 50 percent smaller.

(*3*) *Limited to PBGC maximum benefit guarantee amount.* After the application of the preceding rules of this paragraph (d)(3)(iii)(D), the unrestricted portion of the benefit with respect to the optional form of benefit is reduced, to the extent necessary, so that the present value (determined in accordance with section 417(e)) of the unrestricted portion of that optional form of benefit does not exceed the PBGC maximum benefit guarantee amount (described in paragraph (d)(3)(iii)(C) of this section).

(iv) *Other rules*—(A) *One time application.* A plan satisfies the requirements of this paragraph (d)(3) only if the plan provides that, in the case of a participant with respect to whom a prohibited payment (or series of prohibited payments under a single optional form of benefit) is made pursuant to paragraph (d)(3)(i) or (ii) of this section, no additional prohibited payment may be made with respect to that participant during any period of consecutive plan years for which prohibited payments are limited under this paragraph (d).

(B) *Treatment of beneficiaries.* For purposes of this paragraph (d)(3), benefits provided with respect to a participant and any beneficiary of the participant (including an alternate payee, as defined in section 414(p)(8)) are aggregated. If the only benefits paid under the plan with respect to the participant are death benefits payable to the beneficiary, then paragraph (d)(3)(iii)(B) of this section is applied by substituting the lifetime of the beneficiary for the lifetime of the participant. If the accrued benefit of a participant is allocated to such an alternate payee and one or more other persons, then the unrestricted amount under paragraph (d)(3)(iii)(D) of this section is allocated among such persons in the same manner as the accrued benefit is allocated, unless a qualified domestic relations order (as defined in section 414(p)(1)(A)) with respect to the participant or the alternate payee provides otherwise. See paragraphs (j)(2)(ii) and (j)(6)(ii) of this section for other special rules relating to beneficiaries.

(C) *Treatment of annuity purchases and plan transfers.* This paragraph (d)(3)(iv)(C) applies for purposes of applying paragraphs (d)(3)(i) and (iii)(D) of this section. In the case of a prohibited payment described in paragraph (j)(6)(i)(B) of this section (relating to purchase from an insurer), the present value of the portion of the benefit that is being paid in a prohibited payment is the cost to the plan of the irrevocable commitment and, in the case of a prohibited payment described in paragraph (j)(6)(i)(C) of this section (relating to certain plan transfers), the present value of the portion of the benefit that is being paid in a prohibited payment is the present value of the liabilities transferred (determined in accordance with section 414(l)). In addition, the present value of the accrued benefit is substituted for the present value of the benefit payable in the optional form of benefit that includes the prohibited payment in paragraph (d)(3)(i)(A) of this section. (Further, *see* § 1.411(d)–4, A–2(a)(3)(ii), for a rule under section 411(d)(6) that applies to an optional form of benefit that includes a prohibited payment described in paragraph (j)(6)(i)(B) of this section.)

(v) *Examples.* The following examples illustrate the rules of this paragraph (d)(3):

Example 1. (i) Plan A has a plan year that is the calendar year, and is subject to the restriction on prohibited payments under paragraph (d)(3) of this section for the 2010 plan year. Participant P is not married, and retires at age 65 during 2010, while the restriction under paragraph (d)(3) of this section applies to Plan A. P's accrued benefit is $10,000 per month, payable commencing at age 65 as a straight life annuity. Plan A provides for an optional single-sum payment (subject to the restrictions under section 436) equal to the present value of the participant's accrued benefit using actuarial assumptions under section 417(e). P's single-sum payment, determined without regard to this paragraph (d), is calculated to be $1,416,000, payable at age 65.

(ii) The PBGC guaranteed monthly benefit for a straight life annuity payable at age 65 in 2010 (for purposes of this example) is assumed to be $4,500. The PBGC maximum benefit guarantee amount at age 65 is assumed to be $637,200 for 2010.

(iii) Because Participant P retires during a period when the restriction in paragraph (d)(3) of this section applies to Plan A, only a portion of the benefit can be paid in the form of a single sum. P elects a single-sum payment. Because a single-sum payment is a prohibited payment, a determination must be made whether the payment can be paid under paragraph (d)(3)(i) of this section. In this case, because the present value of the portion of Participant P's benefit that is being paid in a prohibited payment exceeds the lesser of 50% of the benefit or the PBGC maximum benefit guarantee amount, it cannot be paid under paragraph (d)(3)(i) of this section. Accordingly, the maximum single sum that P can receive is $637,200 (that is, the lesser of 50% of $1,416,000 or $637,200).

(iv) Pursuant to paragraph (d)(3)(ii) of this section, Plan A must offer P the option to bifurcate the benefit into unrestricted and restricted portions. The unrestricted portion is a monthly straight life annuity of $4,500, which can be paid in a single sum of $637,200. If P elects to receive the unrestricted portion of the benefit in the form of a single sum, then, with respect to the $5,500 restricted portion, Plan A must permit P to elect any form of benefit that would otherwise be permitted with respect to the full $10,000 and that is not a prohibited payment. Alternatively, Plan A may provide that P is permitted to elect to defer commencement of the restricted portion, subject to applicable qualification rules.

Example 2. (i) The facts are the same as in *Example 1.* In addition, Plan A provides an optional form of payment (subject to any benefit restrictions under section 436) that consists of a partial payment equal to the total return of employee contributions to the plan accumulated with interest, with an annuity payment for the remainder of the participant's benefit.

(ii) Participant Q is not married, and retires at age 65 during 2010, while Plan A is subject to the restriction under paragraph (d)(3) of this section. Participant Q has an accrued benefit equal to a straight life annuity of $3,000 per month. Under the optional form described in paragraph (i) of this *Example 2,* Q may elect a partial payment of $99,120 (representing the return of employee contributions accumulated with interest), plus a straight life annuity of $2,300 per month. The present value of Participant Q's accrued benefit, using actuarial assumptions under section 417(e), is $424,800.

(iii) Because the present value of the portion of Q's benefit that is being paid in a prohibited payment ($99,120) does not exceed the lesser of 50% of the present value of benefits (50% of $424,800) or 100% of the PBGC maximum benefit guarantee amount ($637,200 at age 65 for 2010), the optional form described in paragraph (i) of this *Example 2* is permitted to be paid under paragraph (d)(3)(i) of this section.

Example 3. (i) The facts are the same as in *Example 1.* In addition, Plan A provides an optional form of payment under a social security leveling option (subject to any benefit restrictions under section 436) that consists of an increased temporary benefit payable until age 62, with reduced payments beginning at age 62. The benefit is structured so that the combination of the participant's pension benefit and Social Security benefit provides an approximately level income for the participant's lifetime. The PBGC maximum benefit guarantee amount at age 55 is assumed to be $362,776 for 2010.

(ii) Participant R retires at age 55 in 2010 and is eligible to receive a level lifetime annuity of $1,200 per month beginning immediately. Instead, Participant R elects to receive a benefit under the social security leveling optional form of payment. Participant R's Social Security benefit payable at age 62 is projected, under the terms specified in Plan A, to be $1,500 per month. The Plan A adjustment factor for the social security leveling option using the minimum present value requirements of section 417(e)(3) is .590 at age 55. Therefore, Participant R's benefit payable from age 55 to age 62 is $2,085 per month ($1,200 + .590 × $1,500), and the benefit payable for Participant's lifetime, beginning after age 62, is $585 per month ($2,085 − $1,500).

(iii) Because the optional form provides some payments which are greater than

payments described in paragraph (j)(6)(i)(A) of this section ($1,200), the portion of the benefit that is being paid in a prohibited payment is $1,500 per month which is payable from age 55 to age 62. Using the applicable interest and mortality rates under section 417(e) as in effect for Plan A at the time the benefit commences, the present value of a temporary benefit of $1,500 per month ($2,085 − $585) payable from age 55 to age 62 is $106,417, and the present value of the entire benefit (a temporary benefit of $2,085 per month payable from age 55 to age 62 plus a deferred lifetime benefit of $585 commencing at age 62) is $207,468.

(iv) Because $106,417 is more than 50% of $207,468 (and because 50% of Participant R's benefit is less than $362,776, which is the PBGC maximum guaranteed benefit amount at age 55 for 2010), Participant R can only receive 50% of the benefit in the form of the social security leveling option. Pursuant to paragraph (d)(3)(ii) of this section, Plan A must offer Participant R the option to bifurcate the benefit into unrestricted and restricted portions. Participant R elects to receive the restricted portion of the early retirement benefit as a level lifetime annuity of $600 commencing at age 55.

(v) Participant R elects to receive the unrestricted portion of the early retirement benefit in the social security leveling form of payment. This portion of the benefit is determined under the social security leveling form of payment as if Participant R's benefit was one-half of the early retirement benefit, or $600. However, using a monthly level lifetime benefit of $600 and a monthly social security benefit of $1,500, Participant R would have a negative benefit after age 62 ($600 + .590 × $1,500 is only $1,485; offsetting $1,500 at age 62 would produce a negative amount). Plan A provides that in this situation, the benefit under the social security leveling option is an actuarially equivalent monthly annuity payable until age 62, with zero payable thereafter. Using the actuarial equivalence factor of .590 at age 55, the plan administrator determines that the unrestricted portion of Participant R's benefit is $1,463 per month, payable from age 55 to age 62 ($600 + .590 × $1,463 = $1,463 payable until age 62; $1,463 − $1,463 = zero payable after age 62).

(vi) Combining the unrestricted and restricted portions of the benefit, Participant R will receive a total of $2,063 per month from age 55 to age 62 ($1,463 from the unrestricted portion of the benefit plus $600 from the restricted portion of the benefit), and $600 per month beginning at age 62 (zero from the unrestricted portion of the benefit plus $600 from the restricted portion of the benefit).

(4) *Exception for cessation of benefit accruals.* This paragraph (d) does not apply to a plan for a plan year if the terms of the plan, as in effect for the period beginning on September 1, 2005, provided for no benefit accruals with respect to any participants. If a plan that is described in this paragraph (d)(4) provides for benefit accruals during any time on or after September 1, 2005 (treating benefit increases pursuant to a plan amendment as benefit accruals), this paragraph (d)(4) ceases to apply for the plan as of the date any benefits accrue under the plan (or the date the amendment takes effect). For example, the exception in this paragraph (d)(4) does not apply to a plan after the plan increases benefits to take into account increases in the limitations under section 415(b) on or after September 1, 2005.

(5) *Right to delay commencement.* If a participant or beneficiary requests a distribution in an optional form of benefit that includes a prohibited payment that is not permitted to be paid under paragraph (d)(1), (d)(2), or (d)(3) of this section, the participant retains the right to delay commencement of benefits in accordance with the terms of the plan and applicable qualification requirements (such as sections 411(a)(11) and 401(a)(9)).

(6) *Plan alternative for special optional forms.* A plan is permitted to offer optional forms of benefit that are solely available during the period in which paragraph (d)(1), (d)(2), or (d)(3) of this section applies to limit prohibited payments under the plan. For example, a plan may permit participants or beneficiaries who commence benefits during the period in which paragraph (d)(1) of this section (or paragraph (d)(2) of this section) applies to limit prohibited payments under the plan to elect, within a specified period after the date on which that paragraph ceases to apply to limit prohibited payments under the plan, to receive the remaining benefit in the form of a single-sum payment equal to the present value of the remaining benefit, but only to the extent then permitted under this paragraph (d). As another example, during a period when paragraph (d)(3) of this section applies to a plan, the plan may permit participants and beneficiaries to elect payment in an optional form of benefit that provides for the current payment of the unrestricted portion of the benefit, with a delayed commencement for the restricted portion of the benefit (subject to other applicable qualification requirements, such as sections 411(a)(11) and 401(a)(9)), or may satisfy paragraph (d)(3)(i) of this section by permitting participants and beneficiaries to elect an optional form of benefit that combines an unsubsidized single-sum payment for over 50 percent of the accrued benefit with a subsidized early retirement life annuity for the remainder of the accrued benefit. Any such optional forms must satisfy this paragraph (d) and applicable qualification requirements, including satisfaction of section 417(e) and section 415 (at each annuity starting date).

(7) *Exception for distributions permitted without consent of the participant under section 411(a)(11).* [Reserved]

(e) *Limitation on benefit accruals for plans with severe funding shortfalls*—(1) *In general.* Except as otherwise provided in this paragraph (e), a plan satisfies the requirements of section 436(e) and this paragraph (e) only if it provides that, in any case in which the plan's adjusted funding target attainment percentage for a plan year is less than 60 percent, benefit accruals under the plan will cease as of the applicable section 436 measurement date. If a plan is required to cease benefit accruals under this paragraph (e), then the plan is not permitted to be amended in a manner that would increase the liabilities of the plan by reason of an increase in benefits or establishment of new benefits. The preceding sentence applies regardless of whether an amendment would otherwise be permissible under paragraph (c)(2) or (c)(3) of this section.

(2) *Exemption if section 436 contribution is made.* The prohibition on additional benefit accruals under a plan described in paragraph (e)(1) of this section ceases to apply with respect to a plan year, effective as of the first day of the plan year, upon payment by the plan sponsor of the contribution described in paragraph (f)(2)(v) of this section. See paragraph (f) of this section for additional rules.

(3) *Special rule under section 203 of the Worker, Retiree, and Employer Recovery Act of 2008.* [Reserved]

(f) *Methods to avoid or terminate benefit limitations*—(1) *In general.* This paragraph (f) sets forth rules relating to employer contributions and other methods to avoid or terminate the application of section 436 limitations under a plan for a plan year. In general, there are four methods a plan sponsor may utilize to avoid or terminate one or more of the benefit limitations under this section for a plan year. Two of these methods (where the plan sponsor elects to reduce the prefunding balance or funding standard carryover balance and where the plan sponsor makes additional contributions under section 430 for the prior plan year within the time period provided by section 430(j)(1) that are not added to the prefunding balance) involve increasing the amount of plan assets which are taken into account in determining the adjusted funding target attainment percentage. The other two methods (making a contribution that is specifically designated as a current year

contribution to avoid or terminate application of a benefit limitation under paragraph (b), (c), or (e) of this section, and providing security under section 436(f)(1)) are described in paragraphs (f)(2) and (f)(3) of this section, respectively.

(2) *Current year contributions to avoid or terminate benefit limitations*—(i) *General rules*—(A) *Amount of contribution*—(*1*) *In general.* This paragraph (f)(2) sets forth rules regarding contributions to avoid or terminate the application of section 436 limitations under a plan for a plan year that apply to unpredictable contingent event benefits, plan amendments that increase liabilities for benefits, and benefit accruals.

(*2*) *Interest adjustment.* Any contribution made by a plan sponsor pursuant to this paragraph (f)(2) on a date other than the valuation date for the plan year must be adjusted with interest at the plan's effective interest rate under section 430(h)(2)(A) for the plan year. If the plan's effective interest rate for the plan year has not been determined at the time of the contribution, then this interest adjustment must be made using the highest of the three segment rates as applicable for the plan year under section 430(h)(2)(C). In such a case, if the effective interest rate for the plan year under section 430(h)(2)(A) is subsequently determined to be less than that highest rate, the excess is recharacterized as an employer contribution taken into account under section 430 for the current plan year.

(B) *Timing requirement for section 436 contributions.* Any contribution described in this paragraph (f)(2) must be paid before the unpredictable contingent event benefits are permitted to be paid, the plan amendment is permitted to take effect, or the benefit accruals are permitted to resume. In addition, any contribution described in this paragraph (f)(2) must be paid during the plan year.

(C) *Prefunding balance or funding standard carryover balance may not be used.* No prefunding balance or funding standard carryover balance under section 430(f) may be used as a contribution described in this paragraph (f)(2). However, a plan sponsor is permitted to elect to reduce the funding standard carryover balance or the prefunding balance in order to increase the adjusted funding target attainment percentage for a plan year. See paragraph (a)(5) of this section for a rule mandating such a reduction in certain situations.

(ii) *Section 436 contributions separate from minimum required contributions*—(A) *In general.* The contributions described in this paragraph (f)(2) are contributions described in sections 436(b)(2), 436(c)(2), and 436(e)(2), and are separate from any minimum required contributions under section 430. Thus, if a plan sponsor makes a contribution described in this paragraph (f)(2) for a plan year but does not make the minimum required contribution for the plan year, the plan fails to satisfy the minimum funding requirements under section 430 for the plan year. In addition, a contribution described in this paragraph (f)(2) is disregarded in determining the maximum addition to the prefunding balance under section 430(f)(6) and § 1.430(f)–1(b)(1)(ii).

(B) *Designation requirement.* Any contribution made by a plan sponsor pursuant to this paragraph (f)(2) must be designated as such at the time the contribution is used to avoid or terminate the limitations under this paragraph (f)(2), including designation of the benefits or amendments to which the limits do not apply because of the contribution. Except as specifically provided in paragraph (f)(2)(i)(A)(*2*), (g) or (h) of this section, such a contribution cannot be subsequently recharacterized with respect to any plan year as a contribution to satisfy a minimum required contribution obligation, or otherwise. The designation must be made in accordance with the rules and procedures that otherwise apply to elections under § 1.430(f)–1(f) with respect to the prefunding and funding standard carryover balances.

(C) *Requirement to recertify AFTAP.* If the plan's enrolled actuary has already certified the adjusted funding target attainment percentage for the plan year, a plan sponsor is treated as making the contribution described in paragraph (f)(2)(iii)(B), (f)(2)(iv)(B), or (f)(2)(v) of this section for the plan year only after the plan's enrolled actuary certifies an updated adjusted funding target attainment percentage for the plan year that takes into account the increased liability for the unpredictable contingent event benefits, the plan amendments, or restored accruals, and the associated section 436 contribution, under the rules of paragraph (h)(4)(v) of this section. See also paragraph (g)(4)(i) of this section for a requirement to modify the presumed adjusted funding target attainment percentage to take the liability for the unpredictable contingent event benefits or plan amendments, and the associated section 436 contribution, into account (if the contribution described in paragraph (f)(2)(iii)(B), (f)(2)(iv)(B), or (f)(2)(v) of this section is made before the plan's enrolled actuary certifies the adjusted funding target attainment percentage for the plan year).

(iii) *Contribution for unpredictable contingent event benefits.* In the case of a contribution to avoid or terminate the application of the limitation on benefits attributable to an unpredictable contingent event under section 436(b)—

(A) In the event that the adjusted funding target attainment percentage for the plan year determined without taking into account the liability attributable to the unpredictable contingent event benefits is less than 60 percent, the amount of the contribution under section 436(b)(2) is equal to the amount of the increase in the funding target of the plan for the plan year if the benefits attributable to the unpredictable contingent event were included in the determination of the funding target.

(B) In the event that the adjusted funding target attainment percentage for the plan year determined without taking into account the liability attributable to the unpredictable contingent event benefits is 60 percent or more, the amount of the contribution under section 436(b)(2) is the amount that would be sufficient to result in an adjusted funding target attainment percentage for the plan year of 60 percent if the contribution (and any prior section 436 contributions made for the plan year) were included as part of the plan assets and the funding target were to take into account the adjustments described in paragraph (g)(2)(iii)(A), (g)(3)(ii)(A), or (g)(5)(i)(B) of this section, whichever applies.

(iv) *Contribution for plan amendments increasing liability for benefits.* In the case of a contribution to avoid or terminate the application of the limitation on benefits attributable to a plan amendment under section 436(c)—

(A) In the event that the adjusted funding target attainment percentage for the plan year determined without taking into account the liability attributable to the plan amendment is less than 80 percent, the amount of the contribution under section 436(c)(2) is equal to the amount of the increase in the funding target of the plan for the plan year if the liabilities attributable to the amendment were included in the determination of the funding target.

(B) In the event that the adjusted funding target attainment percentage for the plan year determined without taking into account the liability attributable to the plan amendment is 80 percent or more, the amount of the contribution under section 436(c)(2) is the amount that would be sufficient to result in an adjusted funding target attainment percentage for the plan year of 80

percent if the contribution (and any prior section 436 contributions made for the plan year) were included as part of the plan assets and the funding target were to take into account the adjustments described in paragraph (g)(2)(iii)(A), (g)(3)(ii)(A), or (g)(5)(i)(B) of this section, whichever applies.

(v) *Contribution required for continued benefit accruals.* In the case of a contribution to avoid or terminate the application of the limitation on accruals under section 436(e), the amount of the contribution under section 436(e)(2) is equal to the amount sufficient to result in an adjusted funding target attainment percentage for the plan year of 60 percent if the contribution (and any prior section 436 contributions made for the plan year) were included as part of the plan assets and the funding target were to take into account the adjustments described in paragraph (g)(2)(iii)(A) or (g)(5)(i)(B) of this section, whichever applies.

(3) *Security to increase adjusted funding target attainment percentage*—(i) *In general.* For purposes of avoiding benefit limitations under section 436, a plan sponsor may provide security in the form described in paragraph (f)(3)(ii) of this section. In such a case, the adjusted funding target attainment percentage for the plan year is determined by treating as an asset of the plan any security provided by a plan sponsor by the valuation date for the plan year in a form meeting the requirements of paragraph (f)(3)(ii) of this section. However, this security is not taken into account as a plan asset for any other purpose, including section 430.

(ii) *Form of security.* The forms of security permitted under paragraph (f)(3)(i) of this section are limited to—

(A) A bond issued by a corporate surety company that is an acceptable surety for purposes of section 412 of ERISA; or

(B) Cash, or United States obligations which mature in 3 years or less, held in escrow by a bank or an insurance company.

(iii) *Enforcement.* Any form of security provided under paragraph (f)(3)(i) of this section must provide—

(A) That it will be paid to the plan upon the earliest of—

(*1*) The plan termination date as defined in section 4048 of ERISA;

(*2*) If there is a failure to make a payment of the minimum required contribution for any plan year beginning after the security is provided, the due date for the payment under section 430(j)(1) or 430(j)(3); or

(*3*) If the plan's adjusted funding target attainment percentage is less than 60 percent (without regard to any security provided under this paragraph (f)(3)) for a consecutive period of 7 plan years, the valuation date for the last plan year in the 7-year period; and

(B) That the plan administrator must notify the surety, bank, or insurance company that issued or holds the security of any event described in paragraph (f)(3)(iii)(A) of this section within 10 days of its occurrence.

(iv) *Release of security.* The form of security is permitted to provide that it will be released (and any amounts thereunder will be refunded to the plan sponsor together with any interest accrued thereon) as provided in the agreement governing the security, but such release is not permitted until the plan's enrolled actuary has certified that the plan's adjusted funding target attainment percentage for a plan year is at least 90 percent (without regard to any security provided under this paragraph (f)(3)) or until replacement security has been provided in accordance with paragraph (f)(3)(vi) of this section.

(v) *Contribution of security to plan.* Any security provided under this paragraph (f)(3) that is subsequently turned over to the plan (whether pursuant to the enforcement mechanism of paragraph (f)(3)(iii) of this section or after its release under paragraph (f)(3)(iv) of this section) is treated as a contribution by the plan sponsor taken into account under section 430 when contributed and, if turned over pursuant to paragraph (f)(3)(iii) of this section, is not a contribution under paragraph (f)(2) of this section.

(vi) *Replacement security.* If security has been provided to a plan pursuant to this paragraph (f)(3), the plan sponsor may provide new security to the plan and subsequently or simultaneously have the original security released, but only if—

(A) The new security is in a form that satisfies the requirements of paragraph (f)(3)(ii) of this section;

(B) The amount of the new security is no less than the amount of the original security, determined at the time the original security is released; and

(C) The period described in paragraph (f)(3)(iii)(A)(*3*) of this section with respect to the new security is the same as the period that applied under that paragraph to the original security.

(4) *Examples.* The following examples illustrate the rules of this paragraph (f):

Example 1. (i) Plan Z is a non-collectively bargained defined benefit plan with a plan year that is the calendar year and a valuation date of January 1. Plan Z's sponsor is not in bankruptcy, and Plan Z did not purchase any annuities in 2009 or 2010. As of January 1, 2011, Plan Z does not have a funding standard carryover balance or a prefunding balance, and is not in at-risk status. As of that date, Plan Z has plan assets (and adjusted plan assets) of $2,000,000 and a funding target (and an adjusted funding target) of $2,550,000. On March 1, 2011, the enrolled actuary for the plan certifies that the AFTAP as of January 1, 2011, is 78.43%. The effective interest rate for Plan Z for the 2011 plan year is 5.5%.

(ii) On May 1, 2011, the plan sponsor amends Plan Z to increase benefits. The enrolled actuary for the plan determines that the present value, as of January 1, 2011, of the increase in the funding target due to the amendment is $400,000. Because the AFTAP prior to the plan amendment is less than 80%, Plan Z is subject to the restriction on plan amendments in paragraph (c) of this section, and the amendment cannot take effect unless the employer utilizes one of the methods described in paragraph (f) of this section to avoid benefit limitations.

(iii) In order for the amendment to be permitted to take effect, the plan sponsor makes a contribution described in paragraph (f)(2) of this section. Because the AFTAP prior to the amendment was less than 80%, the provisions of paragraph (f)(2)(iv)(A) of this section apply. The amount of the contribution as of January 1, 2011, needed to avoid the restriction on plan amendments under paragraph (c) of this section is equal to the amount of the increase in funding target attributable to the amendment, or $400,000. Under the provisions of paragraph (f)(2)(iv)(A) of this section, this contribution is required even though, if the contribution were included as part of the plan assets and the liabilities attributable to the plan amendment were included in the funding target, the AFTAP would be 81.36% (that is, adjusted plan assets of $2,000,000 plus the contribution of $400,000 as of January 1, 2011; divided by the adjusted funding target of $2,550,000 increased to reflect the additional $400,000 in the funding target attributable to the plan amendment).

(iv) However, because the contribution is not paid until May 1, 2011, the necessary contribution amount must be adjusted to reflect interest from the valuation date to the date of the contribution, at Plan Z's effective interest rate for the 2011 plan year. The amount of the required contribution after adjustment is $407,203, determined as $400,000 increased for 4 months of compound interest at an effective annual interest rate of 5.5%.

(v) A contribution of $407,203 is made on May 1, 2011, and is designated as a contribution under paragraph (f)(2) of this section with respect to the May 1, 2011, plan amendment. Accordingly, the contribution is not applied toward minimum funding requirements under section 430, and is not eligible for inclusion in the prefunding balance under § 1.430(f)–1(b)(1). Since this contribution meets the requirements of paragraph (f)(2) of this section, the plan amendment takes effect in accordance with its terms.

Example 2. (i) The facts are the same as in *Example 1,* except that the plan is in at-risk status under section 430(i). The funding

target determined under section 430(i) is $2,600,000, and the funding target determined without regard to section 430(i) is $2,550,000.

(ii) On May 1, 2011, the plan sponsor amends Plan Z to increase benefits. The plan's enrolled actuary determines that the present value as of January 1, 2011 of the increase in the funding target due to the amendment (taking into account the at-risk status of the plan) is $440,000. Because the AFTAP prior to the plan amendment is 78.43% (determined taking into account the at-risk status of Plan Z), Plan Z is subject to the restriction on plan amendments in paragraph (c) of this section, and the amendment cannot take effect unless the employer utilizes one of the methods described in this paragraph (f) to avoid benefit limitations.

(iii) In order for this amendment to be permitted to take effect, the plan sponsor makes a contribution described in paragraph (f)(2) of this section. Because the AFTAP prior to the amendment was less than 80%, the provisions of paragraph (f)(2)(iv)(A) of this section apply. The amount of the contribution as of January 1, 2011, needed to avoid the restriction on plan amendments under paragraph (c) of this section is equal to the amount of the increase in funding target attributable to the amendment, or $440,000. Under the provisions of paragraph (f)(2)(iv)(A) of this section, this contribution is required even though, if the contribution were included as part of the plan assets and the liability attributable to the plan amendment were included in the funding target, the AFTAP would exceed 80%.

(iv) However, because the contribution is not paid until May 1, 2011, the necessary contribution amount must be adjusted to reflect interest from the valuation date to the date of the contribution, at Plan Z's effective interest rate for the 2011 plan year. The amount of the required contribution after adjustment is $447,923, determined as $440,000 increased for 4 months of compound interest at an effective annual interest rate of 5.5%.

(v) A contribution of $447,923 is made on May 1, 2011, and is designated as a contribution under paragraph (f)(2) of this section with respect to the May 1, 2011, plan amendment. Accordingly, the contribution is not applied toward minimum funding requirements under section 430, and is not eligible for inclusion in the prefunding balance under § 1.430(f)–1(b)(1). Since this contribution meets the requirements of paragraph (f)(2) of this section, the plan amendment takes effect in accordance with its terms.

Example 3. (i) The facts are the same as in *Example 1,* except that the enrolled actuary for the plan does not issue the certification of the 2011 AFTAP until September 1, 2011. Prior to October 1, 2010, the enrolled actuary had certified the 2010 AFTAP to be 82%. Other than this amendment, no other amendment or unpredictable contingent event has occurred that requires a recertification. As of May 1, 2011, the plan's effective interest rate for the 2011 plan year has not yet been determined. The highest of the three segment rates applicable to the 2011 plan year under section 430(h)(2)(C) is 6%.

(ii) Because the enrolled actuary has not certified the actual AFTAP as of January 1, 2011, and the amendment is scheduled to take effect after April 1, 2011, the rules of paragraph (h)(2)(iii) of this section apply. Accordingly, the AFTAP for 2011 (prior to reflecting the effect of the amendment) is presumed to be 10 percentage points lower than the 2010 AFTAP, or 72%. Because this presumed AFTAP is less than 80%, the restriction on plan amendments in paragraph (c) of this section applies, and the plan amendment cannot take effect.

(iii) In order to allow the plan amendment to take effect, the plan sponsor decides to make a contribution under paragraph (f)(2) of this section on May 1, 2011. Because the presumed AFTAP was less than 80% prior to reflecting the plan amendment, the rules of paragraph (f)(2)(iv)(A) of this section apply, and the amount of the contribution under section 436(c)(2) is the amount of the increase in the funding target for the year if the plan amendment were included in the determination of the funding target. Accordingly, an additional contribution of $400,000 is required as of January 1, 2011, to avoid the restriction on plan amendments under paragraph (c) of this section.

(iv) However, since the contribution is not made until May 1, 2011, the amount of the required contribution must be adjusted to reflect interest from the valuation date to the date of the contribution. Since the effective interest rate has not yet been determined, the interest adjustment is based on the highest of the three segment rates applicable for the 2011 plan year under section 430(h)(2)(C), or 6%. The amount of the required contribution after adjustment is $407,845, determined as $400,000 increased for 4 months of compound interest at the highest segment interest rate for 2011, or 6%.

(v) A contribution of $407,845 is made on May 1, 2011, and is designated as a contribution under paragraph (f)(2) of this section with respect to the May 1, 2011, plan amendment. Accordingly, the contribution is not applied toward minimum funding requirements under section 430, and is not eligible for inclusion in the prefunding balance under § 1.430(f)–1(b)(1). Since this contribution meets the requirements of paragraph (f)(2) of this section, the plan amendment takes effect in accordance with its terms.

(vi) After the plan's effective interest rate for 2011 has been determined to be 5.5%, the amount of excess interest previously contributed is recharacterized as an employer contribution taken into account under section 430 for 2011 (because that rate for the year is less than 6%).

(g) *Rules of operation for periods prior to and after certification*—(1) *In general.* Section 436(h) and paragraph (h) of this section set forth a series of presumptions that apply before the enrolled actuary for a plan issues a certification of the plan's adjusted funding target attainment percentage for the plan year. This paragraph (g) sets forth rules for the application of limitations under sections 436(b), 436(c), 436(d), and 436(e) prior to and during the period those presumptions apply to the plan, and describes the interaction of those presumptions with plan operations after the plan's enrolled actuary has issued a certification of the plan's adjusted funding target attainment percentage for the plan year. Paragraph (g)(2) of this section sets forth rules that apply to periods during which a presumption under section 436(h) and paragraph (h) of this section applies. Paragraph (g)(3) of this section sets forth rules that apply to periods during which no presumptions under section 436(h) and paragraph (h) of this section apply but which are prior to the enrolled actuary's certification of the plan's adjusted funding target attainment percentage for the plan year. Paragraph (g)(4) of this section sets forth rules for modifying the plan's presumed adjusted funding target attainment percentage in certain situations. Paragraph (g)(5) of this section sets forth rules that apply after the enrolled actuary's certification of the plan's adjusted funding target attainment percentage for a plan year. Paragraph (g)(6) of this section sets forth examples illustrating the rules in this paragraph (g).

(2) *Periods prior to certification during which a presumption applies*—(i) *Plan must follow presumptions.* A plan must provide that, for any period during which a presumption under section 436(h) and paragraph (h)(1), (2), or (3) of this section applies to the plan, the limitations applicable under section 436 and paragraphs (b), (c), (d), and (e) of this section are applied to the plan as if the adjusted funding target attainment percentage for the year were the presumed adjusted funding target attainment percentage determined under the rules of section 436(h) and paragraph (h)(1), (2), or (3) of this section, as applicable, updated to take into account certain unpredictable contingent event benefits and plan amendments in accordance with section 436 and the rules of this paragraph (g).

(ii) *Determination of amount of reduction in balances*—(A) *In general.* During the period described in this paragraph (g)(2), the rules of paragraph (a)(5) of this section (relating to the deemed election to reduce the funding standard carryover balance and the prefunding balance) must be applied based on the presumed adjusted funding target attainment percentage. This paragraph (g)(2)(ii) provides rules for the determination of the reduction that applies as of the first day of the plan year, and, in certain circumstances, that applies later in the plan year. Paragraph (g)(2)(iii) of this section provides additional rules that apply with respect to unpredictable contingent event

benefits or plan amendments, which rules must be applied prior to the application of paragraph (g)(2)(iv) of this section relating to section 436 contributions. The reapplication of the rules under this paragraph (g)(2) regarding the deemed election in paragraph (a)(5) of this section may require an additional reduction in the prefunding and funding standard carryover balances if the amount of the reduction in those balances that is necessary to reach the applicable threshold to avoid the application of a section 436 limitation exceeds the amount that was initially reduced. Prior reductions of the prefunding and funding standard carryover balances continue to apply.

(B) *Reduction in balances at the first day of plan year*—(*1*) *Plans with a certified AFTAP for the prior plan year.* If section 436(h)(1) and paragraph (h)(1) of this section apply to determine the presumed adjusted funding target attainment percentage as of the first day of the current plan year based on the plan's enrolled actuary certification of the adjusted funding target attainment percentage for the prior plan year made during that prior plan year, then, in order to determine the amount of the reduction (if any) in the funding standard carryover balance and prefunding balance under this paragraph (g)(2)(ii), a presumed adjusted funding target must be established as of the first day of the plan year, and that amount is then compared to the interim value of adjusted plan assets as of that date. For this purpose, the interim value of adjusted plan assets is equal to the value of adjusted plan assets (within the meaning of paragraph (j)(1)(ii) of this section) as of the first day of the plan year, determined without regard to future contributions and future elections with respect to the plan's prefunding and funding standard carryover balances under section 430(f) (for example, elections to add to the prefunding balance for the prior plan year, elections to use the prefunding and funding standard carryover balances to offset the minimum required contribution for a year, and elections (including deemed elections under paragraph (a)(5) of this section) to reduce the prefunding and funding standard carryover balances for the current plan year), and the presumed adjusted funding target is equal to the interim value of adjusted plan assets for the plan year divided by the presumed adjusted funding target attainment percentage. As provided in § 1.430(f)–1(e)(1), the rules of § 1.430(f)–1(d)(1)(ii) apply for purposes of determining the amount of the prefunding balance or the funding standard carryover balance that is available for reduction.

(*2*) *Plans with presumed AFTAP deemed under 60 percent.* If paragraph (g)(2)(ii)(B)(*1*) of this section does not apply to the plan for a plan year and the last day of the plan year is on or after the first day of the 10th month of the plan year, such that the presumed adjusted funding target attainment percentage for the prior plan year is conclusively presumed to be less than 60 percent under section 436(h)(2) and paragraph (h)(3) of this section, then no reduction in the funding standard carryover balance and prefunding balance is required under this paragraph (g)(2)(ii)(B). However, see paragraph (g)(2)(iv)(A) of this section for rules for determining the amount of a section 436 contribution that would permit unpredictable contingent event benefits to be paid in such a case.

(*3*) *Treatment of short plan years.* If paragraph (g)(2)(ii)(B)(*1*) of this section does not apply to the plan for a plan year but the last day of the plan year is before the first day of the 10th month of the plan year, such that section 436(h)(2) and paragraph (h)(3) of this section did not apply for that plan year, then paragraph (g)(2)(ii)(B)(*1*) of this section must be applied as of the first day of the next plan year based on the presumed adjusted funding target attainment percentage as of that last day of the prior short plan year.

(C) *Change in presumed AFTAP later in the plan year.* If the presumed adjusted funding target attainment percentage for the plan year changes during the year, the rules regarding the deemed election to reduce the prefunding and funding standard carryover balances described in paragraph (a)(5) of this section must be reapplied based on the new presumed adjusted funding target attainment percentage. This will typically occur on the first day of the 4th month of a plan year, but could happen at a different date if the enrolled actuary certifies the adjusted funding target attainment percentage for the prior plan year during the current plan year. In order to determine the amount of any reduction in the prefunding and funding standard carryover balances that would apply in such a situation, a new presumed adjusted funding target must be established, which is then compared to the updated interim value of adjusted plan assets. For this purpose, the updated interim value of adjusted plan assets for the plan year is determined as the interim value of adjusted plan assets as of the first day of the plan year updated to take into account contributions for the prior plan year and section 430(f) elections with respect to the plan's prefunding and funding standard carryover balances made before the date of the change in the presumed adjusted funding target attainment percentage, and the new presumed adjusted funding target is equal to the updated interim value of adjusted plan assets divided by the new presumed adjusted funding target attainment percentage.

(D) *Plans funded below the threshold.* If, after application of paragraph (g)(2)(ii)(B) and (C) of this section, the presumed adjusted funding target attainment percentage under this paragraph (g)(2)(ii) is less than the 60 percent threshold under section 436(e), then no benefit accruals are permitted under the plan unless the plan sponsor makes a section 436 contribution as provided in paragraph (g)(2)(iv)(A) of this section. *See* paragraph (g)(5)(ii) of this section for rules that apply on and after the date the enrolled actuary for the plan issues a certification of the adjusted funding target attainment percentage of the plan for the current plan year.

(iii) *Calculation of inclusive presumed AFTAP for application to unpredictable contingent event benefits and plan amendments*—(A) *Requirement to calculate inclusive presumed AFTAP.* For purposes of applying the limitations under paragraphs (b) and (c) of this section during the period described in this paragraph (g)(2), an inclusive presumed adjusted funding target attainment percentage must be calculated. The inclusive presumed adjusted funding target attainment percentage is the ratio (expressed as a percentage) of the interim value of adjusted plan assets (updated to take into account contributions for the prior plan year, any prior section 436 contributions made for the plan year to the extent not previously taken into account in the interim value of adjusted plan assets for the plan year, and section 430(f) elections with respect to the plan's prefunding and funding standard carryover balances made before the date of the unpredictable contingent event or the date the plan amendment would take effect) to the inclusive presumed adjusted funding target. The inclusive presumed adjusted funding target is calculated as the presumed adjusted funding target determined under paragraph (g)(2)(ii)(B) or (C) of this section, increased to take into account—

(*1*) The unpredictable contingent event benefits or plan amendment;

(*2*) Any unpredictable contingent event benefits that are permitted to be paid as a result of any unpredictable

contingent event that occurred, or plan amendment that has taken effect, in the prior plan year to the extent not taken into account in the prior plan year adjusted funding target attainment percentage; and

(*3*) Any other unpredictable contingent event benefits that are permitted to be paid as a result of any unpredictable contingent event that occurred, or plan amendment that has taken effect, in the current plan year to the extent not previously taken into account in the presumed adjusted funding target for the plan year.

(B) *Mandatory reduction for collectively bargained plans.* During the period described in this paragraph (g)(2), the rules of paragraph (a)(5)(ii) of this section (relating to the deemed election to reduce the funding standard carryover balance and the prefunding balance) must be applied by treating the inclusive presumed adjusted funding target attainment percentage determined under this paragraph (g)(2)(iii) as if it were the adjusted funding target attainment percentage.

(C) *Optional reduction for plans that are not collectively bargained plans.* A plan sponsor of a plan that is not a collectively bargained plan (and, thus, is not required to reduce the funding standard carryover balance and the prefunding balance under the rules of paragraph (a)(5)(ii) of this section) is permitted to elect to reduce those balances in order to increase the updated interim value of adjusted plan assets that is used to determine the inclusive presumed adjusted funding target attainment percentage under this paragraph (g)(2)(iii).

(D) *Plans funded below the threshold.* If, after application of paragraph (g)(2)(iii)(B) and (C) of this section, the inclusive presumed adjusted funding target attainment percentage determined under this paragraph (g)(2)(iii) is less than the applicable threshold under section 436(b) or 436(c), then the plan is not permitted to provide any benefits attributable to the unpredictable contingent event, nor is the plan amendment permitted to take effect, unless the plan sponsor makes a section 436 contribution as provided in paragraph (g)(2)(iv) of this section. *See* paragraph (g)(5)(ii) of this section for rules that apply on and after the date the enrolled actuary for the plan issues a certification of the adjusted funding target attainment percentage of the plan for the current plan year.

(E) *Plans funded at or above the threshold.* If, after application of paragraph (g)(2)(iii)(B) or (C) of this section, the inclusive presumed adjusted funding target attainment percentage is greater than or equal to the applicable threshold under section 436(b) or 436(c), then the plan is not permitted to limit the payment of unpredictable contingent event benefits described in paragraph (b) of this section, nor is the plan permitted to restrict a plan amendment increasing benefit liabilities described in paragraph (c) of this section from taking effect, based on an expectation that the limitations under paragraph (b) or (c) of this section will apply following the enrolled actuary's certification of the adjusted funding target attainment percentage for the plan year.

(iv) *Section 436 contributions*—(A) *Plans with presumed AFTAP below 60 percent*—(*1*) *Unpredictable contingent event benefits.* If the presumed adjusted funding target attainment percentage for a plan is less than 60 percent, then unpredictable contingent event benefits are permitted to be paid as a result of an unpredictable contingent event occurring during the period described in this paragraph (g)(2) if the plan sponsor makes the section 436 contribution described in paragraph (f)(2)(iii)(A) of this section.

(*2*) *Plan amendments.* If the presumed adjusted funding target attainment percentage for a plan is less than 60 percent, then no plan amendment increasing plan liabilities is permitted to take effect during the period described in this paragraph (g)(2). See paragraph (e)(1) of this section.

(*3*) *Benefit accruals.* If the presumed adjusted funding target attainment percentage for a plan year of less than 60 percent is determined based on the plan's enrolled actuary certification of the adjusted funding target attainment percentage for the prior plan year made during that prior plan year (as opposed to being presumed to be less than 60 percent under the rules of section 436(h)(2) and paragraph (h)(3) of this section because the actuary has not certified the adjusted funding target attainment percentage for the prior plan year before the first day of the 10th month of the prior plan year), then benefits are permitted to accrue if the plan sponsor makes a section 436 contribution in the amount necessary to bring the ratio of the updated interim value of adjusted plan assets to the presumed adjusted funding target up to 60 percent, as described in paragraph (f)(2)(v) of this section.

(B) *Plan amendments for plans with presumed AFTAP below 80 percent.* If the presumed adjusted funding target attainment percentage for a plan is less than 80 percent, but is not less than 60 percent, then a plan amendment increasing plan liabilities is permitted to take effect during the period described in this paragraph (g)(2) if the plan sponsor makes a section 436 contribution described in paragraph (f)(2)(iv)(A) of this section.

(C) *Contributions required to reach threshold.* If a plan is described in paragraph (g)(2)(iii)(D) of this section and neither paragraph (g)(2)(iv)(A) nor (B) of this section apply to the plan, then unpredictable contingent event benefits are permitted to be paid or the plan amendment is permitted to become effective during the period this paragraph (g)(2) applies to the plan only if the plan sponsor makes a section 436 contribution in the amount necessary to bring the ratio of the updated interim value of adjusted plan assets to the inclusive presumed adjusted funding target up to the applicable threshold under section 436(b) or (c), as described in paragraph (f)(2)(iii)(B) or (f)(2)(iv)(B) of this section. This paragraph (g)(2)(iv)(C) applies, for example, if an unpredictable contingent event occurs in the case of a plan with a presumed adjusted funding target attainment percentage of more than 60 percent where taking into account the unpredictable contingent event benefit in the inclusive presumed adjusted funding target would cause the ratio of the interim value of adjusted plan assets to the inclusive presumed adjusted funding target to be less than 60 percent.

(v) *Bankruptcy of plan sponsor.* Pursuant to section 436(d)(2), during any period in which the plan sponsor of a plan is a debtor in a case under title 11, United States Code, or any similar Federal or State law (as described in paragraph (d)(2) of this section), no prohibited payment within the meaning of paragraph (j)(6) of this section may be paid if the plan's enrolled actuary has not yet certified the plan's adjusted funding target attainment percentage for the plan year to be at least 100 percent. Thus, the presumption rules of paragraph (h) of this section do not apply for purposes of section 436(d)(2) and this paragraph (g)(2)(v).

(3) *Periods prior to certification during which no presumption applies*—(i) *Prohibited payments and benefit accruals.* If no presumptions under section 436(h) apply to a plan during a period and the plan's enrolled actuary has not yet issued the certification of the plan's actual adjusted funding target attainment percentage for the plan year, the plan is not permitted to limit prohibited payments under paragraph (d) of this section or the accrual of benefits under paragraph (e) of this section based on an expectation that those paragraphs will apply to the plan once an actuarial certification is issued.

However, see paragraph (g)(2)(v) of this section for a restriction on prohibited payments during any period in which the plan sponsor of a plan is a debtor in a case under title 11, United States Code, or any similar Federal or State law.

(ii) *Unpredictable contingent event benefits and plan amendments increasing benefit liability*—(A) *In general.* If no presumptions under section 436(h) apply to a plan during a period and the plan's enrolled actuary has not yet issued a certification of the plan's adjusted funding target attainment percentage for the plan year, the limitations on unpredictable contingent event benefits under paragraph (b) of this section and plan amendments increasing benefit liabilities under paragraph (c) of this section must be applied during that period by following the rules of paragraphs (g)(2)(iii) of this section, based on the inclusive presumed adjusted funding target determined using the prior plan year adjusted funding target attainment percentage. Thus, whether unpredictable contingent event benefits are permitted to be paid or a plan amendment is permitted to take effect during a plan year is determined by calculating the ratio of the interim value of adjusted plan assets to the inclusive presumed adjusted funding target, where the inclusive presumed adjusted funding target is determined by dividing the interim value of adjusted plan assets by the prior plan year adjusted funding target attainment percentage and then adding the adjustments described in paragraphs (g)(2)(iii)(A)(*1*), (*2*) and (*3*) of this section. If, after application of paragraphs (g)(2)(iii)(B) and (C) of this section, that ratio is less than the applicable threshold under section 436(b) or 436(c), then the plan is not permitted to provide any benefits attributable to the unpredictable contingent event, nor is the plan amendment permitted to take effect, unless the plan sponsor makes the contribution described in paragraph (g)(2)(iv)(C) of this section.

(B) *Recharacterization of contributions made to avoid benefit limitations.* In any case where, pursuant to paragraph (g)(3)(ii)(A) of this section, the plan sponsor makes section 436 contributions to avoid the application of the applicable benefit limitation, to the extent those contributions would not be needed to permit the payment of the unpredictable contingent event benefits or for the plan amendment to go into effect based on a subsequent certification of the adjusted funding target attainment percentage for the current plan year that takes into account the increase in the liability attributable to the unpredictable contingent event benefits or plan amendment, the excess section 436 contributions are recharacterized as employer contributions taken into account under section 430 for the current plan year.

(4) *Modification of the presumed AFTAP*—(i) *Section 436 contributions.* If, in accordance with the rules of paragraph (g)(2)(iv) of this section, unpredictable contingent event benefits are permitted to be paid, or a plan amendment takes effect, during the plan year because the plan sponsor makes a contribution described in paragraph (f)(2)(iii)(B) or (f)(2)(iv)(B) of this section, then the presumed adjusted funding target must be adjusted to reflect any increase in the funding target attributable to the unpredictable contingent event benefits or the plan amendment and the interim value of plan assets must be increased by the present value of the contribution. Similarly, if benefit accruals are permitted to resume in a plan year because the plan sponsor makes the contribution described in paragraph (f)(2)(v) of this section, then the presumed adjusted funding target must be adjusted to reflect any increase in the funding target attributable to the benefit accruals for the prior plan year and the interim value of adjusted plan assets must be increased by the present value of the contribution. The adjustment to the presumed adjusted funding target is made as of the date of the contribution, and that date is a section 436 measurement date.

(ii) *Modification of the presumed AFTAP for reduction in balances.* If a plan's funding standard carryover balance or prefunding balance is reduced under the rules of paragraph (g)(2) or (g)(3) of this section, then the presumed adjusted funding target attainment percentage for the plan year is increased to reflect the higher interim value of adjusted plan assets resulting from the reduction in the funding standard carryover balance or prefunding balance. The date of the event that causes the reduction is a section 436 measurement date.

(5) *Periods after certification of AFTAP*—(i) *Plan must follow certified AFTAP*—(A) *In general.* The rules of paragraphs (g)(2) and (g)(3) of this section no longer apply for a plan year on and after the date the enrolled actuary for the plan issues a certification of the adjusted funding target attainment percentage of the plan for the current plan year, provided that the certification is issued before the first day of the 10th month of the plan year. For example, the plan must provide that the limitations on prohibited payments apply for distributions with annuity starting dates on and after the date of that certification using the certified adjusted funding target attainment percentage of the plan for the plan year. Similarly, the plan must provide that any prohibition on accruals under paragraph (e) of this section as a result of the enrolled actuary's certification that the adjusted funding target attainment percentage of the plan for the plan year is less than 60 percent is effective as of the date of the certification and that any prohibition on accruals ceases to be effective on the date the enrolled actuary issues a certification that the adjusted funding target attainment percentage of the plan for the plan year is at least 60 percent.

(B) *Unpredictable contingent events and plan amendments.* In the case of a plan that has been issued a certification of the plan's adjusted funding target attainment percentage for a plan year by the plan's enrolled actuary, the plan sponsor must comply with the requirements of paragraphs (b) and (c) of this section for an unpredictable contingent event that occurs or a plan amendment that takes effect on or after the date of the enrolled actuary's certification. Thus, the plan administrator must determine if the adjusted funding target attainment percentage would be at or above the applicable threshold if it were modified to take into account—

(*1*) The unpredictable contingent event or plan amendment;

(*2*) Any other unpredictable contingent event benefits that were permitted to be paid as a result of any unpredictable contingent event that occurred, and any other plan amendment that took effect, earlier during the plan year to the extent not taken into account in the certified adjusted funding target attainment percentage for the plan year; and

(*3*) Any earlier section 436 contributions made for the plan year to the extent those contributions were not taken into account in the certified adjusted funding target attainment percentage.

(C) *Application of rule for deemed election to reduce funding balances.* After the adjusted funding target attainment percentage for a plan year is certified by the plan's enrolled actuary, the deemed election to reduce the prefunding and funding standard carryover balances under paragraph (a)(5) of this section must be reapplied based on the actual funding target for the year (provided the certification is issued before the first day of the 10th

month of the plan year). The reapplication of the rules under this paragraph (g)(5) regarding the deemed election in paragraph (a)(5) of this section may require an additional reduction in the prefunding and funding standard carryover balances if the amount of the reduction in the prefunding and funding standard carryover balances that is necessary to reach the applicable threshold to avoid the application of a section 436 limitation exceeds the amount that was initially reduced. Prior reductions of the prefunding and funding standard carryover balances continue to apply.

(ii) *Applicability to prior periods*—(A) *In general*. Except as otherwise provided in this paragraph (g)(5)(ii), the enrolled actuary's certification of the adjusted funding target attainment percentage for the plan for the plan year does not affect prior periods. For example, the certification does not affect the application of the limitation under paragraph (d) of this section for distributions with annuity starting dates before the certification or the application of the limitation under paragraph (e) of this section prior to the date of that certification. *See* paragraph (a)(4) of this section for rules relating to the period of time after benefits cease to be limited. Except as otherwise provided in this paragraph (g)(5)(ii), the enrolled actuary's certification of the adjusted funding target attainment percentage for the plan for the plan year does not affect the application of the limitation under paragraph (b) or (c) of this section to unpredictable contingent event benefits, or a plan amendment that increases the liability for benefits, where the unpredictable contingent event occurs or the amendment takes effect during the periods to which paragraphs (g)(2) and (g)(3) of this section apply.

(B) *Special rule for unpredictable contingent event benefits*. If a plan does not pay benefits attributable to an unpredictable contingent event because of the application of paragraph (g)(2)(iii)(D) or (g)(3)(ii)(A) of this section, then the plan must pay the benefits attributable to that event that were not previously paid if such benefits would be permitted under the rules of section 436 based on a certified adjusted funding target attainment percentage for the plan year that takes into account the increase in the funding target that would be attributable to those unpredictable contingent event benefits.

(C) *Special rule for plan amendments that increase liability*. If a plan amendment does not take effect because of the application of paragraph (g)(2)(iii)(D) or (g)(3)(ii)(A) of this section, the plan amendment must go into effect if it would be permitted under the rules of section 436 based on a certified actual adjusted funding target attainment percentage for the plan year that takes into account the increase in the funding target attributable to the plan amendment, unless the plan amendment provides otherwise.

(D) *Ordering rule for multiple unpredictable contingent events or plan amendments*. [Reserved]

(6) *Examples*. The following examples illustrate the rules of this paragraph (g). Unless otherwise indicated, these examples are based on the following facts: each plan has a plan year that is the calendar year and a valuation date of January 1; section 436 applies to the plan beginning in 2008; the plan has no funding standard carryover balance; the plan sponsor is not in bankruptcy; no annuity purchases have been made from the plan; and the plan offers a lump sum form of payment. No plan is in at-risk status for the years discussed in the examples. The examples read as follows:

Example 1. (i) The plan's certified AFTAP as of January 1, 2010, is 75%. As of January 1, 2011, Plan A has assets of $3,300,000 and a prefunding balance of $300,000. Beginning on January 1, 2011, Plan A's AFTAP for 2011 is presumed to be 75%, under the rules of paragraph (h) of this section and based on the certified AFTAP for 2010.

(ii) Based on Plan A's presumed AFTAP of 75%, Plan A would continue to be subject to the restriction on prohibited payments in paragraph (d)(3) of this section as of January 1, 2011. However, under the provisions of paragraph (a)(5) of this section, if the prefunding balance is large enough, Plan A's sponsor is deemed to elect to reduce the prefunding balance to the extent needed to avoid this restriction.

(iii) The amount needed to avoid the restriction in paragraph (d)(3) of this section is determined by comparing the presumed adjusted funding target for Plan A with the interim value of adjusted plan assets as of the valuation date. The interim value of adjusted plan assets for Plan A is $3,000,000 (that is, the asset value of $3,300,000 reduced by the prefunding balance of $300,000). The presumed adjusted funding target for Plan A is the interim value of the adjusted plan assets divided by the presumed AFTAP, or $4,000,000 (that is, $3,000,000 divided by 75%).

(iv) In order to avoid the restriction on prohibited payments in paragraph (d)(3) of this section, Plan A's presumed AFTAP must be increased to 80%. This requires an increase in Plan A's adjusted plan assets of $200,000 (that is, 80% of the presumed adjusted funding target of $4,000,000, minus the interim value of the adjusted plan assets of $3,000,000). Plan A's prefunding balance as of January 1, 2011, is reduced by $200,000 under the deemed election provisions of paragraph (a)(5) of this section. Accordingly, Plan A's prefunding balance is $100,000 (that is, $300,000 minus $200,000) and the interim value of adjusted plan assets is increased to $3,200,000 (that is, $3,300,000 minus the reduced prefunding balance of $100,000). Pursuant to paragraph (g)(4)(ii) of this section, the presumed adjusted funding target attainment percentage for Plan A is redetermined as 80% and Plan A must pay the full amount of the accelerated benefit distributions elected by participants with an annuity starting date of January 1, 2011, or later.

Example 2. (i) The facts are the same as in *Example 1.* As of April 1, 2011, the enrolled actuary for Plan A has not certified the 2011 AFTAP. Therefore, beginning April 1, 2011, Plan A's AFTAP is presumed to be reduced by 10 percentage points to 70%, in accordance with paragraph (h)(2) of this section. Under the provisions of paragraph (g)(2)(ii)(B) of this section, the deemed election to reduce the prefunding and funding standard carryover balances described in paragraph (a)(5) of this section must be reapplied based on the new presumed AFTAP.

(ii) In accordance with paragraph (g)(2)(ii)(C) of this section, a new presumed adjusted funding target must be determined based on the new presumed AFTAP and must be compared to an updated interim value of adjusted plan assets. The new presumed adjusted funding target is $3,200,000 divided by the new presumed AFTAP of 70%, or $4,571,429.

(iii) In order to avoid the restriction on prohibited payments in paragraph (d)(3) of this section, Plan A's presumed AFTAP must be increased to 80%. This requires an additional increase in Plan A's adjusted plan assets of $457,143 (that is, 80% of the new presumed adjusted funding target of $4,571,429, minus the updated interim value of the adjusted plan assets of $3,200,000 reflecting the deemed reduction in Plan A's prefunding balance).

(iv) Plan A's remaining prefunding balance as of January 1, 2011, is only $100,000, which is not enough to avoid the restriction on prohibited payments under paragraph (d)(3) of this section. Accordingly, unless Plan A's sponsor utilizes one of the methods described in paragraph (f) of this section to avoid the restriction, Plan A is subject to the restriction on prohibited payments in paragraph (d)(3) of this section and cannot pay accelerated benefit distributions elected by participants with an annuity starting date of April 1, 2011, or later.

(v) Plan A's prefunding balance remains at $100,000 because, under paragraph (a)(5)(iii) of this section, the deemed reduction rules do not apply if the prefunding balance is not large enough to increase the adjusted value of plan assets enough to avoid the restriction. However, the earlier deemed reduction of $200,000 continues to apply because all elections (including deemed elections) to reduce a plan's funding standard carryover balance or prefunding balance are irrevocable and must be unconditional in accordance with paragraph (g)(2)(ii)(A) of this section.

Example 3. (i) The facts are the same as in *Example 1.* On July 1, 2011, the enrolled actuary for Plan A calculates the actual adjusted funding target as $3,700,000 as of

January 1, 2011. Therefore, the 2011 AFTAP would have been 81.08% without reducing the prefunding balance (that is, plan assets of $3,300,000 minus the prefunding balance of $300,000, divided by the adjusted funding target of $3,700,000), and Plan A would not have been subject to the restrictions under paragraph (d)(3) of this section.

(ii) However, paragraph (g)(5)(i)(C) of this section requires that any prior reductions in the prefunding or funding standard carryover balances continue to apply, and so Plan A's prefunding balance remains at the reduced amount of $100,000 as of January 1, 2011. The enrolled actuary certifies that the 2011 AFTAP is 86.49% (that is, plan assets of $3,300,000 reduced by the prefunding balance of $100,000, divided by the adjusted funding target of $3,700,000).

Example 4. (i) Plan B is a collectively bargained plan with assets of $2,500,000 and a prefunding balance of $150,000 as of January 1, 2011. On August 14, 2010, the enrolled actuary for Plan B certified the AFTAP for 2010 to be 83%. No unpredictable contingent events giving rise to unpredictable contingent event benefits occurred during 2010 and no plan amendments took effect in 2010 that were not taken into account in the certified AFTAP.

(ii) On January 10, 2011, Plan B's sponsor amends the plan to increase benefits effective on February 1, 2011. The amendment would increase Plan B's funding target by $350,000. Under the rules of paragraph (g)(3) of this section, the determination of whether the amendment is permitted to take effect is based on a comparison of the inclusive presumed adjusted funding target with the updated interim value of adjusted plan assets.

(iii) Plan B's interim value of adjusted plan assets as of the valuation date is $2,350,000 (that is, $2,500,000 minus the prefunding balance of $150,000). Prior to reflecting the amendment, Plan B's presumed adjusted funding target as of January 1, 2011, is $2,831,325, which is equal to the interim value of adjusted plan assets as of the valuation date of $2,350,000, divided by the presumed AFTAP of 83%. Increasing Plan B's presumed adjusted funding target by $350,000 to reflect the amendment results in an inclusive presumed adjusted funding target of $3,181,325 and would result in a presumed AFTAP of 73.87% (that is, the interim value of adjusted plan assets as of the valuation date of $2,350,000 divided by the inclusive presumed adjusted funding target of $3,181,325).

(iv) Because Plan B's presumed AFTAP was over 80% prior to taking the amendment into account but would be less than 80% if the amendment were taken into account, section 436(c) and paragraph (c) of this section prohibit the plan amendment from taking effect unless the adjusted plan assets are increased so that the inclusive presumed AFTAP would be increased to 80%. This would require an additional amount of $195,060 (that is, 80% of the inclusive presumed adjusted funding target of $3,181,325 less the interim value of adjusted plan assets of $2,350,000).

(v) Plan B's prefunding balance of $150,000 is not large enough for Plan B to avoid the restriction on plan amendments, and therefore the deemed election to reduce the prefunding balance under paragraph (a)(5) of this section does not apply, and the amendment cannot take effect unless the plan sponsor makes a contribution described in paragraph (f)(2) of this section.

Example 5. (i) The facts are the same as in *Example 4,* except that Plan B's sponsor decides to make a contribution on February 1, 2011, to avoid the benefit limitation as provided in paragraph (f)(2) of this section. As of February 1, 2011, Plan B's effective interest rate for the 2011 plan year has not yet been determined. Pursuant to paragraph (f)(2)(i)(A)(*2*) of this section, Plan B's effective interest rate for 2011 is treated as 6.25%, which is the largest of the three segment interest rates applicable to the 2011 plan year, as provided in paragraph (f)(2)(i)(A)(*2*) of this section.

(ii) The amount of the contribution as of January 1, 2011, needed to avoid the restriction on plan amendments under paragraph (c) of this section is $195,060. However, because the contribution is not paid until February 1, 2011, the necessary contribution amount must be adjusted to reflect interest that would otherwise have accrued between the valuation date and the date of the contribution, at Plan B's effective interest rate for the 2011 plan year. The amount of the required contribution after adjustment is $196,048, determined as $195,060 increased for one month of compound interest at an effective annual interest rate of 6.25%.

(iii) In accordance with paragraph (g)(4)(i) of this section, the inclusive presumed AFTAP as of February 1, 2011, is 80 percent.

Example 6. (i) The facts are the same as in *Example 5.* As of April 1, 2011, the enrolled actuary for the plan has not certified the 2011 AFTAP. Beginning April 1, 2011, Plan A's presumed AFTAP is equal to be 70%, 10 percentage points lower than the inclusive presumed AFTAP as of February 1, 2011, in accordance with paragraphs (g)(2)(iii)(A) and (h)(2) of this section. On July 1, 2011, the enrolled actuary for the plan calculates the actual adjusted funding target, prior to taking the plan amendment into account, as $2,700,000, and determines the actual effective interest rate for 2011 to be 5.25%. On this basis, the actual AFTAP for 2011 (prior to taking the amendment into account) as 87.04% (that is, adjusted assets of $2,350,000 divided by the adjusted funding target of $2,700,000). Reflecting the $350,000 increase in funding target due to the plan amendment would increase the adjusted funding target to $3,050,000 and would decrease Plan B's AFTAP to 77.05%.

(ii) Based on the calculated adjusted funding target, the amount that was necessary to avoid the benefit restriction under paragraph (c) of this section was $90,000 (that is, 80% of the adjusted funding target reflecting the plan amendment (or $3,050,000), minus the adjusted value of plan assets of $2,350,000). This amount must be adjusted for interest between the valuation date and the date the contribution was made using the effective interest rate for Plan B. Therefore, the amount required on the payment date of February 1, 2011, was $90,385 (that is, $90,000 adjusted for compound interest for one month at Plan B's effective interest rate of 5.25% per year).

(iii) Under paragraph (g)(3)(ii)(B) of this section, the contribution made on February 1, 2011, is recharacterized as an employer contribution under section 430 to the extent that it exceeded the amount necessary to avoid application of the restriction on plan amendments under paragraph (c) of this section. Therefore, $105,663 (that is, the $196,048 actual contribution paid on February 1, 2011, minus the $90,385 required contribution based on the actual AFTAP) is recharacterized as an employer contribution under section 430 for the 2011 plan year. As such, it may be applied toward the minimum required contribution for 2011, or the plan sponsor can elect to credit the contribution to Plan B's prefunding balance to the extent that the contributions for the 2011 plan year exceed the minimum required contribution.

(iv) This recharacterization applied only because the 436 contribution was made during a period prior to the certification of Plan B's actual AFTAP for 2011 and during which no presumption applied (that is, when section 436 is applied based on the 2010 AFTAP, which was high enough that no restrictions applied for 2010). If the contribution had been made during a time when the presumptions applied (for instance, after April 1, 2011, when the presumed AFTAP was under 80%) then the only portion of the 436 contribution that would be recharacterized as an employer contribution under section 430 would be the portion of the interest adjustment attributable to the difference between the highest segment rate (6.25%) and the plan's actual effective interest rate (5.25%), in accordance with paragraph (f)(2)(i)(A)(*2*) of this section.

(v) After reflecting the plan amendment and the present value of the portion of the section 436 contribution that is not recharacterized as an employer contribution under section 430, the adjusted assets as of January 1, 2011, for purposes of section 436 are $2,440,000 ($2,350,000 plus $90,000) and the inclusive adjusted funding target is $3,050,000. Accordingly, the enrolled actuary certifies the inclusive AFTAP for 2011 as 80% ($2,440,00 ÷ $3,050,000). Note that assets for section 430 purposes are not increased to reflect the section 436 contribution as of January 1, 2011.

Example 7. (i) The facts are the same as in *Example 6,* except that on July 1, 2011, the enrolled actuary for Plan B calculates the actual adjusted funding target (before reflecting the plan amendment) as $3,000,000 and certifies the actual AFTAP as 78.33% prior to reflecting the plan amendment (that is, adjusted plan assets of $2,350,000 divided by the actual adjusted funding target of $3,000,000). Based on the provisions of paragraph (c) of this section, because the AFTAP prior to reflecting the amendment is less than 80%, the contribution required to avoid the restriction on plan amendments would have been the amount equal to the increase in funding target due to the plan amendment, or $350,000.

(ii) However, according to paragraph (g)(5)(ii)(A) of this section, the enrolled actuary's certification of the 2011 AFTAP

does not affect the application of the limitation under paragraph (c) of this section to the amendment, because the amendment to Plan B took effect prior to the date of the certification. Therefore, it is not necessary for Plan B's sponsor to contribute an additional amount in order for the plan amendment to remain in effect regardless of the extent to which the certified AFTAP for the plan year is less than the presumed inclusive AFTAP.

(h) *Presumed underfunding for purposes of benefit limitations*—(1) *Presumption of continued underfunding*—(i) *In general.* This paragraph (h)(1) applies to a plan for a plan year if a limitation under paragraph (b), (c), (d), or (e) of this section applied to the plan on the last day of the preceding plan year. If this paragraph (h)(1) applies to a plan, the first day of the plan year is a section 436 measurement date and the presumed adjusted funding target attainment percentage for the plan is the percentage under paragraph (h)(1)(ii) or (iii) of this section, whichever applies to the plan, beginning on that first day of the plan year and ending on the date specified in paragraph (h)(1)(iv) of this section.

(ii) *Rule where preceding year certification issued during preceding year*—(A) *General rule.* In any case in which the plan's enrolled actuary has issued a certification under paragraph (h)(4) of this section of the adjusted funding target attainment percentage for the plan year preceding the current plan year before the first day of the current plan year, the presumed adjusted funding target attainment percentage of the plan for the current plan year is equal to the prior plan year adjusted funding target attainment percentage until it is changed under paragraph (h)(1)(iv) of this section.

(B) *Special rule for late certifications.* If the certification of the adjusted funding target attainment percentage for the prior plan year occurred after the first day of the 10th month of that prior plan year, the plan is treated as if no such certification was made, unless the certification took into account the effect of any unpredictable contingent event benefits that are permitted to be paid based on unpredictable contingent events that occurred, and any plan amendments that became effective, during the prior plan year but before the certification (and any associated section 436 contributions).

(iii) *No certification for preceding year issued during preceding year*—(A) *Deemed percentage continues.* In any case in which the plan's enrolled actuary has not issued a certification under paragraph (h)(4) of this section of the adjusted funding target attainment percentage of the plan for the plan year preceding the current plan year during that prior plan year, the presumed adjusted funding target attainment percentage of the plan for the current plan year is equal to the presumed adjusted funding target attainment percentage that applied on the last day of the preceding plan year until the presumed adjusted funding target attainment percentage is changed under paragraph (h)(1)(iii)(B) or (h)(1)(iv) of this section. Thus, if the prior plan year was a 12-month plan year (so that the last day of the plan year was after the first day of the 10th month of the plan year and the rules of section 436(h)(2) and paragraph (h)(3) of this section applied to the plan for that plan year), then the presumed adjusted funding target attainment percentage for the current plan year is presumed to be less than 60 percent. By contrast, if the prior plan year was less than 9 months, the presumed adjusted funding target attainment percentage for the current plan year is the presumed adjusted funding target attainment percentage at the last day of the preceding plan year.

(B) *Enrolled actuary's certification in following year.* In any case in which the plan's enrolled actuary has issued the certification under paragraph (h)(4) of this section of the adjusted funding target attainment percentage of the plan for the plan year preceding the current plan year on or after the first day of the current plan year, the date of that prior plan year certification is a new section 436 measurement date for the current plan year. In such a case, the presumed adjusted funding target attainment percentage for the current plan year is equal to the prior plan year adjusted funding target attainment percentage (reduced by 10 percentage points if paragraph (h)(2)(iv) of this section applies to the plan) until it is changed under paragraph (h)(1)(iv) of this section. The rules of paragraph (h)(1)(ii)(B) of this section apply for purposes of determining whether the enrolled actuary has issued a certification of the adjusted funding target attainment percentage for the prior plan year during the current plan year.

(iv) *Duration of use of presumed adjusted funding target attainment percentage.* If this paragraph (h)(1) applies to a plan for a plan year, the presumed adjusted funding target attainment percentage determined under this paragraph (h)(1) applies until the earliest of—

(A) The first day of the 4th month of the plan year if paragraph (h)(2) of this section applies;

(B) The first day of the 10th month of the plan year if paragraph (h)(3) of this section applies;

(C) The date of a change in the presumed adjusted funding target attainment percentage under paragraph (g)(4) of this section; or

(D) The date the enrolled actuary issues a certification under paragraph (h)(4) of this section of the adjusted funding target attainment percentage for the plan year.

(2) *Presumption of underfunding beginning on first day of 4th month for certain underfunded plans*—(i) *In general.* This paragraph (h)(2) applies to a plan for a plan year if—

(A) The enrolled actuary for the plan has not issued a certification of the adjusted funding target attainment percentage for the plan year before the first day of the 4th month of the plan year; and

(B) The plan's adjusted funding target attainment percentage for the preceding plan year was either—

(*1*) At least 60 percent but less than 70 percent; or

(*2*) At least 80 percent but less than 90 percent.

(ii) *Special rule for first plan year a plan is subject to section 436.* This paragraph (h)(2) also applies to a plan for the first effective plan year if—

(A) The enrolled actuary for the plan has not issued a certification of the adjusted funding target attainment percentage for the plan year before the first day of the 4th month of the plan year; and

(B) The prior plan year adjusted funding target attainment percentage is at least 70 percent but less than 80 percent.

(iii) *Presumed adjusted funding target attainment percentage.* If this paragraph (h)(2) applies to a plan for a plan year and the date of the enrolled actuary's certification of the adjusted funding target attainment percentage under paragraph (h)(4) of this section for the prior plan year (taking into account the special rules for late certifications under paragraph (h)(1)(ii)(B) of this section) occurred before the first day of the 4th month of the current plan year, then, commencing on the first day of the 4th month of the current plan year—

(A) The presumed adjusted funding target attainment percentage of the plan for the plan year is reduced by 10 percentage points; and

(B) The first day of the 4th month of the plan year is a section 436 measurement date.

(iv) *Certification for prior plan year.* If this paragraph (h)(2) applies to a plan and the date of the enrolled actuary's certification of the adjusted funding

target attainment percentage under paragraph (h)(4) of this section for the prior plan year (taking into account the rules for late certifications under paragraph (h)(1)(ii)(B) of this section) occurs on or after the first day of the 4th month of the current plan year, then, commencing on the date of that prior plan year certification—

(A) The presumed adjusted funding target attainment percentage of the plan for the current plan year is equal to 10 percentage points less than the prior plan year adjusted funding target attainment percentage; and

(B) The date of the prior plan year certification is a section 436 measurement date.

(v) *Duration of use of presumed adjusted funding target attainment percentage.* If this paragraph (h)(2) applies to a plan for a plan year, the presumed adjusted funding target attainment percentage determined under this paragraph (h)(2) applies until the earliest of—

(A) The first day of the 10th month of the plan year if paragraph (h)(3) of this section applies;

(B) The date of a change in the presumed adjusted funding target attainment percentage under paragraph (g)(4) of this section; or

(C) The date the enrolled actuary issues a certification under paragraph (h)(4) of this section of the adjusted funding target attainment percentage for the plan year.

(3) *Presumption of underfunding beginning on first day of 10th month.* In any case in which no certification of the specific adjusted funding target attainment percentage for the current plan year under paragraph (h)(4) of this section is made with respect to the plan before the first day of the 10th month of the plan year, then, commencing on the first day of the 10th month of the current plan year—

(i) The presumed adjusted funding target attainment percentage of the plan for the plan year is presumed to be less than 60 percent; and

(ii) The first day of the 10th month of the plan year is a section 436 measurement date.

(4) *Certification of AFTAP*—(i) *Rules generally applicable to certifications*—(A) *In general.* The enrolled actuary's certification referred to in this section must be made in writing, must be signed and dated to show the date of the signature, must be provided to the plan administrator, and, except as otherwise provided in paragraph (h)(4)(ii) of this section, must certify the plan's adjusted funding target attainment percentage for the plan year. Except in the case of a range certification described in paragraph (h)(4)(ii) of this section, the certification must set forth the value of plan assets, the prefunding balance, the funding standard carryover balance, the value of the funding target used in the determination, the aggregate amount of annuity purchases included in the adjusted value of plan assets and the adjusted funding target, the unpredictable contingent event benefits permitted to be paid for unpredictable contingent events that occurred during the current plan year that were taken into account for the current plan year (including any associated section 436 contributions), the plan amendments that took effect in the current plan year that were taken into account for the current plan year (including any associated section 436 contributions), any benefit accruals that were restored for the plan year (including any section 436 contributions), and any other relevant factors. The actuarial assumptions and funding methods used in the calculation for the certification must be the actuarial assumptions and funding methods used for the plan for purposes of determining the minimum required contributions under section 430 for the plan year.

(B) *Determination of plan assets.* For purposes of making any determination of the adjusted funding target attainment percentage under this section, the determination is not permitted to include in plan assets contributions that have not been made to the plan by the certification date. Thus, the enrolled actuary's certification of the adjusted funding target attainment percentage for a plan year cannot take into account contributions that are expected to be made after the certification date. Notwithstanding the foregoing, for plan years beginning before January 1, 2009, the enrolled actuary's certification of the adjusted funding target attainment percentage is permitted to take into account employer contributions for the prior plan year that are reasonably expected to be made for that prior plan year but have not been contributed by the date of the enrolled actuary's certification. See paragraphs (h)(4)(iii) and (v) of this section for rules relating to changes in the certified percentage.

(ii) *Special rules for certification within range*—(A) *In general.* Under this paragraph (h)(4)(ii), the plan's enrolled actuary is permitted to certify during a plan year that the plan's adjusted funding target attainment percentage for that plan year either is less than 60 percent, is 60 percent or higher (but is less than 80 percent), is 80 percent or higher, or is 100 percent or higher. If the enrolled actuary has issued such a range certification for a plan year and the enrolled actuary subsequently issues a certification of the specific adjusted funding target attainment percentage for the plan before the end of that plan year, then the certification of the specific adjusted funding target attainment percentage is treated as a change in the applicable percentage to which paragraph (h)(4)(iii) of this section applies.

(B) *Effect of range certification before certification of specific percentage.* If a plan's enrolled actuary issues a range certification pursuant to this paragraph (h)(4)(ii), then, for purposes of this section (including application of the limitations of sections 436(b) and (c), contributions described in sections 436(b)(2), 436(c)(2), and 436(e)(2), and the mandatory reduction of the prefunding and funding standard carryover balances under paragraph (a)(5) of this section), the plan is treated as having a certified percentage at the smallest value within the applicable range until a certification of the plan's specific adjusted funding target attainment percentage for the plan year has been issued under paragraph (h)(4)(i) of this section. However, if the plan's enrolled actuary has issued a range certification for the plan year but does not issue a certification of the specific adjusted funding target attainment percentage for the plan by the last day of that plan year, the adjusted funding target attainment percentage for the plan is retroactively deemed to be less than 60 percent as of the first day of the 10th month of the plan year.

(C) *Effect of range certification on and after certification of specific percentage.* Once the certification of the specific adjusted funding target attainment percentage is issued by the plan's enrolled actuary, the certified percentage applies for all purposes of this section on and after the date of that certification. If the plan sponsor made section 436 contributions to avoid application of a benefit limitation during the period a range certification was in effect, those section 436 contributions are recharacterized as employer contributions under section 430 to the extent the contributions exceed the amount necessary to avoid application of a limitation based on the specific adjusted funding target attainment percentage as certified by the plan's enrolled actuary on or before the last day of the plan year.

(iii) *Change of certified percentage*—(A) *Application of new percentage.* If the enrolled actuary for the plan provides a certification of the adjusted funding target attainment percentage of

the plan for the plan year under this paragraph (h)(4) (including a range certification) and that certified percentage is superseded by a subsequent determination of the adjusted funding target attainment percentage for that plan year, then, except to the extent provided in paragraph (h)(4)(iv)(B) of this section, that later percentage must be applied for the portion of the plan year beginning on the date of the earlier certification. The subsequent determination could be the correction of a prior incorrect certification or it could be an update of a prior correct certification to take into account subsequent facts under the rules of paragraph (h)(4)(v) of this section. The implications of such a change depend on whether the change is a material change or an immaterial change. *See* paragraph (h)(4)(iv) of this section.

(B) *Material change.* A change in a plan's certified adjusted funding target attainment percentage constitutes a material change for a plan year if plan operations with respect to benefits that are addressed by section 436, taking into account any actual contributions and elections under section 430(f) made by the plan sponsor based on the prior certified percentage, would have been different based on the subsequent determination of the plan's adjusted funding target attainment percentage for the plan year. A change in a plan's adjusted funding target attainment percentage for a plan year can be a material change even if the only impact of the change occurs in the following plan year under the rules for determining the presumed adjusted funding target attainment percentage in that following year.

(C) *Immaterial change.* In general, an immaterial change is any change in an adjusted funding target attainment percentage for a plan year that is not a material change. In addition, subject to the requirement to recertify the adjusted funding target attainment percentage in paragraph (h)(4)(v)(B) of this section, a change in adjusted funding target attainment percentage is deemed to be an immaterial change if it merely reflects a change in the funding target for the plan year or the value of the adjusted plan assets after the date of the enrolled actuary's certification resulting from—

(*1*) Additional contributions for the preceding year that are made by the plan sponsor;

(*2*) The plan sponsor's election to reduce the prefunding balance or funding standard carryover balance;

(*3*) The plan sponsor's election to apply the prefunding balance or funding standard carryover balance to offset the prior plan year's minimum required contribution;

(*4*) A change in funding method or actuarial assumptions, where such change required actual approval of the Commissioner (rather than deemed approval);

(*5*) Unpredictable contingent event benefits which are permitted to be paid because the employer makes the section 436 contribution described in paragraph (f)(2)(iii)(A) of this section;

(*6*) Unpredictable contingent event benefits which are permitted to be paid because the plan's enrolled actuary determines that the increase in the funding target attributable to the occurrence of the unpredictable contingent event would not cause the plan's adjusted funding target attainment percentage to fall below 60 percent;

(*7*) A plan amendment which takes effect because the employer makes the section 436 contribution described in paragraph (f)(2)(iv)(A) of this section, the liability for which was not taken into account in the certification of the adjusted funding target attainment percentage; or

(*8*) A plan amendment which takes effect because the plan's enrolled actuary determines that the increase in the funding target attributable to the plan amendment would not cause the plan's adjusted funding target attainment percentage to fall below 80 percent, the liability for which was not taken into account in the certification of the adjusted funding target attainment percentage.

(iv) *Effect of change in percentage*—(A) *Material change.* In the case of a material change, if the plan's prior operations were in accordance with the prior certification of the adjusted funding target attainment percentage for the plan year (rather than the actual adjusted funding target attainment percentage for the plan year), then the plan will not have satisfied the requirements of section 401(a)(29) and section 436. Even if the plan's prior operations were in accordance with the subsequent certification of the adjusted funding target attainment percentage, the plan will not have satisfied the qualification requirements of section 401(a) because the plan will not have been operated in accordance with its terms during the period of time the prior certification applied. In addition, in the case of a material change, the rules requiring application of a presumed adjusted funding target attainment percentage under paragraphs (h)(1) through (h)(3) of this section continue to apply from and after the date of the prior certification until the date of the subsequent certification.

(B) *Immaterial change.* An immaterial change in the adjusted funding target attainment percentage applies prospectively only and does not change the inapplicability of the presumptions under paragraphs (h)(1), (2), and (3) of this section prior to the date of the later certification.

(v) *Rules relating to updated certification*—(A) *In general.* This paragraph (h)(4)(v) sets forth rules relating to updates of an actuary's certification of the plan's adjusted funding target attainment percentage for a plan year. Paragraphs (h)(4)(v)(B) and (D) of this section require that an updated adjusted funding target attainment percentage be certified in certain situations. Even if the updated adjusted funding target attainment percentage is not required to be certified, plan administrators may request that the actuary prepare an updated certification of the adjusted funding target attainment percentage, as described in paragraphs (h)(4)(v)(C) and (E) of this section. Any updated adjusted funding target attainment percentage determined under this paragraph (h)(4)(v) will apply beginning as of the date of the event that gave rise to the need for the update which is a section 436 measurement date. Thus, pursuant to this paragraph (h)(4)(v), the updated funding target attainment percentage applies thereafter for all purposes of section 436, including application with respect to unpredictable contingent events occurring on or after the measurement date (but not for unpredictable contingent events that occurred before such measurement date or for benefits with annuity starting dates before that measurement date). The updated adjusted funding target attainment percentage will continue to apply for the remainder of the plan year and will be used for the presumed adjusted funding target attainment percentage for the next plan year, unless there is a later updated certification of adjusted funding target attainment percentage for the plan year.

(B) *Requirement to recertify AFTAP if plan sponsor contributes to threshold.* If, during the plan year, unpredictable contingent event benefits are permitted to be paid, a plan amendment takes effect, or benefits are permitted to accrue because the plan sponsor makes a contribution described in paragraph (f)(2)(iii)(B), (f)(2)(iv)(B), or (f)(2)(v) of this section, then, in accordance with paragraph (f)(2)(ii)(C) of this section, the plan's enrolled actuary must issue an updated certification of the adjusted

funding target attainment percentage that takes into account such contribution as well as the liability for unpredictable contingent event benefits that are permitted to be paid, plan amendments that take effect during the plan year, and restored benefits.

(C) *Optional recertification of AFTAP after other unpredictable contingent event or plan amendment.* Except as provided in paragraph (h)(4)(v)(D) of this section, if, during a plan year, unpredictable contingent event benefits are permitted to be paid, or a plan amendment takes effect, because either the plan sponsor makes a contribution described in paragraph (f)(2)(iii)(A) or (f)(2)(iv)(A) of this section, or the plan's enrolled actuary determines that the increase in the funding target attributable to the occurrence of the unpredictable contingent event or the plan amendment would not cause the plan's adjusted funding target attainment percentage to fall below the applicable 60 percent or 80 percent threshold (taking into account the occurrence of all previous unpredictable contingent event benefits and plan amendments to the extent not already reflected in the certified adjusted funding target attainment percentage for the plan year (or update)), then the plan administrator may request that the plan actuary issue an updated certification of the adjusted funding target attainment percentage that takes into account the unpredictable contingent event benefits or plan amendments and any associated section 436 contribution.

(D) *Requirement to recertify AFTAP after deemed immaterial change.* If a change in the adjusted funding target attainment percentage as a result of one of the items listed in paragraph (h)(4)(iii)(C) of this section would be a material change, then the change is treated as an immaterial change only if the plan's enrolled actuary recertifies the adjusted funding target attainment percentage for the plan year as soon as practicable after the event that gives rise to the change.

(E) *Optional recertification after other immaterial change.* If a change in the adjusted funding target attainment percentage is immaterial, then the plan administrator may request that the plan actuary issue an updated certification of the adjusted funding target attainment percentage that takes into account the unpredictable contingent event benefits or plan amendments and any associated section 436 contribution.

(5) *Examples of rules of paragraphs (h)(1), (h)(2), and (h)(3) of this section.* The following examples illustrate the rules of paragraphs (h)(1), (h)(2), and (h)(3) of this section. Unless otherwise indicated, the examples in this section are based on the information in this paragraph (h)(5). Each plan is a non-collectively bargained defined benefit plan with a plan year that is the calendar year and a valuation date of January 1. The plan year is subject to section 436 in 2008. The plan does not have a funding standard carryover balance or a prefunding balance as of any of the dates mentioned, and the plan sponsor does not elect to utilize any of the methods in paragraph (f) of this section to avoid applicable benefit restrictions. No range certification under paragraph (h)(4) of this section has been issued. The plan sponsor is not in bankruptcy. The examples read as follows:

Example 1. (i) On July 15, 2010, the adjusted funding target attainment percentage (''AFTAP'') for Plan T for 2010 is certified to be 65%. Based on this AFTAP, Plan T is subject to the restriction on prohibited payments in paragraph (d)(3) of this section for the remainder of 2010.

(ii) Beginning January 1, 2011, Plan T's AFTAP for 2011 is presumed to be equal to the AFTAP for 2010, or 65%, under the provisions of paragraph (h)(1)(ii) of this section. Accordingly, the restriction on prohibited payments in paragraph (d)(3) of this section continues to apply.

(iii) On March 1, 2011, the enrolled actuary for the plan certifies that the actual AFTAP for 2011 is 80%. Therefore, beginning March 1, 2011, Plan T is no longer subject to the restriction under paragraph (d)(3) of this section, and so Plan T resumes paying the full amount of any prohibited payments elected by participants with an annuity starting date of March 1, 2011, or later.

Example 2. (i) The facts are the same as in *Example 1,* except that the enrolled actuary for the plan does not certify the AFTAP for 2011 until June 1, 2011, when it is certified to be 66%.

(ii) Beginning January 1, 2011, Plan T's AFTAP for 2011 is presumed to be equal to the AFTAP for 2010, or 65%, under the provisions of paragraph (h)(1)(ii) of this section. Accordingly, the restriction on prohibited payments in paragraph (d)(3) of this section continues to apply.

(iii) Pursuant to paragraph (h)(2)(iv) of this section, beginning April 1, 2011, the AFTAP for 2011 is presumed to be 55% (10 percentage points less than the AFTAP for 2010). Plan T is subject to the restriction on prohibited payments under paragraph (d)(1) of this section for annuity starting dates on or after April 1, 2011. In addition, Plan T is subject to the restriction on unpredictable contingent event benefits under paragraph (b) of this section for unpredictable contingent events occurring on or after April 1, 2011 and benefits are required to be frozen on and after April 1, 2011 under paragraph (e) of this section.

(iv) Once the enrolled actuary for the plan certifies that the AFTAP for 2011 for Plan T is 66%, Plan T is no longer subject to the restriction under paragraph (d)(1) of this section, but it is subject to the restriction under paragraph (d)(3) of this section. Plan T must resume paying prohibited payments, as restricted under paragraph (d)(3) of this section, for participants who elect benefits in accelerated forms of payment and who have an annuity starting date of June 1, 2011, or later. In addition, Plan T must provide benefits for any unpredictable contingent event occurring on or after January 1, 2011, to the extent permitted under paragraph (b) of this section. Similarly, Plan T is no longer subject to the restriction on benefit accruals under paragraph (e) of this section, and benefit accruals resume under Plan T beginning June 1, 2011, unless Plan T provides otherwise.

Example 3. (i) The facts are the same as in *Example 1,* except that the enrolled actuary for the plan does not certify the 2011 AFTAP until November 15, 2011. Beginning October 1, 2011, Plan T is conclusively presumed to have an AFTAP of less than 60%, in accordance with the provisions of paragraph (h)(3) of this section. Accordingly, Plan T is subject to the restrictions in paragraphs (b), (d)(1), and (e) of this section commencing on October 1, 2011.

(ii) On November 15, 2011, the enrolled actuary for the plan certifies that the AFTAP for 2011 is 72%. However, because the certification occurred after September 30, 2011, the certification does not constitute a new section 436 measurement date, and Plan T continues to be subject to the restrictions on unpredictable contingent event benefits, prohibited payments, and benefit accruals under paragraphs (b), (d)(1), and (e) of this section.

(iii) Beginning January 1, 2012, the 2012 AFTAP for Plan T is presumed to be equal to the 2011 AFTAP of 72%. Because the presumed 2012 AFTAP is between 70% and 80% and, therefore, paragraph (h)(2) of this section (which provides for a 10 percentage point reduction in a plan's AFTAP in certain cases) will not apply, the presumed AFTAP will remain at 72% until the plan's enrolled actuary certifies the AFTAP for 2012 or until paragraph (h)(3) of this section applies on the first day of the 10th month of the plan year. Because the presumed AFTAP is 72%, Plan T is no longer subject to the restrictions on prohibited payments under paragraph (d)(1) of this section, and Plan T must provide benefits for any unpredictable contingent event occurring on or after January 1, 2012, to the extent permitted under paragraph (b) of this section and must resume paying prohibited payments, as restricted under paragraph (d)(3) of this section, that are elected by participants with annuity starting dates on or after January 1, 2012. Similarly, Plan T is no longer subject to the restriction on benefit accruals under paragraph (e) of this section, and benefit accruals resume under Plan T beginning January 1, 2012, unless Plan T provides otherwise.

Example 4. (i) The facts are the same as in *Example 3,* except that the enrolled actuary for the plan does not issue a certification of the AFTAP for 2011 for Plan T until February 1, 2012.

(ii) Beginning on January 1, 2012, the presumptions in paragraph (h)(1)(iii) of this section apply for the 2012 plan year. Because the enrolled actuary for the plan has not

certified the AFTAP for 2011, the presumed AFTAP as of October 1, 2011, continues to apply for the period beginning January 1, 2012. Therefore, the AFTAP as of January 1, 2012, is presumed to be less than 60%, and Plan T continues to be subject to the restrictions on unpredictable contingent event benefits under paragraph (b) of this section, prohibited payments under paragraph (d)(1) of this section, and benefit accruals under paragraph (e) of this section.

(iii) On February 1, 2012, the enrolled actuary for the plan certifies that the AFTAP for 2011 for Plan T is 65%. Because the enrolled actuary for the plan has not issued a certification of the AFTAP for 2012, the provisions of paragraph (h)(1)(iii)(B) of this section apply. Accordingly, the certification date for the 2011 AFTAP (February 1, 2012) is a section 436 measurement date and 65% is the presumed AFTAP for 2012 beginning on that date.

(iv) Because the presumed AFTAP is over 60% but less than 80%, the full restriction on prohibited payments under paragraph (d)(1) of this section no longer applies; however, the partial restriction on prohibited payments under paragraph (d)(3) of this section applies beginning on February 1, 2012. Therefore, Plan T must pay a portion of the prohibited payments elected by participants with annuity starting dates on or after February 1, 2012. Furthermore, based on the presumed AFTAP of 65%, the restriction on unpredictable contingent event benefits under paragraph (b) of this section ceases to apply for events occurring on or after February 1, 2012, to the extent permitted under paragraph (b) of this section and the restriction on benefit accruals under paragraph (e) of this section no longer applies so that, unless Plan T provides otherwise, benefit accruals will resume as of February 1, 2012.

Example 5. (i) The facts are the same as in *Example 3,* except that the enrolled actuary for the plan does not issue a certification of the actual AFTAP for Plan T as of January 1, 2011, until May 1, 2012.

(ii) Beginning on January 1, 2012, the presumptions in paragraph (h)(1)(iii) of this section apply for the 2012 plan year. Because the enrolled actuary for the plan has not certified the actual AFTAP as of January 1, 2011, the presumed AFTAP as of October 1, 2011, continues to apply for the period beginning January 1, 2012. Therefore, the AFTAP as of January 1, 2012, is presumed to be less than 60%, and Plan T continues to be subject to the restrictions on unpredictable contingent event benefits under paragraph (b) of this section, on prohibited payments under paragraph (d)(1) of this section, and on benefit accruals under paragraph (e) of this section.

(iii) Since the enrolled actuary for the plan has not issued a certification of the actual AFTAP as of January 1, 2011, the rules of paragraph (h)(1)(iii) of this section apply beginning April 1, 2012, and the AFTAP is presumed to remain less than 60%. Plan T continues to be subject to the restrictions on unpredictable contingent event benefits under paragraph (b) of this section, on prohibited payments under paragraph (d)(1) of this section, and on benefit accruals under paragraph (e) of this section.

(iv) On May 1, 2012, the enrolled actuary for the plan certifies that the actual AFTAP for 2011 for Plan T is 65%. Because the enrolled actuary for the plan has not issued a certification of the actual AFTAP as of January 1, 2012, the provisions of paragraph (h)(2)(iv) of this section apply. Accordingly, on May 1, 2012, the 2012 AFTAP is presumed to be 10 percentage points less than the 2011 AFTAP, or 55%, so that the restrictions under paragraphs (b), (d), and (e) of this section continue to apply.

Example 6. (i) The enrolled actuary for Plan V certifies the plan's AFTAP for 2010 to be 69%. Based on this AFTAP, Plan V is subject to the restriction in paragraph (d)(3) of this section, and can only pay a portion (generally 50%) of the prohibited payments otherwise due to plan participants who commence benefits while the restriction is in effect. The enrolled actuary for the plan does not issue a certification of the AFTAP for 2011 until June 1, 2011.

(ii) Beginning January 1, 2011, Plan V's 2011 AFTAP is presumed to be equal to the 2010 AFTAP, or 69%, under the provisions of paragraph (h)(1)(ii) of this section. Accordingly, the restriction on prohibited payments in paragraph (d)(3) of this section continues to apply from January 1, 2011, through March 31, 2011, and Plan T may only pay a portion of the prohibited payments otherwise due to participants who commence benefit payments during this period.

(iii) Beginning April 1, 2011, the provisions of paragraph (h)(2)(ii) of this section apply. Under those provisions, the AFTAP beginning April 1, 2011, is presumed to be 10 percentage points lower than the presumed 2011 AFTAP, or 59%. Because Plan V's presumed AFTAP for 2011 is less than 60%, the restrictions on unpredictable contingent event benefits under paragraph (b) of this section, on the payment of accelerated benefit distributions under paragraph (d)(1) of this section, and on benefit accruals under paragraph (e) of this section apply. Accordingly, Plan V cannot pay any unpredictable contingent event benefits for events occurring on or after April 1, 2011, or prohibited payments to participants with an annuity starting date on or after April 1, 2011, and benefit accruals cease as of April 1, 2011.

(iv) On June 1, 2011, Plan V's enrolled actuary certifies that the plan's AFTAP for 2011 is 71%. Therefore, the restrictions on unpredictable contingent event benefits, prohibited payments, and benefit accruals in paragraphs (b), (d)(1), and (e) of this section no longer apply, but the partial restriction on benefit payments in paragraph (d)(3) of this section does apply. Accordingly, Plan V begins paying unpredictable contingent event benefits for events occurring on or after January 1, 2011, to the extent permitted under paragraph (b) of this section and a portion of the prohibited payments elected by participants with an annuity starting date on or after June 1, 2011. Benefit accruals previously restricted under paragraph (e) of this section resume effective June 1, 2011, unless Plan V provides otherwise.

(v) Participants who were not able to elect an accelerated form of payment during the period from April 1, 2011, through May 31, 2011, would be able to elect a new annuity starting date with a partial distribution of accelerated benefits effective June 1, 2011, if Plan V contained a preexisting provision permitting such an election after the restriction in paragraph (d)(1) of this section no longer applies. This is permitted because, under paragraph (a)(4)(ii)(B) of this section, a preexisting provision of this type is not considered a plan amendment and is therefore not subject to the plan amendment restriction in paragraph (c) of this section even though Plan V's AFTAP for 2011 is less than 80%.

(vi) Benefit accruals for the period beginning April 1, 2011, through May 31, 2011, would be automatically restored if Plan V contained a preexisting provision to retroactively restore benefit accruals restricted under paragraph (e) of this section after the restriction no longer applies. This is permitted because under paragraph (a)(4)(ii)(B) of this section, a preexisting provision of this type is not considered to be a plan amendment and is therefore not subject to the plan amendment restriction in paragraph (c) of this section even though Plan V's AFTAP for 2011 is less than 80%, because the period of the restriction did not exceed 12 months.

(6) *Examples of rules of paragraph (h)(4) of this section.* The following examples illustrate the rules of paragraph (h)(4) of this section:

Example 1. (i) Plan Y is a non-collectively bargained defined benefit plan with a plan year that is the calendar year and a valuation date of January 1. Plan Y does not have a funding standard carryover balance or a prefunding balance. Plan Y's sponsor is not in bankruptcy. In June of 2010, the actual AFTAP for 2010 for Plan Y is certified as 65%. On the last day of the 2010 plan year, Plan Y is subject to the restrictions in paragraph (d)(3) of this section.

(ii) The enrolled actuary for the plan issues a range certification on March 21, 2011, certifying that the AFTAP for 2011 is at least 60% and less than 80%. Because the certification was issued before the first day of the 4th month of the plan year, the 10 percentage point reduction in the presumed AFTAP under paragraph (h)(2) of this section does not apply. In addition, because the enrolled actuary for the plan has certified that the AFTAP is within this range, Plan Y is not subject to the full restriction on accelerated benefit payments in paragraph (d)(1) of this section or the restriction on benefit accruals under paragraph (e) of this section.

(iii) On August 1, 2011, the enrolled actuary for the plan certifies that the actual AFTAP as of January 1, 2011, is 75.86%. This AFTAP falls within the previously certified range. Thus, the change is immaterial under paragraph (h)(4)(iii) of this section and the new certification does not change the applicability or inapplicability of the restrictions in this section.

Example 2. (i) The facts are the same as in *Example 1,* except that the plan sponsor makes an additional contribution for the 2010 plan year on September 1, 2011, that is

not added to the prefunding balance. Reflecting this contribution, the enrolled actuary for the plan issues a revised certification stating that the AFTAP for 2011 is 81%, and Plan Y is no longer subject to the restriction on accelerated benefit payments under paragraph (d)(3) of this section on that date.

(ii) Although the revised certification changes the applicability of the restriction under paragraph (d)(3) of this section, the change is not a material change under paragraph (h)(4)(iii)(C)(*1*) of this section because the AFTAP changed only because of additional contributions for the preceding year made by the plan sponsor after the date of the enrolled actuary's initial certification.

(i) [Reserved]

(j) *Definitions.* For purposes of this section—

(1) *Adjusted funding target attainment percentage*—(i) *In general.* Except as otherwise provided in this paragraph (j)(1), the *adjusted funding target attainment percentage* for a plan year is the fraction (expressed as a percentage)—

(A) The numerator of which is the adjusted plan assets for the plan year described in paragraph (j)(1)(ii) of this section; and

(B) The denominator of which is the adjusted funding target for the plan year described in paragraph (j)(1)(iii) of this section.

(ii) *Adjusted plan assets*—(A) *General rule.* The adjusted plan assets for a plan year is generally determined by—

(*1*) Subtracting the plan's funding standard carryover balance and prefunding balance as of the valuation date from the value of plan assets for the plan year under section 430(g) (but treating the resulting value as zero if it is below zero); and

(*2*) Increasing the resulting value by the aggregate amount of purchases of annuities for participants and beneficiaries (other than participants who, at the time of the purchase, were highly compensated employees as defined in section 414(q), which definition includes highly compensated former employees under § 1.414(q)–1T, Q&A–4) which were made by the plan during the preceding 2 plan years, to the extent not included in plan assets for purposes of section 430.

(B) *Special rule for plans that are fully funded without regard to subtraction of funding balances from plan assets.* If for a plan year the value of plan assets determined without subtracting the funding standard carryover balance and the prefunding balance is not less than 100 percent of the plan's funding target determined under section 430 without regard to section 430(i), then the adjusted value of plan assets used in the calculation of the adjusted funding target attainment percentage for the plan year is determined without subtracting the plan's funding standard carryover balance and prefunding balance from the value of plan assets for the plan year.

(C) *Special rule for plans with section 436 contributions.* If an employer makes a contribution described in paragraph (f)(2) of this section after the valuation date in order to avoid or terminate limitations under section 436, then the present value of that contribution (determined using the effective interest rate under section 430(h)(2)(A) for the plan year) is permitted to be added to the plan assets as of the valuation date for purposes of determining or redetermining the adjusted funding target attainment percentage for a plan year, but only if the liability for the benefits, amendment, or accruals that would have been limited (but for the contribution) is included in determining the adjusted funding target for the plan year.

(D) *Transition rule.* Paragraph (j)(1)(ii)(B) of this section is applied to plan years beginning after 2007 and before 2011 by substituting for ''100 percent'' the applicable percentage determined in accordance with the following table:

In the case of a plan year beginning in calendar year:	The applicable percentage is:
2008	92
2009	94
2010	96

(E) *Limitation on transition rule.* Paragraph (j)(1)(ii)(D) of this section does not apply with respect to the current plan year unless, for each plan year beginning after December 31, 2007, and before the current plan year, the value of plan assets determined without subtracting the funding standard carryover balance and the prefunding balance is not less than the product of—

(*1*) The applicable percentage determined under paragraph (j)(1)(ii)(D) of this section for that plan year; and

(*2*) The funding target (determined without regard to the at-risk rules of section 430(i)) for that plan year.

(iii) *Adjusted funding target*—(A) *In general.* Except as otherwise provided in this paragraph (j)(1)(iii), the adjusted funding target equals the funding target for the plan year, determined in accordance with the rules set forth in § 1.430(d)–1, but without regard to the at-risk rules under section 430(i), increased by the aggregate amount of purchases of annuities that were added to assets for purposes of determining the plan's adjusted plan assets under paragraph (j)(1)(ii)(A)(*2*) of this section. The definition of adjusted funding target for a plan maintained by a commercial airline for which the plan sponsor has made the election described in section 402(a)(1) of Pension Protection Act of 2006 (PPA '06), Public Law 109–280 (120 Stat. 780), is the same as if it did not make such an election.

(B) *Adjusted funding target after updated certification.* After the plan's enrolled actuary prepares an updated certification of the adjusted funding target attainment percentage under paragraph (h)(4)(v) of this section, the adjusted funding target will also be updated to reflect unpredictable contingent event benefits and plan amendments not already taken into account.

(iv) *Plans with zero adjusted funding target.* If the adjusted funding target for the plan year is zero, then the adjusted funding target attainment percentage for the plan year is 100 percent.

(v) *Plans with end of year valuation dates.* [Reserved]

(vi) *Special rule for plans that are the result of a merger.* [Reserved]

(vii) *Special rule for plans that are involved in a spinoff.* [Reserved]

(2) *Annuity starting date*—(i) *General rule.* The term *annuity starting date* means, as applicable—

(A) The first day of the first period for which an amount is payable as an annuity as described in section 417(f)(2)(A)(i);

(B) In the case of a benefit not payable in the form of an annuity, the annuity starting date is the annuity starting date for the qualified joint and survivor annuity that is payable under the plan at the same time as the benefit that is not payable as an annuity;

(C) In the case of an amount payable under a retroactive annuity starting date, the benefit commencement date (instead of the date determined under paragraphs (j)(2)(i)(A) and (B) of this section);

(D) The date of the purchase of an irrevocable commitment from an insurer to pay benefits under the plan; and

(E) The date of any transfer to another plan described in paragraph (j)(6)(i)(C) of this section.

(ii) *Special rule for beneficiaries.* If a participant commences benefits at an annuity starting date (as defined in paragraph (j)(2)(i) of this section) and, after the death of the participant, payments continue to a beneficiary, the annuity starting date for the payments to the participant constitutes the annuity starting date for payments to the beneficiary, except that a new annuity starting date occurs (determined by applying paragraph (j)(2)(i)(A), (B), and

(C) of this section to the payments to the beneficiary) if the amounts payable to all beneficiaries of the participant in the aggregate at any future date can exceed the monthly amount that would have been paid to the participant had he or she not died.

(3) *First effective plan year.* The *first effective plan year* for a plan is the first plan year to which section 436 applies to the plan under paragraph (k)(1) or (k)(2) of this section.

(4) *Funding target.* In general, the *funding target* means the funding target under § 1.430(d)–1, without regard to the at-risk rules under section 430(i) and § 1.430(i)–1. However, solely for purposes of sections 436(b)(2)(A) and (c)(2)(A), the funding target means the funding target under § 1.430(i)–1 if the plan is in at-risk status for the plan year.

(5) *Prior plan year adjusted funding target attainment percentage*—(i) *In general.* Except as otherwise provided in this paragraph (j)(5), the *prior plan year adjusted funding target attainment percentage* is the adjusted funding target attainment percentage determined under paragraph (j)(1) of this section for the immediately preceding plan year.

(ii) *Special rules*—(A) *Special rule for new plans.* In the case of a plan established during the plan year that was not the result of a merger or spinoff, the adjusted funding target attainment percentage is equal to 100 percent for plan years before the plan was established. Except as otherwise provided in paragraph (j)(5)(ii)(B) of this section, a plan that has a predecessor plan in accordance with § 1.415(f)–1(c) is not a plan established during the plan year under this paragraph (j)(5)(ii)(A). Instead, if the plan has a predecessor plan, the adjusted funding target attainment percentage for the prior plan year is the adjusted funding target attainment percentage for the prior plan year for the predecessor plan (and that predecessor plan's adjusted funding target attainment percentage is treated as equal to 100 percent on any date on which it is terminated, other than in a distress termination).

(B) *Special rules for plans that are the result of a merger.* [Reserved]

(C) *Special rules for plans that are involved in a spinoff.* [Reserved]

(iii) *Special rules for 2007 plan year*—(A) *General determination of 2007 adjusted funding target attainment percentage.* In the case of the first plan year beginning in 2008, except as otherwise provided in this paragraph (j)(5), the adjusted funding target attainment percentage for the immediately preceding plan year (the 2007 plan year) is determined as the fraction (expressed as a percentage)—

(*1*) The numerator of which is the value of plan assets determined under paragraph (j)(5)(iii)(B) of this section increased by the aggregate amount of purchases of annuities for participants and beneficiaries (other than participants who, at the time of the purchase, were highly compensated employees as defined in section 414(q), which definition includes highly compensated former employees under § 1.414(q)–1T, Q&A–4 which were made by the plan during the preceding 2 plan years, to the extent not included in plan assets under section 412(c)(2) (as in effect prior to amendment by PPA '06); and

(*2*) The denominator of which is the plan's current liability determined pursuant to section 412(l)(7) (as in effect prior to amendment by PPA '06) on the valuation date for the 2007 plan year increased by the aggregate amount of purchases of annuities that were added to the plan assets under the rules of paragraph (j)(5)(iii)(A)(*1*) of this section.

(B) *General determination of value of plan assets*—(*1*) *In general.* The value of plan assets for purposes of this paragraph (j)(5)(iii) is determined under section 412(c)(2) as in effect for the 2007 plan year, except that the value of plan assets prior to subtracting the plan's funding standard account credit balance described in paragraph (j)(5)(iii)(B)(*2*) of this section must be adjusted so that the value of plan assets is neither less than 90 percent of the fair market value of plan assets nor greater than 110 percent of the fair market value of plan assets on the valuation date for that plan year.

(*2*) *Subtraction of credit balance.* If a plan has a funding standard account credit balance as of the valuation date for the 2007 plan year, that balance is subtracted from the value of plan assets described in paragraph (j)(5)(iii)(B)(*1*) of this section as of that valuation date. However, the subtraction does not apply if the value of plan assets prior to adjustment under paragraph (j)(5)(iii)(B)(*1*) of this section is greater than or equal to 90 percent of the plan's current liability as of the valuation date for the 2007 plan year.

(*3*) *Effect of funding standard carryover balance reduction for 2007 plan year.* Notwithstanding paragraph (j)(5)(iii)(B)(*2*) of this section, if, for the first plan year beginning in 2008, the employer has made an election to reduce some or all of the funding standard carryover balance as of the first day of that year in accordance with § 1.430(f)–1(e), then the present value (determined as of the valuation date for the 2007 plan year using the valuation interest rate for that plan year) of the amount so reduced is not treated as part of the funding standard account credit balance when that balance is subtracted from the asset value under paragraph (j)(5)(iii)(B)(*2*) of this section.

(C) *Plan with end-of-year valuation date.* With respect to the first plan year beginning in 2008, if the plan had a valuation date under section 412 that was the last day of the plan year for each of the plan years beginning in 2006 and 2007, the adjusted funding target attainment percentage for the 2007 plan year may be determined as the fraction (expressed as a percentage)—

(*1*) The numerator of which is the value of plan assets determined under paragraph (j)(5)(iii)(D) of this section increased by the aggregate amount of purchases of annuities for participants and beneficiaries (other than participants who, at the time of the purchase, were highly compensated employees as defined in section 414(q), which definition includes highly compensated former employees under § 1.414(q)–1T, Q&A–4 which were made by the plan during the preceding 2 plan years, to the extent not included in plan assets under section 412(c)(2) (as in effect prior to amendment by PPA '06); and

(*2*) The denominator of which is the plan's current liability determined pursuant to section 412(l)(7) (as in effect prior to amendment by PPA '06) on the valuation date for the second plan year that begins before 2008 (the 2006 plan year), including the increase in current liability for the 2006 plan year, increased by the aggregate amount of purchases of annuities that were added to the plan assets under the rules of paragraph (j)(5)(iii)(C)(*1*) of this section.

(D) *Special asset determinations for 2006 adjusted funding target attainment percentage*—(*1*) *General rule.* If the adjusted funding target attainment percentage for the 2007 plan year is determined under the rules of paragraph (j)(5)(iii)(C) of this section, then the value of plan assets is determined as the value of plan assets under section 412(c)(2) as in effect for the 2006 plan year, adjusted as provided in this paragraph (j)(5)(iii)(D).

(*2*) *Inclusion of contributions for 2006.* Contributions made for the 2006 plan year are taken into account in determining the value of plan assets, regardless of whether those contributions are made during the plan year or after the end of the plan year and within the period specified under section 412(c)(10) (as in effect prior to amendment by PPA '06).

(*3*) *Restriction to 90–110 percent corridor.* The value of plan assets taking into account the amount of contributions made for the 2006 plan

year is increased or decreased, as necessary, so that it is neither less than 90 percent of the fair market value of plan assets nor greater than 110 percent of the fair market value of plan assets on the valuation date for the 2006 plan year (taking into account assets attributable to contributions for the 2006 plan year).

(*4*) *Subtraction of credit balance*. The plan's funding standard account credit balance as of the end of the 2006 plan year is generally subtracted from the value of plan assets determined after application of paragraph (j)(5)(iii)(D)(*3*) of this section. However, this subtraction does not apply if the value of plan assets is greater than or equal to 90 percent of the plan's current liability determined under section 412(l)(7) (as in effect prior to amendment by PPA '06) on the valuation date for the 2006 plan year.

(E) *Special rules for mergers and spinoffs*. Rules similar to the rules of paragraph (j)(5)(ii) of this section apply for purposes of determining the adjusted funding target attainment percentage for the 2007 plan year in the case of a newly established plan, a plan that is the result of a merger of two plans, or a plan that is in involved in a spinoff.

(6) *Prohibited payment*—(i) *General rule*. The term *prohibited payment* means—

(A) Any payment for a month that is in excess of the monthly amount paid under a straight life annuity (plus any social security supplements described in the last sentence of section 411(a)(9)) to a participant or beneficiary whose annuity starting date occurs during any period that a limitation under paragraph (d) of this section is in effect;

(B) Any payment for the purchase of an irrevocable commitment from an insurer to pay benefits;

(C) Any transfer of assets and liabilities to another plan maintained by the same employer (or by any member of the employer's controlled group) that is made in order to avoid or terminate the application of section 436 benefit limitations; and

(D) Any other amount that is identified as a prohibited payment by the Commissioner in revenue rulings and procedures, notices, and other guidance published in the Internal Revenue Bulletin (*see* § 601.601(d)(2) relating to objectives and standards for publishing regulations, revenue rulings and revenue procedures in the Internal Revenue Bulletin).

(ii) *Special rule for beneficiaries*. In the case of a beneficiary that is not an individual, the amount that is a prohibited payment is determined by substituting for the amount in paragraph (j)(1)(i)(A) of this section the monthly amount payable in installments over 240 months that is actuarially equivalent to the benefit payable to the beneficiary.

(7) *Section 436 contributions. Section 436 contributions* are the contributions described in paragraph (f)(2) of this section that are made in order to avoid the application of section 436 limitations under a plan for a plan year.

(8) *Section 436 measurement date.* A *section 436 measurement date* is the date that is used to determine when the limitations of sections 436(d) and 436(e) apply or cease to apply, and is also used for calculations with respect to applying the limitations of paragraphs (b) and (c) of this section. *See* paragraphs (h)(1)(i), (h)(2)(iii)(B), (h)(2)(iv)(B), and (h)(3)(i) of this section regarding section 436 measurement dates that result from application of the presumptions under paragraph (h) of this section.

(9) *Unpredictable contingent event.* An *unpredictable contingent event benefit* means any benefit or increase in benefits to the extent the benefit or increase would not be payable but for the occurrence of an unpredictable contingent event. For this purpose, an *unpredictable contingent event* means a plant shutdown (whether full or partial) or similar event, or an event (including the absence of an event) other than the attainment of any age, performance of any service, receipt or derivation of any compensation, or the occurrence of death or disability. For example, if a plan provides for an unreduced early retirement benefit upon the occurrence of an event other than the attainment of any age, performance of any service, receipt or derivation of any compensation, or the occurrence of death or disability, then that unreduced early retirement benefit is an unpredictable contingent event benefit to the extent of any portion of the benefit that would not be payable but for the occurrence of the event, even if the remainder of the benefit is payable without regard to the occurrence of the event. Similarly, if a plan includes a benefit payable upon the presence (including the absence) of circumstances specified in the plan (other than the attainment of any age, performance of any service, receipt or derivation of any compensation, or the occurrence of death or disability), but not upon a severance from employment that does not include those circumstances, that benefit is an unpredictable contingent event benefit.

(10) *Examples*. The following examples illustrate the rules of this paragraph (j):

Example 1. (i) Plan S is a non-collectively bargained defined benefit plan with a plan year that is the calendar year and a valuation date of January 1. The first effective plan year is 2008. Plan S is not in at-risk status for 2008.

(ii) As of January 1, 2008, Plan S has a value of plan assets (equal to the market value of assets) of $2,100,000 and a funding standard carryover balance of $200,000. During 2006, assets from Plan S were used to purchase a total of $100,000 in annuities for employees other than highly compensated employees. No annuities were purchased during 2007. On May 1, 2008, the enrolled actuary for the plan determines that the funding target as of January 1, 2008, is $2,500,000.

(iii) The adjusted value of assets for Plan S as of January 1, 2008, is $2,000,000 (that is, plan assets of $2,100,000, plus annuity purchases of $100,000, and minus the funding standard carryover balance of $200,000). The adjusted funding target is $2,600,000 (that is, the funding target of $2,500,000, increased by the annuity purchases of $100,000).

(iv) Based on the above adjusted plan assets and adjusted funding target, the adjusted funding target attainment percentage (AFTAP) as of January 1, 2008, would be 76.92%. Since the AFTAP is less than 80% but is at least 60%, Plan S is subject to the restrictions in paragraph (d)(3) of this section.

Example 2. (i) The facts are the same as in *Example 1*, except that it is reasonable to expect that the plan sponsor will make a contribution of $80,000 to Plan S for the 2007 plan year by September 15, 2008. This amount is in excess of the minimum required contribution for 2007. The plan sponsor elects to reduce the funding standard carryover balance by $80,000.

(ii) Because it is reasonable to expect that the $80,000 will be contributed by the plan sponsor, that amount is taken into account when the enrolled actuary certifies the 2008 AFTAP under the special rule in paragraph (h)(4)(i)(B) of this section for plan years beginning before 2009. Accordingly, the enrolled actuary for the plan certifies the 2008 AFTAP as 80% (that is, adjusted plan assets of $2,080,000, reflecting the $80,000 in contributions receivable, divided by the adjusted funding target of $2,600,000).

(iii) The ability to take contributions into account before they are actually paid to the plan is available only for plan years beginning before 2009. Furthermore, if the employer does not actually make the contribution and the difference between the incorrect certification and the corrected AFTAP constitutes a material change, the plan will have violated section 401(a)(29) or will not have been operated in accordance with its terms.

Example 3. (i) Plan R is a defined benefit plan with a plan year that is the calendar year and a valuation date of January 1. Section 436 applies to Plan R for 2008. The valuation interest rate for the 2007 plan year for Plan R is 7%. The fair market value of assets of Plan R as of January 1, 2007, is $1,000,000. The actuarial value of assets of Plan R as of January 1, 2007, is $1,200,000.

The current liability of Plan R as of January 1, 2007, is $1,500,000. The funding standard account credit balance as of January 1, 2007, is $80,000. The funding standard carryover balance of Plan R is $50,000 as of the beginning of the 2008 plan year. The sponsor of Plan R, Sponsor T, elects in 2008 to reduce the funding standard carryover balance in accordance with § 1.430(f)–1 by $45,000. No annuities were purchased using plan assets during 2005 or 2006.

(ii) Pursuant to paragraph (j)(5)(iii)(B)(*1*) of this section, the asset value used to determine the AFTAP for the 2007 plan year is limited to 110% of the fair market value of assets on January 1, 2007, or $1,100,000 (110% of $1,000,000).

(iii) Pursuant to paragraph (j)(5)(iii)(B)(*2*) of this section, the funding standard account credit balance as of January 1, 2007, is subtracted from the asset value used to determine the AFTAP for the 2007 plan year. However, pursuant to paragraph (j)(5)(iii)(B)(*3*) of this section, the present value of the amount by which Sponsor T elected to reduce the funding standard carryover balance in 2008 is not subtracted.

(iv) The present value, determined at an interest rate of 7%, of the $45,000 reduction in the funding standard carryover balance elected by Sponsor T in 2008 is $42,056. Thus, $42,056 is not subtracted from the 2007 plan year asset value. Accordingly, the funding standard account credit balance that is subtracted from the 2007 plan year asset value is $37,944 (that is, $80,000 less $42,056).

(v) Thus, the asset value that is used to determine the FTAP for the 2007 plan year is $1,100,000 less $37,944, or $1,062,056. Accordingly, for purposes of this section, the FTAP for the 2007 plan year for Plan R is 70.8% (that is, $1,062,056 divided by $1,500,000).

Example 4. (i) Plan T is a non-collectively bargained defined benefit plan that was established prior to 2007. Plan T has a plan year that is the calendar year and a valuation date of January 1. The first effective plan year is 2008; the plan met the conditions of paragraph (j)(1)(ii)(E) of this section for 2008. As of January 1, 2009, Plan T has a value of plan assets (equal to the market value of assets) of $3,000,000, a funding standard carryover balance of $150,000, and a prefunding balance of $50,000. During 2007 and 2008, assets from Plan T were used to purchase a total of $400,000 in annuities for employees other than highly compensated employees. The funding target for Plan T (without regard to the at-risk rules of section 430(i)) is $3,200,000 as of January 1, 2009.

(ii) The plan's funding status is calculated in accordance with paragraph (j)(1)(ii)(B) of this section to determine whether the special rule for fully-funded plans applies to Plan T. Accordingly, the value of plan assets determined without subtracting the funding standard carryover balance and the prefunding balance is 93.75% of the plan's funding target ($3,000,000 ÷ $3,200,000). The applicable transitional percentage in paragraph (j)(1)(ii)(D) of this section is 94% for 2009. Because the percentage calculated above is less than 94%, the transition rule does not apply to Plan T.

(iii) Accordingly, the January 1, 2009, AFTAP for Plan T is calculated without reflecting the special rule in paragraph (j)(1)(ii)(B) of this section. The AFTAP as of January 1, 2009, is calculated by dividing the adjusted assets by the adjusted funding target. For this purpose, the value of assets is increased by the annuities purchased for nonhighly compensated employees during 2007 and 2008, and decreased by the funding standard carryover balance and the prefunding balance as of January 1, 2009, resulting in an adjusted asset value of $3,200,000 (that is, $3,000,000 + $400,000 − $150,000 − $50,000). The funding target is increased by the annuities purchased for nonhighly compensated employees during 2007 and 2008, resulting in an adjusted funding target of $3,600,000 (that is, $3,200,000 + $400,000). The AFTAP for Plan T for 2009 is therefore $3,200,000 ÷ $3,600,000, or 88.89%.

(k) *Effective/applicability dates*—(1) *Statutory effective date.* Section 436 generally applies to plan years beginning on or after January 1, 2008. The applicability of section 436 for purposes of determining the minimum required contribution is delayed for certain plans in accordance with sections 104 through 106 of PPA '06.

(2) *Collectively bargained plan exception*—(i) *In general.* In the case of a collectively bargained plan that is maintained pursuant to one or more collective bargaining agreements between employee representatives and one or more employers ratified before January 1, 2008, section 436 does not apply to plan years beginning before the earlier of—

(A) January 1, 2010; or

(B) The later of—

(*1*) The date on which the last such collective bargaining agreement relating to the plan terminates (determined without regard to any extension thereof agreed to after August 17, 2006); or

(*2*) The first day of the first plan year to which section 436 would (but for this paragraph (k)(2)) apply.

(ii) *Treatment of certain plan amendments.* For purposes of this paragraph (k)(2), any plan amendment made pursuant to a collective bargaining agreement relating to the plan which amends the plan solely to conform to any requirement added by section 436 is not treated as a termination of the collective bargaining agreement.

(iii) *Treatment of plans with both collectively bargained and non-collectively bargained employees.* In the case of a plan with respect to which a collective bargaining agreement applies to some, but not all, of the plan participants, the plan is considered a collectively bargained plan for purposes of this paragraph (k)(2) if it is considered a collectively bargained plan under the rules of paragraph (a)(5)(ii)(B) of this section.

(3) *Effective date/applicability date of regulations.* This section applies to plan years beginning on or after January 1, 2010. For plan years beginning before January 1, 2010, plans are permitted to rely on the provisions set forth in this section for purposes of satisfying the requirements of section 436.

PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

■ **Par. 9.** The authority citation for part 602 continues to read as follows:

Authority: 26 U.S.C. 7805.

■ **Par. 10.** In § 602.101, paragraph (b) is amended by adding entries for §§ 1.430(f)–1, 1.430(g)–1, 1.430(h)(2)–1, and 1.436–1 to the table to read as follows:

§ 602.101 OMB Control numbers.

* * * * *

(b) * * *

CFR part or section where identified and described	Current OMB control No.
* * * * *	
1.430(f)–1	1545–2095
1.430(g)–1	1545–2095
1.430(h)(2)–1	1545–2095
1.436–1	1545–2095
* * * * *	

Steven Miller,

Acting Deputy Commissioner for Services and Enforcement.

Approved: September 24, 2009.

Michael Mundaca,

Acting Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. E9–24284 Filed 10–14–09; 8:45 am]

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Federal Register

Thursday,
October 15, 2009

Part III

Securities and Exchange Commission

17 CFR Parts 220, 229, 239, et al.
Credit Ratings Disclosure and Concept Release on Possible Rescission of Rule 436(g) Under the Securities Act of 1933; Proposed Rules

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 229, 239, 240, 249 and 274

[Release Nos. 33–9070; 34–60797; IC–28942; File No. S7–20–09]

RIN 3235–AK41

Credit Ratings Disclosure

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: We are proposing amendments to our rules to require disclosure of information regarding credit ratings used by registrants, including closed-end management investment companies, in connection with a registered offering of securities so that investors will better understand the credit rating and its limitations. The amendments we are proposing today also would require additional disclosure that would inform investors about potential conflicts of interest that could affect the credit rating. In addition, we are proposing amendments to require disclosure of preliminary credit ratings in certain circumstances so that investors have enhanced information about the credit ratings process that may bear on the quality or reliability of the rating. The proposed amendments would be applicable to registration statements filed under the Securities Act of 1933, the Securities Exchange Act of 1934 and the Investment Company Act of 1940, and Forms 8–K and 20–F.

DATES: Comments should be received on or before December 14, 2009.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/proposed.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number S7–20–09 on the subject line; or

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

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 S7–20–09. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Web site (*http://www.sec.gov/rules/proposed.shtml*). Comments are also available for public 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. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Blair F. Petrillo, Special Counsel in the Office of Rulemaking, Division of Corporation Finance, at (202) 551–3430, or with respect to questions regarding investment companies, Devin F. Sullivan, Staff Attorney in the Office of Disclosure Regulation, Division of Investment Management, at (202) 551–6784, 100 F Street, NE., Washington, DC 20549.

SUPPLEMENTARY INFORMATION: The Commission is proposing amendments to Regulation S–K,[1] and forms under the Securities Act of 1933,[2] the Securities Exchange Act of 1934 [3] and the Investment Company Act of 1940.[4] In Regulation S–K, the Commission is proposing to amend Items 10 [5] and 202.[6] Under the Securities Act, the Commission is proposing to amend Form S–3 [7] and Form S–4.[8] Under the Exchange Act, the Commission is proposing to amend Rule 13a–11 [9] and Rule 15d–11,[10] as well as Form 8–K [11] and Form 20–F.[12] The Commission is also proposing amendments to Form N–2 [13] under the Securities Act and the Investment Company Act.

I. Proposed Amendments

A. Introduction

The disclosure requirements we are proposing today are intended to enhance credit rating disclosure so that investors will better understand credit ratings and their limitations. These proposals reflect our concerns that even though credit ratings appear to be a major factor in the investment decision for investors and play a key role in marketing and pricing of the securities,[14] investors may not have access to sufficient information about credit ratings. We believe our proposed rules would improve investor protection by providing information about credit ratings that will place the credit rating in an appropriate context.

We have four principal areas of concern. First, we are concerned that investors may not be provided with sufficient information to understand the scope or meaning of ratings being used to market various securities. Historically, credit ratings were intended to be a measure of the registrant's ability to repay its corporate debt.[15] As the types of investment products expand and become more complex, however, the returns (including the prospect of repayment) on these securities often are dependent on factors other than the creditworthiness of the registrant.[16] As a result, the information conveyed by ratings has become increasingly less comparable across types of securities.[17] Investors, however, may not be aware of the differences underlying two

[1] 17 CFR 229.10 through 1123.

[2] 15 U.S.C. 77a *et seq.*

[3] 15 U.S.C. 78a *et seq.*

[4] 15 U.S.C. 80a–1 *et seq.*

[5] 17 CFR 229.10.

[6] 17 CFR 229.202.

[7] 17 CFR 239.13.

[8] 17 CFR 239.25.

[9] 17 CFR 240.13a–11.

[10] 17 CFR 240.15d–11.

[11] 17 CFR 249.308.

[12] 17 CFR 249.220f.

[13] 17 CFR 239.14; 17 CFR 274.11a–1.

[14] *See* Report on the Role and Function of Credit Rating Agencies in the Operation of the Securities Markets, January 2003, at *http://www.sec.gov/news/studies/credratingreport0103.pdf* (noting that issuers use credit ratings in part ''to improve the marketability or pricing of their financial obligations.''). See also Bo Becker and Todd Milbourn, *Reputation and Competition: Evidence from the Credit Rating Industry,* Working Paper, (June 2009) at *http://www.hbs.edu/research/pdf/09-051.pdf.*

[15] *See Disclosure of Ratings in Registration Statements,* Release No. 33–6336 (Aug. 6, 1981) [46 FR 42024].

[16] *See Disclosure of Security Ratings,* Release No. 33–7086 (Aug. 31, 1994) [59 FR 46304] (''1994 Ratings Release'') (noting that ''[b]ecause of these non-credit payment risks, there is substantially greater uncertainty relating to yield and total return than for traditional debt obligations of comparable credit rating''). *See also* Joseph Mason and Joshua Rosner, *Where Did the Risk Go? How Misapplied Bond Ratings Cause Mortgage Backed Securities and Collateralized Debt Obligation Market Disruptions,* Working Paper, (May 2007), at *http://ssrn.com/abstract=1027475.*

[17] As we noted in 1994:

> Today, a traditional corporate debt instrument with fixed principal and interest obligations, a structured note whose principal and interest is tied, for example, to an index of securities, an ''interest-only'' strip, a collateralized mortgage obligation security, a residual interest in a CMO offering, and a cash flow (or ''kitchen-sink'') bond all can be designated ''triple-a,'' notwithstanding that investment returns on most of these instruments are largely dependent on factors in addition to the issuer's creditworthiness and that the scope of the rating differs among the securities.

See 1994 Ratings Release in note 16 above. See also Alan Blinder, *Six Fingers of Blame in the Mortgage Mess,* N.Y. Times, Sept. 30, 2007.

securities with the same credit rating even if the securities were issued by the same registrant. The recent turmoil in the credit markets has raised serious concerns that investors may not have fully understood what credit ratings mean, or the limits inherent in them.[18] Even when securities are highly rated, investors can suffer significant losses, as was evident during the recent market crisis.[19] For example, the value of AAA-rated mortgage-backed securities fell 70 percent from January 2007 to January 2008.[20] As a result, we believe that investors should be provided with additional disclosure regarding credit ratings so that investors can choose how much weight to place on a credit rating when making an investment decision.

Second, we are concerned that investors may not have access to information allowing them to appreciate fully the potential conflicts of interest faced by credit rating agencies and how these conflicts may impact ratings. For example, most credit rating agencies are paid by the registrants who receive the credit ratings.[21] This situation creates the potential for a rating to be inflated by a credit rating agency as a result of the credit rating agency's desire to keep the registrant's business for future ratings.[22] Credit rating agencies also may provide additional services to registrants, which can be an important source of revenue for the credit rating agency.[23]

Third, there has been significant discussion of the possibility that ''ratings shopping'' may lead to inflated ratings.[24] Ratings shopping occurs when a registrant, or someone acting on its behalf, seeks the highest credit rating available from multiple credit rating agencies. We are concerned that investors have not been informed about this practice, which we believe could color their assessment of the reliability of the credit ratings ultimately obtained.

Finally, even though credit ratings appear to be a key part of investment decisions and are used to market securities, disclosure about ratings is not required in prospectuses currently. As a result, we are concerned that investors may not be receiving even basic information about a potentially key element of their investment decisions.

To address these concerns, we are proposing several enhancements to our disclosure rules. As a threshold matter, we are proposing to require disclosure by registrants regarding credit ratings in their registration statements under the Securities Act and the Exchange Act, and by closed-end management investment companies (''closed-end funds'') in registration statements under the Securities Act and the Investment Company Act, if the registrant uses the rating in connection with a registered offering. The disclosure requirements are intended to address the concerns noted above. To keep investors apprised of developments relating to credit ratings for their investments, we are also proposing amendments to Exchange Act reports to require registrants to disclose changes to credit ratings. We are not proposing to require registrants to obtain credit ratings; instead, we are proposing to require disclosure about credit ratings used by registrants and other offering participants in connection with a registered offering in order to place the credit rating in its proper context for investors.

In a companion concept release,[25] we seek comment on whether we should propose to repeal the exemption for credit ratings provided by NRSROs from being considered a part of the registration statement prepared or certified by a person within the meaning of Sections 7[26] and 11[27] of the Securities Act currently contained in Rule 436(g) under the Securities Act.[28] If Rule 436(g) were eliminated, there would no longer be a distinction between NRSROs and credit rating agencies that are not NRSROs for purposes of liability under Section 11 of the Securities Act.

As we noted, we continue to have concerns about the appropriate use of credit ratings by investors, but we recognize the reality that credit ratings are important to investors. Therefore, we seek to improve investor protection through enhanced disclosure about credit ratings. In addition to proposing the rule amendments set forth in this release, the Commission today is also adopting certain amendments to its existing rules regulating NRSROs, as well as proposing additional amendments and a new rule.[29] We believe that today's proposals could help reduce undue reliance on credit ratings by providing investors with information about what a credit rating is, and what it is not, and other information bearing on the reliability of ratings to place the credit rating in its proper context. In light of the importance of credit ratings to investors and their use by registrants in marketing securities, we believe it is appropriate to require that this information be included in a registrant's prospectus so that all investors receive this information.

B. Background

In 1981, the Commission issued a statement of policy regarding its view of disclosure of credit ratings in registration statements under the Securities Act.[30] This statement marked a clear shift from the Commission's historic practice of discouraging the

[18] *See e.g.* Recommendations of the Securities Industry and Financial Markets Association Credit Rating Agency Task Force (July 2008), at *http://www.sifma.org/capital_markets/docs/SIFMA-CRA-Recommendations.pdf* (recommending that investor education regarding the nature and limitations of the credit rating process is necessary to prevent over-reliance on credit ratings). *See also* Report of the Financial Stability Forum on Enhancing Market and Institutional Resilience (Apr. 7, 2008), at *http://www.financialstabilityboard.org/publications/r_0804.pdf.*

[19] For a more detailed discussion of the role of nationally recognized statistical rating organizations (''NRSROs'') in determining ratings for structured products, particularly subprime residential mortgage backed securities and collateralized debt obligations, in the time period leading up to the credit crisis, see *Proposed Rules for Nationally Recognized Statistical Rating Organizations,* Release No. 34–57967 (June 16, 2008) [73 FR 36212].

[20] *See e.g.*, Marco Pagano and Paolo Volpin, *Credit Ratings Failures: Causes and Policy Options,* Working Paper, (Feb. 9, 2009), at *http://www.italianacademy.columbia.edu/publications/working_papers/2008_2009/pagano_volpin_seminar_IA.pdf.*

[21] *See* Briefing Paper: Roundtable to Examine Oversight of Credit Rating Agencies (Apr. 2009), at *http://www.sec.gov/spotlight/cra-oversight-roundtable/briefing-paper.htm* (noting that seven of the ten NRSROs registered with the Commission operate under the issuer-pay model and that the issuer-pay NRSROs have determined 98% of the currently outstanding credit ratings issued by NRSROs).

[22] *See* Pagano and Volpin in note 20 above.

[23] As discussed below, Exchange Act Section 15E(h) and (i) and Exchange Act Rule 17g–5 [17 CFR 240.17g–5] identify a series of conflicts arising from the business of determining credit ratings. Under the rule, some of these conflicts must be disclosed and managed, while others are prohibited outright.

[24] *See e.g.* Vasiliki Skreta and Laura Veldkamp, *Ratings Shopping and Asset Complexity: A Theory of Ratings Inflation,* working paper, (Feb. 2009), at *http://pages.stern.nyu.edu/%7Elveldkam/pdfs/ratings.pdf*; Patrick Bolton, Xavier Freixas and Joel Shapiro, The Credit Ratings Game, Working Paper, (Feb. 2009), at *http://www.nber.org/papers/w14712*; Becker and Milbourn in note 14 above.

[25] *See* the companion concept release considered by the Commission on September 17, 2009 regarding Rule 436(g) under the Securities Act.

[26] 15 U.S.C. 77g.

[27] 15 U.S.C. 77k.

[28] 17 CFR 220.436(g).

[29] *See* the releases considered by the Commission on September 17, 2009 regarding (i) amendments to Rule 17g–2 under the Exchange Act; (ii) amendments to Rule 17g–5 under the Exchange Act; (iii) amendments to Regulation FD; (iv) proposed amendments to Rule 17g–3 under the Exchange Act; (v) proposed amendments to the Instructions to Exhibit 6 of Form NRSRO; and (vi) proposed new Rule 17g–7 under the Exchange Act.

[30] *See Disclosure of Ratings in Registration Statements*, in note 15 above.

disclosure of credit ratings in these filings and reflected the Commission's then-developing acknowledgement of the growing importance of credit ratings in the securities markets and in the regulation of those markets.[31] Soon thereafter, the Commission amended Regulation S–K to reflect its new policy of permitting the voluntary disclosure of credit ratings in registration statements along with clear disclosure explaining the rating.[32] The Commission also adopted rules to permit the voluntary disclosure of credit ratings in tombstone advertisements,[33] and provided that a credit rating by an NRSRO generally is not part of a registration statement or report prepared or certified by a person within the meaning of Sections 7 and 11 of the Securities Act.[34]

At various times since the policy statement and the adoption of these rules and form eligibility requirements, the Commission has reviewed and reconsidered its approach to the disclosure of credit ratings in filings and the reliance on ratings in the Commission's form eligibility requirements. For example, in 1994, the Commission published a proposing release that would have mandated disclosure in Securities Act prospectuses of a credit rating given by an NRSRO whenever a credit rating with respect to the securities being offered is ''obtained by or on behalf of an issuer.'' [35] The proposals would have required disclosure of specified information with respect to credit ratings, whether or not disclosed voluntarily or mandated by the then-proposed rules. In addition, the release sought comment on various areas relating to the disclosure of credit ratings. The release also proposed to require disclosure on a Form 8–K of any material change in the credit rating assigned to the registrant's securities by an NRSRO.[36] The Commission received wide-ranging comments on those proposals. Commenters' views on whether registrants should be required to provide disclosure regarding credit ratings of their securities in a final prospectus reflected a wide variety of opinions. Commenters who were against the mandatory disclosure of credit ratings argued, among other things, that: NRSROs have incentives to provide quality ratings; information about credit ratings is widely available and understood; requiring disclosure would be costly and burdensome; and requiring disclosure of ratings may increase investors' reliance on them.[37] Commenters who supported mandatory disclosure regarding credit ratings argued, among other things, that: credit ratings have the potential to confuse and mislead investors; investors do not receive sufficient information about the credit rating; and investors expect to know the credit rating when buying a security, so the proposed required disclosure would comport with investor expectations.[38] The Commission did not act on the proposals.

In 2002, as part of the broader changes to the Form 8–K current reporting requirements, the Commission again proposed to require a registrant to file a Form 8–K current report when it received a notice or other communication from any rating agency regarding, for example, a change or withdrawal of a particular rating.[39] Comments were mixed on whether changes to a credit rating should be reported on a Form 8–K.[40] Commenters against the requirement generally believed it was unnecessary because the information was publicly available.[41] Commenters who supported the requirement generally believed it should be limited to ratings provided by NRSROs.[42] The new Form 8–K filing regime adopted in 2004 did not include this requirement.[43] In declining to adopt a Form 8–K reporting requirement for credit rating changes, the Commission noted that it was continuing to consider the appropriate regulatory approach for rating agencies.[44]

In 2003, the Commission issued a concept release requesting comment on whether it should cease using the NRSRO designation and, as an alternative to the ratings criteria, provide for Form S–3 eligibility where investor sophistication or large size denomination criteria are met.[45] In 2008, the Commission proposed changes to certain of its forms and rules that would have removed references to credit ratings and would have amended Securities Act Rule 436(g), which exempts NRSROs from liability under Section 11 of the Securities Act, so that

[31] *See* Release No. 33–6336 in note 15 above. The Commission announced ''that, contrary to prior general staff positions on this matter, it will now permit the disclosure of security ratings assigned by rating organizations in registration statements.'' In support of this shift in policy, the Commission cited ''the general usefulness'' of credit ratings to investors and the ''importance that the Commission and other regulatory entities have attached to the issuance'' of a credit rating. *Id.*

[32] *See Adoption of Integrated Disclosure System*, Release No. 33–6383 (Mar. 3, 1982) [47 FR 11380] (''Integrated Disclosure Release''). *See also Registration Form for Closed-End Management Investment Companies*, Release No. 33–6967 (November 20, 1992) [57 FR 56826] (adopting amendment to Form N–2 regarding voluntary disclosure of credit ratings for closed-end funds).

[33] *See* Integrated Disclosure Release in note 32 above (adopting amendments to Rule 134(a) under the Securities Act to provide that certain communications containing a security rating or ratings of a class of debt securities, convertible debt securities and preferred stock and the name(s) of the rating organization would not be deemed to be a prospectus under Section 2(10) of the Securities Act).

[34] Concurrent with the adoption of these rules and guidance, the Commission adopted Securities Act Form S–3, the short-form Securities Act registration statement for eligible domestic issuers [17 CFR 239.13]. Form S–3 provides that a primary offering of non-convertible debt securities may be eligible for registration on the form if rated investment grade. A non-convertible security is an ''investment grade security'' for purposes of form eligibility if at the time of sale, at least one NRSRO has rated the security in one of its generic rating categories which signifies investment grade, typically one of the four highest rating categories. In adopting this requirement, the Commission specifically noted that commenters believed that the component relating to investment grade ratings was appropriate because non-convertible debt securities generally are purchased on the basis of interest rates and credit ratings. *See* Section III.A.1 of the Integrated Disclosure Release in note 32 above. Later, in 1992, the Commission expanded the eligibility requirement to delete references to debt or preferred securities and to provide Form S–3 eligibility for other investment grade securities (such as foreign currency or other cash settled derivative securities). *See Simplification of Registration Procedures for Securities Offerings*, Release No. 33–6964 (Oct. 22, 1992) [57 FR 48970]. Consistent with Form S–3, the Commission adopted a provision in Form F–3 [17 CFR 239.33] providing for the eligibility of a primary offering of investment grade non-convertible debt securities by eligible foreign private issuers. Shelf registration requirements for asset-backed securities, originally adopted in 1992, also depend on a credit ratings component. *See* General Instruction I.B.5 of Form S–3.

[35] *See* the 1994 Ratings Release in note 16 above.

[36] *See* the 1994 Ratings Release in note 16 above.

[37] *See e.g.* letter regarding File No. S7–24–94 of Moody's Investor Service, Inc. (Dec. 5, 1994); and letter regarding File No. S7–24–94 of Fitch Investors Service Inc. (Dec. 6, 1994).

[38] *See e.g.* letter regarding File No. S7–24–94 of Savings & Community Bankers of America; and letter regarding file No. S7–24–94 of A.G. Edwards & Sons, Inc.

[39] *See Additional Form 8–K Disclosure Requirements and Acceleration of Filing Date,* Release No. 33–8106 (June 17, 2002) [67 FR 42914].

[40] *See also* the discussion of Form 8–K in Section I.D. below.

[41] *See e.g.* letter regarding File No. S7–22–02 of CIGNA Corporation (Aug. 26, 2002), *at http://www.sec.gov/rules/proposed/s72202.shtml.*

[42] *See e.g.* letter regarding File No. S7–22–02 of Investment Counsel Association of America (Aug. 26, 2002), *at http://www.sec.gov/rules/proposed/s72202.shtml.*

[43] *See Additional Form 8–K Filing Requirements and Acceleration of Filing Date,* Release No. 33–8400 (Mar. 16, 2004) [69 FR 15594], amended by *Additional Form 8–K Disclosure Requirements and Acceleration of Filing Dates; Correction,* Release No. 33–8400A (Aug. 4, 2004) [69 FR 48370].

[44] *Id.*

[45] *See Rating Agencies and the Use of Credit Ratings under the Federal Securities Laws,* Release No. 33–8236 (June 4, 2003) [68 FR 35258] (''2003 Concept Release''). Most of the commenters that addressed the issue supported retaining the requirement to use NRSRO ratings for purposes of Form S–3 eligibility. Comments on the concept release are available *at http://www.sec.gov/rules/concept/s71203.shtml. See also* the extensive discussion of market developments in Release No. 34–57967 in note 19.

the exemption would apply to all credit rating agencies, including those that are not NRSROs.[46]

In April 2009, the Commission held a roundtable to examine the oversight of credit rating agencies.[47] Topics addressed by the panels at the roundtable included current actions being taken by NRSROs, competition within the industry and how to improve oversight of the industry. Participants and the public were invited to submit comments regarding the issues addressed at the roundtable. Commenters addressed a wide range of issues.

The Commission's history in considering the possibility of mandating disclosure of credit ratings reflects the complexity of the issues raised by investors' reliance on them. Our rules under the Securities Act and the Exchange Act require that investors be provided material information in order to evaluate investment opportunities. We understand that investors will continue to use credit ratings in making investment decisions; therefore, we are proposing disclosure requirements we believe will provide investors with additional meaningful information that they can use to make those decisions. We acknowledge the risk that requiring disclosure of credit ratings could emphasize their significance and draw attention away from other, more important information about the registrant and its securities. However, we believe the recent market crisis and questions about the use of credit ratings suggest that investors may not have sufficient information to understand credit ratings fully. In light of the concerns discussed above, we believe all investors would benefit from the proposed revisions to our disclosure rules to require specific disclosures about ratings.

C. Mandatory Disclosure of Credit Ratings

As noted above, the Commission's policy on credit ratings currently is set forth in Item 10(c) of Regulation S–K. Specifically, the policy permits registrants to voluntarily disclose ratings assigned by credit rating agencies to classes of debt securities, convertible debt securities and preferred stock in registration statements and periodic reports.[48] Item 10(c) also provides the Commission's views on important matters registrants should consider in disclosing credit ratings in Securities Act and Exchange Act filings. So that all investors are provided with appropriate information about credit ratings, the amendments we propose today would mandate much of the disclosure permitted under Item 10(c) when a registrant uses a credit rating in connection with a registered offering and would remove the policy statement and recommended disclosure from that Item.

Specifically, we are proposing a new paragraph in Item 202 of Regulation S–K that would require much of the specific disclosure currently permitted under Item 10(c).[49] As more fully described below, proposed Item 202(g) would require disclosure of all material scope limitations of the credit rating and any related published designation, such as non-credit payment risks, assigned by the rating organization with respect to the security.[50] In addition, in order to highlight potential conflicts of interest, the proposed rule would require disclosure of the source of payment for the credit rating; and if any additional non-rating services have been provided by the credit rating agency or its affiliates to the registrant or its affiliates over a specified period of time, disclosure of the services and the fees paid for those services would be required. Disclosure required pursuant to proposed Item 202(g) of Regulation S–K would be required in Securities Act and Exchange Act registration statements. We are proposing to amend Item 9 of Form S–3 and Item 4(a)(3) of Form S–4 so that disclosure regarding credit ratings is provided in all registration statements on that form when the trigger for disclosure is met. We also are proposing to require, in certain circumstances, disclosure of preliminary ratings, as well as final ratings not used by a registrant, so that investors will be informed when a registrant may have engaged in ratings shopping. Finally, we are proposing to amend Exchange Act reports to require reporting of changes in credit ratings in certain circumstances.

We are proposing to apply similar mandatory disclosure requirements regarding credit ratings of senior securities issued by closed-end funds registered under the Investment Company Act. Like other companies, closed-end funds sometimes issue senior securities that are rated by one or more credit rating agency and currently are permitted to voluntarily disclose these credit ratings in their registration statements.[51] We are proposing to amend Form N–2 to require that closed-end funds include credit ratings disclosure in their registration statements under the Securities Act and the Investment Company Act. We are also proposing to amend Exchange Act Rules 13a-11 and 15d-11 to require reporting by closed-end funds of changes in credit ratings in certain circumstances.

We believe that the proposed amendments to require disclosure of certain information regarding credit ratings, rather than permitting voluntary disclosure, would provide investors with the information they need about credit ratings to put the rating in the appropriate context. The proposed amendments also may benefit companies that in the past may have hesitated to provide disclosure voluntarily by leveling the playing field so that all companies using credit ratings in connection with a registered offering of securities would be required to provide disclosure.

1. Trigger for Required Disclosure

We believe that it is appropriate for registrants to provide the proposed disclosure when they use a credit rating in connection with a registered offering of their securities. As discussed above, investors rely on credit ratings in making investment decisions. We believe requiring disclosure when a registrant uses the credit rating to offer or sell securities would provide investors with the information they need about the credit rating to put the credit rating in its appropriate context. Specifically, we are proposing to amend Item 202 of Regulation S–K,[52] Item 12 of Form 20–F,[53] and Item 10.6 of Form

[46] *See Security Ratings,* Release No. 33–8940 (Jul.1, 2008) [73 FR 40106].

[47] *See generally http://www.sec.gov/spotlight/cra-oversight-roundtable.htm.*

[48] We understand that only a small number of registrants include disclosure regarding credit ratings in their prospectuses. Generally, if ratings are disclosed, they are disclosed in free writing prospectuses filed pursuant to Rule 433 [17 CFR 230.433].

[49] *See* proposed new paragraph (g) to Item 202 of Regulation S–K.

[50] *See* note 67 below.

[51] Section 18(f) of the Investment Company Act [15 U.S.C. 80a-18(f)] generally prohibits a registered open-end management investment company (*i.e.,* mutual fund) from issuing senior securities.

[52] *See* proposed new paragraph (g) to Item 202 of Regulation S–K.

[53] Form 20–F is the combined registration statement and annual report form for foreign private issuers under the Exchange Act. It also sets forth disclosure requirements for registration statements filed by foreign private issuers under the Securities Act. ''Foreign private issuer'' is defined in Securities Act Rule 405 [17 CFR 230.405] and Exchange Act Rule 12b-2 [17 CFR 240.12b-2]. We are proposing to amend Item 12 of Form 20–F, which pertains to securities other than equity securities, to elicit the same disclosure that would be required by proposed Item 202(g) of Regulation S–K. We also propose to amend Item 10 of Form 20–F to require the same disclosure under proposed Regulation S–K Item 202(g) for a class of preferred securities, including non-participatory preferred

Continued

N–2 [54] to require registrants to provide detailed disclosure regarding credit ratings if the registrant, any selling security holder, any underwriter, or any member of a selling group uses a credit rating [55] from a credit rating agency [56] with respect to the registrant or a class of securities issued by the registrant, in connection with a registered offering. The proposed rule would not require that registrants obtain a credit rating on any security; however, if a registrant uses a credit rating in connection with a registered offering, then disclosure would be required.

We have proposed to require disclosure regarding credit ratings if the registrant, a selling security holder, underwriter or any member of a selling group uses a credit rating in connection with a registered offering. We included selling security holders, underwriters and other members of the selling group in the proposed trigger for disclosure so that registrants would not be able to structure their selling efforts in a manner that would avoid triggering disclosure under the proposed rule. In addition, there are circumstances where the underwriter obtains the credit rating on behalf of the registrant, and if the underwriter uses that rating, we believe disclosure should be required.

A credit rating may be ''used'' in a variety of ways. For example, in addition to oral and written selling efforts of the registrant and other members of the selling group, we would consider a credit rating to be used in connection with a registered offering of securities when it is disclosed in a prospectus or a term sheet filed pursuant to Rule 433 or Rule 497 [57] under the Securities Act.

Furthermore, as proposed, a credit rating also would be considered to be used in connection with a registered offering of securities if it is used in connection with a private offering of securities that is made in reliance on an exemption from registration under the Securities Act when the privately offered securities are exchanged shortly thereafter for substantially identical registered securities.[58] Disclosure would be required even if the rating was not disclosed in the registered exchange offer.[59] As a result, registrants would not be able to avoid the proposed disclosure requirements regarding credit ratings by disclosing a credit rating to investors in a private offering but not using it in connection with the registered exchange offer to those same investors of substantially identical securities.

We intend for the proposed rule to apply to both oral and written selling efforts. Thus, for example, disclosure would be required when a credit rating is disclosed to potential purchasers by the registrant, any selling security holder, any underwriter or any member of a selling group in response to an inquiry from an investor. A registrant would not be able to avoid providing the proposed disclosure by using a rating only in oral selling efforts and not including it in written communications related to an offering, by not ''volunteering'' the information about the credit rating except upon request or by referring an investor to a Web site that discloses the credit rating. We believe that if a credit rating is used in connection with a registered offering, then investors should have the benefit of all of the disclosure required by our proposed amendments.

We have not proposed to require that a registrant provide disclosure when it has not sought or otherwise solicited the credit rating unless the rating is used in connection with a registered offering of its securities, as we believe that such a requirement may create an undue burden for registrants to follow and provide disclosure on all of the ratings outstanding on their securities. In this regard, we note that regulatory changes could increase the number of unsolicited ratings being provided. [60] If we were to require disclosure of unsolicited ratings not used in connection with a registered offering of a security, a registrant would have to monitor all of the credit rating agencies to determine not only whether a credit rating had been issued with respect to a security, but also whether the rating has been changed or withdrawn.

We are aware that some registrants discuss their credit rating in other contexts in their periodic reports or Securities Act registration statements. As proposed, the disclosure requirement regarding credit ratings would not be triggered if the only disclosure of a credit rating in a filing with the Commission is related to changes to a credit rating, the liquidity of the registrant, the cost of funds for a registrant or the terms of agreements that refer to credit ratings, and the credit rating is not otherwise used in connection with a registered offering. For instance, some registrants note their ratings in the context of a risk factor discussion regarding the risk of failure to maintain a certain rating and the potential impact a change in credit rating would have on the registrant. A registrant also may refer to its rating in the context of its liquidity discussion in Management's Discussion and Analysis of Financial Condition and Results of Operations (''MD&A''). Registrants may need to discuss ratings when they describe debt covenants, interest or dividends that are tied to credit ratings or potential support to variable interest entities. We have proposed to exclude these references to credit ratings from the trigger that would require additional disclosure regarding credit ratings because we believe that the additional information is not necessary in that setting. We believe that the material information to be conveyed in that setting relates to the fact that a credit rating has the potential to have a material impact on the registrant. We believe additional information about

stock as that term is used under 17 CFR 230.902(a)(1).

[54] Form N–2 is the registration form used by closed-end funds to register under the Investment Company Act and to offer their securities under the Securities Act. We are proposing to amend Item 10.6 of Form N–2 to elicit the same disclosure that would be required by proposed Item 202(g) of Regulation S–K.

[55] As proposed, a ''credit rating'' would have the same meaning as the definition in Section 3(a)(60) of the Securities Exchange Act [15 U.S.C. 78c(a)(60)].

[56] As proposed, a ''credit rating agency'' would have the same meaning as the definition in Section 3(a)(61) of the Securities Exchange Act [15 U.S.C. 78c(a)(61)].

[57] 17 CFR 230.497. This would include closed-end fund advertisements that, under Rule 497(i) [17 CFR 230.497(i)], are considered to be filed with the Commission upon filing with a national securities association registered under Section 15A of the Exchange Act [15 U.S.C. 78o].

[58] *See* proposed Instruction 3 to Item 202(g).

[59] These transactions are sometimes referred to as Exxon Capital exchange offers based on a series of no-action letters issued by the staff beginning in May 1988 that outline the staff's interpretive positions regarding such exchange offers. In a typical Exxon Capital exchange offer, an issuer sells debt securities to a broker-dealer in reliance on the exemption in Section 4(2) of the Securities Act [15 U.S.C. 77d(2)]. The broker-dealer then immediately resells those securities to qualified institutional buyers in reliance on Rule 144A under the Securities Act. [17 CFR 230.144A]. The issuer then files a registration statement on Form S–4 to register the exchange of the securities for substantially identical securities. Upon effectiveness of the S–4 registration statement, the qualified institutional buyers exchange restricted securities for registered securities, and therefore, may resell the securities they receive in the exchange offer without further registration or prospectus delivery. *See* Exxon Capital Holdings Corporation, SEC No-Action Letter (pub. avail. May 13, 1988); Morgan Stanley & Co., Inc., SEC No-Action Letter (pub. avail. June 5, 1991); Mary Kay Cosmetics, Inc., SEC No-Action Letter (pub. avail. June 5, 1991); K–III Communications Corp., SEC No-Action Letter (pub. avail. May 14, 1993); Shearman & Sterling, SEC No-Action Letter (pub. avail. July 2, 1993); Brown & Wood LLP, SEC No-Action Letter (pub. avail. Feb. 5, 1997).

[60] The Commission is adopting today various changes to Exchange Act Rule 17g–5 [17 CFR 240.17g–5] that would provide the opportunity for other credit rating agencies to use the information provided to NRSROs by the registrant to develop ''unsolicited ratings'' for certain rated asset-backed securities. *See* the adopting release considered by the Commission on September 17, 2009.

scope limitations, conflicts of interest, preliminary ratings and other matters does not appear to be necessary to understand that disclosure.

We are proposing to amend Item 9 of Form S–3 and Item 4(a)(3) of Form S–4 so that disclosure regarding credit ratings is included in all registration statements where appropriate. Currently, Item 9 requires registrants to include the disclosure required by Item 202 of Regulation S–K in a registration statement on Form S–3 unless capital stock is to be registered and securities of the same class are registered pursuant to Section 12 of the Exchange Act.[61] Item 4(a)(3) of Form S–4 requires registrants to include the disclosure required by Item 202 of Regulation S–K unless the registrant would meet the requirements for use of Form S–3 and capital stock is to be registered, securities of the same class are registered pursuant to Section 12 of the Exchange Act, and the security is listed on a national securities exchange. We are proposing to amend these items so that the disclosure required by proposed Item 202(g) of Regulation S–K would be included in a registration statement on Form S–3 or Form S–4 even if securities of the same class are registered under Section 12 of the Exchange Act so long as the trigger for disclosure under proposed Item 202(g) has been met. We believe these amendments are appropriate so that investors would receive information about credit ratings in circumstances where securities of the same class have been previously registered because securities of the same class that are issued at different times may have different ratings.

Request for Comments

- As proposed, we would require disclosure of credit ratings if the registrant, any selling securityholder, underwriter or member of a selling group uses a credit rating in connection with a registered offering. Are there any other persons that should be included as persons who could cause the disclosure requirement to be triggered? Are there reasons to exclude any of the persons or entities currently included in the proposal?
- Should the proposed rule mandate disclosure of a credit rating obtained by a registrant regardless of whether the rating is used in connection with a registered offering? For example, should we require disclosure whenever a registrant discloses a rating? Do the triggers in the requirement encourage the use and related disclosure of only favorable ratings? Are there other circumstances that should trigger the proposed disclosure?
- Would the rule, as proposed, have an effect on the frequency with which registrants seek credit ratings? Why or why not?
- As proposed, we would consider a credit rating to be used in connection with a registered offering of securities if it is disclosed upon request of an investor. We believe this approach should reduce the risk that practices might develop that would undermine the purpose of our proposal, such as a registrant or member of a selling group not offering the information about a credit rating unless asked. Is this approach necessary or appropriate? Should registrants be excluded from the proposed requirement to provide disclosure regarding credit ratings if they and the offering participants decide not to use the rating in selling efforts, but disclose the rating in response to an investor who specifically asks about the rating?
- Would registrants and other members of a selling group be able to circumvent the rule as proposed? How would they be able to do that? How could we modify the rule proposal to avoid circumvention? Could the proposed trigger for disclosure lead to procedural modifications to the practice of assigning credit ratings so that registrants could avoid the disclosure requirement even though the credit rating is used in connection with a registered offering? If so, how could we modify the proposal to avoid such modifications?
- As proposed, a credit rating would be considered used for purposes of the proposed disclosure trigger if it is used in connection with a private offering even if not used in a subsequent registered exchange offering for substantially identical securities made to the purchasers in the private placement. Is this trigger for disclosure appropriate in light of the unique structure of these transactions? Should we expand the instruction to include a credit rating obtained in connection with a private offering if those securities are subsequently registered for resale?
- Is the instruction, as proposed, that a credit rating would be considered used if it is used in connection with a private offering but not used in a subsequent registered exchange offering for substantially identical securities, appropriate for closed-end funds?
- As proposed, a registrant would not be required to make disclosure with regard to solicited or unsolicited ratings unless the rating is used in connection with the registered offering of a security. Is there a difference between solicited and unsolicited ratings such that they should be treated differently for purposes of this proposal? Would requiring disclosure of all unsolicited ratings regardless of whether they are used in connection with a registered offering be too burdensome for registrants? Should disclosure be triggered only if the registrant, or someone acting on its behalf, obtains the credit rating (*i.e.*, a solicited rating) and uses the rating in connection with a registered offering? If we were to require disclosure of unsolicited ratings regardless of whether they are used in connection with a registered offering of securities, should we impose limitations on how many ratings, or which credit rating agencies' ratings, should be required to be disclosed? For example, should we require disclosure for unsolicited ratings issued by NRSROs only? Would such disclosure impose an undue burden on the registrant?
- Should the proposed mandatory disclosure of credit ratings apply to closed-end funds?
- Investment companies, including both closed-end funds and mutual funds, sometimes represent that they invest only in securities that have a specified credit rating, such as investment grade, or disclose the percentage of their portfolios comprised of securities with specified ratings. As noted above, investors may not have access to sufficient information in order to understand fully what credit ratings mean, or the limits inherent in them. Do current investment company disclosure requirements adequately address the meaning and limitations of credit ratings of portfolio securities? If not, how could investment company disclosure requirements be changed to better promote investor understanding of credit ratings of portfolio securities?
- The proposed amendments apply to the disclosure of credit ratings. Mutual funds sometimes obtain other non-credit ratings and use such ratings in connection with the offer or sale of their securities. For example, rating agencies issue credit quality ratings to fixed-income funds, which examine credit

[61] 15 U.S.C. 78*l*.

risk in the fund's underlying portfolio.[62] Ratings agencies may also issue volatility ratings, which are designed to identify the potential volatility of the market value of a fund's shares.[63] In addition, at least one rating agency issues principal stability ratings that are designed to identify a money market fund's capacity to maintain stable principal or a stable net asset value.[64] Should we require the mandatory disclosure of these additional fund ratings as part of a fund's prospectus or statement of additional information if the ratings are used in connection with the offer or sale of an investment company's securities? If so, what disclosures should we require?

- The proposed disclosure item includes an instruction that provides that a registrant would not trigger the disclosure requirement regarding credit ratings if the credit rating is not otherwise used in connection with a registered offering, and the only disclosure of a credit rating in a filing with the Commission is related to changes to a credit rating, the liquidity of the registrant, the cost of funds for a registrant or the terms of agreements that refer to credit ratings. Is this approach appropriate? Are there other disclosures about credit ratings of a similar nature that should be added to this instruction? Would registrants avoid such references because of concerns that it might trigger the proposed additional disclosure requirements? Would this instruction be used to circumvent the disclosure requirement?
- We are proposing to amend Item 9 of Form S–3 and Item 4(a)(3) of Form S–4 so that disclosure regarding credit ratings would be included (if applicable) in registration statements for offerings of capital stock even if securities of the same class have previously been registered pursuant to Section 12 of the Exchange Act. Are there any other circumstances where we need to amend forms so that information regarding credit ratings is provided to investors when a credit rating is used in connection with a registered offering?
- Schedule B under the Securities Act provides the disclosure requirements for foreign governments or political subdivisions thereof that register their securities for public offering in the United States. The disclosure requirements for those issuers are located directly in the Securities Act, and there are no corresponding disclosure regulations or forms under Schedule B applicable to foreign governments[65] or their political subdivisions.[66] However, through market practice and investor expectation, registration statements prepared under Schedule B generally contain disclosure beyond the requirements of the statute, and may include, for example, credit rating information relating to the sovereign issuer's debt. Should we extend the proposals for the disclosure of credit ratings to foreign government issuers? Or should we continue to permit foreign governments to disclose credit ratings on a voluntary basis? Should a foreign government be required to disclose credit ratings in Schedule B registration statements under the Securities Act and in Exchange Act documents, including the annual report on Form 18–K and the registration statement on Form 18, if it uses the credit rating in connection with a registered offering of its debt securities? If we extend the credit rating disclosure requirements to foreign governments, are there some forms or documents that in whole or in part should be exempt from these requirements? Would disclosure of credit ratings be appropriate for foreign government issuers? If so, why? If not, why should they be exempt? If mandatory credit ratings disclosure in filings under the Securities Act or the Exchange Act is appropriate for foreign government issuers, should they be subject to requirements analogous to those proposed for other issuers or are there different factors that should be considered in any amendments that may be adopted for foreign government issuers? What are those considerations?

2. Required Disclosure

Under the proposed amendments, a registrant would be required to disclose the information for each credit rating that triggers disclosure. The proposed disclosure seeks to provide investors with a specific description of the ratings and to make clear to investors:

- The elements of the securities that the credit rating addresses;
- The material limitations or qualifications on the credit rating; and
- Any related published designation, such as non-credit payment risks, assigned by the credit rating agency with respect to the security.

The disclosure would be required in registration statements under the Securities Act and the Exchange Act, including Form 10 and Form 20–F, and in registration statements filed by closed-end funds on Form N–2 under the Securities Act and the Investment Company Act.

(a) General Information Including Scope and Limitations

As proposed, our amendments would require disclosure of certain general information regarding credit ratings, including the scope of the rating and any limitations on the scope of the rating. In this regard, our proposed rules would require:

- The identity of the credit rating agency assigning the rating and whether such organization is an NRSRO;
- The credit rating assigned by the credit rating agency;
- The date the credit rating was assigned;
- The relative rank of the credit rating within the credit rating agency's classification system;
- A credit rating agency's definition or description of the category in which the credit rating agency rated the class of securities;
- All material scope limitations of the credit rating;[67]
- How any contingencies related to the securities are or are not reflected in the credit rating;
- Any published designation reflecting the results of any other evaluation done by the credit rating agency in connection with the rating, along with an explanation of the designation's meaning and the relative rank of the designation;

[62] *See, e.g.*, Fitch's Fund and Asset Manager Ratings, at *http://www.fitchratings.com/jsp/sector/Sector.faces?selectedTab=Overview&Ne=11%2b4293330821* (last visited on Aug. 11, 2009) (''Fitch's Fund and Asset Manager Ratings''); Moody's Ratings Definitions, Money Market and Bond Fund Ratings, at *http://v3.moodys.com/ratings-process/Money-Market-and-Bond-Fund-Ratings/002001018* (last visited Aug. 11, 2009) (''Moody's Ratings Definitions''); Standard & Poor's Ratings Definitions, Ratings Direct, (Apr. 30, 2009), available at *http://www2.standardandpoors.com/spf/pdf/fixedincome/Ratings_Definitions_Update.pdf* (''Standard & Poor's Ratings Definitions'').

[63] *See, e.g.*, Fitch's Fund and Asset Manager Ratings; Standard & Poor's Ratings Definitions.

[64] *See, e.g.*, Standard & Poor's Ratings Definitions.

[65] ''Foreign government'' refers to any issuer that is eligible to register securities under Schedule B of the Securities Act, including political subdivisions and some quasi-governmental entities.

[66] Unlike other issuers, foreign government issuers that register securities under Schedule B of the Securities Act are not subject to reporting obligations under Section 15(d) of the Exchange Act [15 U.S.C. 78*o*(d)]. However, foreign government securities listed on a U.S. exchange must be registered under Section 12(b) of the Exchange Act [15 U.S.C. 78*l*(b)], as is the case with the securities of other issuers. Foreign governments that have securities registered under Section 12(b) file annual reports with the Commission on Form 18.

[67] A limited scope rating is a rating that assesses less than the promised or expected return on a security. We are proposing disclosure of any material scope limitations in order to mitigate the potential risk that investors may not understand the limited scope of the rating. *See* the 1994 Release in note 15 above.

• Any material differences between the terms of the securities as assumed or considered by the credit rating agency in rating the securities and (i) the minimum obligations of the security as specified in the governing instruments of the security; and (ii) the terms of the securities as used in any marketing or selling efforts; and

• A statement informing investors that a credit rating is not a recommendation to buy, sell, or hold securities; that it may be subject to revision or withdrawal at any time by the assigning credit rating agency; that each credit rating is applicable only to the specific class of securities to which it applies; and that investors should perform their own evaluation as to whether an investment in the security is appropriate.[68]

A preliminary prospectus would include information about any credit rating that is used in connection with a registered offering of securities. For example, a registrant would disclose the initial rating (if any) assigned by the credit rating agency in the preliminary prospectus when a final rating is not assigned until after the effectiveness of a registration statement. If a disclosed rating is changed or if a different rating becomes available before effectiveness, the registrant would be required to convey the rating change to the purchaser. The registrant would be required to update the final prospectus to reflect the final rating assigned and all related disclosure. In connection with delayed shelf offerings, the final rating would be disclosed in a prospectus supplement.[69]

We are proposing to require disclosure of the relative rank of the credit rating within the credit rating agency's classification system and the credit rating agency's definition or description of the category in which the credit rating agency rated the class of securities. We believe this disclosure will help put the credit rating in its appropriate context and provide investors with important information about the credit rating agency's assessment of the degree of risk presented by the security.

Under the proposed amendments, a registrant would be required to disclose any material limitations on the scope of the credit rating and how any contingencies related to the securities are or are not reflected in the credit rating. For example, a registrant would be required to disclose if the credit rating takes into account less than the promised return on a security. A residual security, for example, typically represents a beneficial interest in whatever cash flows remain in a pool of financial assets after obligations to pay all other outstanding classes have been satisfied. Sometimes, because of the highly speculative nature of these cash flows, a residual security incorporates a fixed promise to pay a nominal amount of principal to the residual holder in the early months of the securities'' existence. The amount of the nominal fixed obligation may have no relationship to the amount paid for the residual security, nor to the anticipated residual cash flow. The credit rating for the residual interest represents only an evaluation of the likelihood that the nominal fixed obligation would be paid. It does not evaluate whether there will be any residual cash flow. Under the proposed rule, such a limitation would be required to be disclosed. We believe this type of disclosure would help investors understand what the rating is intended to cover, and, just as importantly, the limitations on the rating issued. In addition, if the security is subject to contingent payment obligations, registrants would be required to disclose how those contingencies are reflected in the credit rating. We believe these requirements will provide investors with better information so that they can make important distinctions about the nature of risks presented by securities with the same or similar ratings.

If the credit rating includes a related published designation, such as non-credit payment risk assessments, volatility assessments or other analyses performed by the credit rating agency that do not solely reflect credit risk, the proposed amendments would require a description of the additional analysis, so that investors relying on the designation are not left unaware of the related evaluation. For example, the related evaluations covered by such designation could include an analysis of prepayment speeds, effects of interest rates or other market based factors, or volatility assessments done in connection with a credit rating.[70] We believe disclosure of these published designations together with a description of the analysis would provide meaningful additional information to investors regarding the information taken into consideration by the credit rating agency. We also believe disclosure of these related designations would signal to investors that significant differences may exist between a security with a credit rating that includes a published designation indicating that an evaluation of additional risk was done by the credit rating agency and a security with a similar credit rating without such a designation. In addition, we believe disclosure of published designations would help investors understand the limitations on comparing credit ratings across different types of securities.

Under the proposed amendments, registrants would be required to disclose any material differences between the terms of the security as considered or assumed by the credit rating agency for purposes of determining the rating, the terms in the governing documents of the securities and the terms of the securities as marketed to investors. We believe this disclosure may allow investors to better evaluate the credit rating and the security to which it applies because they would understand if the credit rating was based on assumptions or terms different from the information provided to investors. For example, this item would require disclosure if the security was rated using a yield assumption which differs from the expected yield being disclosed to investors.

We have also proposed to require that registrants include a statement informing investors that a credit rating is not a recommendation to buy, sell, or hold securities; that it may be subject to revision or withdrawal at any time by the assigning credit rating agency; that each credit rating is applicable only to the specific class of securities to which it applies; and that investors should perform their own evaluation as to whether an investment in the security is appropriate. We believe this statement will alert investors to some of the limitations inherent in a credit rating so that the credit rating is placed in an appropriate context.

Under the proposed amendments, a closed-end fund would be required to

[68] *See* proposed amendments to Item 202(g) of Regulation S–K, Item 12 of Form 20–F, and Item 10.6 of Form N–2.

[69] The registrant could also disclose the credit rating in a free writing prospectus, such as a term sheet, as long as it was also included in the registration statement (including through disclosure in a prospectus supplement that becomes a part of the registration statement in accordance with Rule 430B).

[70] *See e.g.*, Moody's Global Credit Policy, Rating Methodology, Updated Report on V Scores and Parameter Sensitivities for Structured Finance Securities (Dec. 2008), *at http://www.moodys.com* indicating that the evaluations are intended to address the degree of uncertainty underlying the assumptions made in determining ratings and how sensitive the ratings are to changes in those assumptions); Fitch Ratings Structured Finance Global Criteria Report, Criteria for Structured Finance Loss Severity Ratings (Feb. 2009), at *http://www.fitchratings.com* indicating that a Loss Severity Rating is intended to indicate the relative risk that a security will incur a severe loss in the event of default).

include the disclosure concerning credit ratings in its prospectus, unless the prospectus relates to securities other than senior securities that have been rated by a credit rating agency, in which case such disclosure may be provided in the statement of additional information unless the rating criteria will materially affect the registrant's investment policies.[71]

For closed-end funds, current Item 10.6 of Form N–2 requires that, if a registrant discloses a rating assigned by an NRSRO in its prospectus, the registrant must briefly discuss the significance of the rating, the basis upon which ratings are issued, any conditions or guidelines imposed by the NRSRO for the registrant to maintain the rating, and whether or not the registrant intends, or has any contractual obligation, to comply with these conditions or guidelines. Current Item 10.6 also requires disclosure of the material terms of any agreement between the registrant or its affiliates and the NRSRO under which the NRSRO provides the rating. The proposed amendments would, if adopted, replace those requirements with the same disclosure requirements contained in proposed Item 202(g) of Regulation S-K, which, in some cases, are substantially similar to the current requirements and, in other cases, provide information that is intended to allow investors to more easily put the credit rating in its appropriate context than the disclosure requirements of current Item 10.6 of Form N–2.[72] We are also proposing technical amendments to remove the current instructions to Item 10.6.[73]

Request for Comments

- We have proposed to require disclosure similar to the disclosure recommended in Item 10(c) of Regulation S–K. Is there a better model for providing disclosure about credit ratings? Should we adopt a general rule that all material elements of a credit rating be disclosed and give examples of the types of information that should be disclosed? Does our proposed approach capture the information that investors would need to make informed investment decisions?
- Does the proposed disclosure requirement add too much weight to the credit rating?
- Non-investment company registrants would be required to make the Item 202(g) disclosures in their Securities Act and Exchange Act registration statements, and closed-end funds would be required to make similar disclosures in their Securities Act and Investment Company Act registration statements. Is disclosure about a registrant's credit ratings appropriate disclosure for such filings? Are there alternative or additional filings in which the disclosure should be made? Should we also require that similar disclosure be provided in any written selling materials that disclose the rating? Should this disclosure be recommended rather than required?
- Is there another means that could be used to provide investors with this information, and the information described below, when a credit rating is used in connection with a registered offering?
- Is the proposed disclosure regarding credit ratings adequate to provide investors with sufficient information to be able to understand the ratings assigned by a credit rating agency and to understand the limitations associated with a rating? Is there other information that would be useful?
- As proposed, Item 202(g) and Item 10.6 of Form N–2 include a list of specific items that must be disclosed about the credit rating. Is this approach appropriate? Should we also include a ''catch-all'' provision that would require any other information necessary to understand the credit rating? Would including a catch-all help to assure that our rules will be flexible enough to elicit material information about credit ratings, as securities and credit ratings change in response to innovations and market developments? Would Rule 408 under the Securities Act be sufficient to capture any additional material information?[74]
- Should our proposed disclosure distinguish between corporate debt and structured finance products? Is there different information that would be relevant for ratings of corporate debt and structured finance products? Should we require disclosure of the differences in risk characteristics between corporate debt and structured finance products? Is this information already available to investors in all cases?
- Would investors benefit from the disclosure of the relative rank of the credit rating within the credit rating agency's classification system and the credit rating agency's definition or description of the category in which the credit rating agency rated the class of securities? Is there other or additional information that would assist investors in placing the credit rating in context?
- In addition to requiring the disclosure about a credit rating that currently is recommended in Item 10(c) of Regulation S–K, proposed Item 202(g) of Regulation S–K, Item 12 of Form 20–F and Item 10.6 of Form N–2 would require disclosure of all material scope limitations of the rating, how any contingencies are or are not reflected in the credit rating and any related designation (or other published evaluation) of non-credit payment risks assigned by the rating agency with respect to the security. Would this additional disclosure assist investors in better understanding the credit rating and assessing the risks of an investment in the security? What additional disclosure would be helpful to investors in making these assessments?
- As noted above, under proposed Item 12 to Form 20–F, foreign private issuers would be required to provide the same disclosure that would be required by proposed Item 202(g) of Regulation S–K for domestic issuers. Is this type of ratings information disclosed by foreign private issuers in their home jurisdictions? Should foreign private issuers be required to provide this type of information? Is there a basis on which to distinguish between foreign private issuers and other registrants for this purpose? If so, please explain. Is there any other type of credit ratings information that foreign private issuers should disclose?

[71] *See* proposed Instruction 4 to Item 10.6 of Form N–2. *Cf.* Item 10.6 of Form N–2 (similar current provision regarding inclusion of disclosure in statement of additional information).

[72] Proposed Item 10.6 of Form N–2 is substantially similar to current Item 10.6 in that a registrant would be required to disclose the relative rank of the credit rating within the rating agency's overall classification system, the rating agency's definition or description of the category in which the rating agency rated the class of securities, all material scope limitations, how any contingencies related to the securities are or are not reflected in the credit rating, and any material differences between the terms of the securities as assumed or considered by the rating agency and (i) the minimum obligations of the security as specified in its governing instruments and (ii) the terms of the security as used in any marketing or selling efforts. Rather than require disclosure of the material terms of any agreement between the registrant or its affiliates and the NRSRO under which the NRSRO provides the rating as set forth in current Item 10.6, proposed Item 10.6 would require disclosure of the identity of the person compensating the rating agency for providing the rating and a description of any other non-rating services provided by the rating agency to the registrant or its affiliates and any fees paid for such non-rating services.

[73] The current instructions to Item 10.6 define NRSRO, cross-reference Rule 436(g)(1) under the Securities Act, and cross-reference Item 10(c) of Regulation S–K.

[74] 17 CFR 230.408. Rule 408 provides that, in addition to the information expressly required to be included in a registration statement, the registrant is required to include any additional material information necessary to make the required statements, in the light of the circumstances under which they are made, not misleading.

• As proposed, a registrant would be required to disclose additional information about any published designation that reflects the results of any other evaluation done by a credit rating agency. Should we require disclosure for any evaluation by a credit rating agency that is communicated to the registrant, regardless of whether it is published? Do credit rating agencies communicate information of this type to the registrant? If so, what types of information would this cover?

• We are proposing to require registrants to disclose any material differences between the terms of the security as assumed or considered by the credit rating agency in rating the security and (i) the minimum obligations of the security as specified in the governing instruments, and (ii) the terms of the security as marketed to investors. Would this disclosure be helpful to investors in making an investment decision?

• Does the proposed requirement that registrants include a statement informing investors that a credit rating is not a recommendation to buy, sell, or hold securities; that it may be subject to revision or withdrawal at any time by the assigning credit rating agency; that each credit rating is applicable only to the specific class of securities to which it applies; and that investors should perform their own evaluation as to whether an investment in the security is appropriate provide meaningful information to investors? Would this statement help to place the credit rating in an appropriate context? Why or why not?

• Are the proposed disclosure requirements appropriate for closed-end funds or should they be modified? Should we instead, or in addition, require all or any of the disclosures that are enumerated in current Item 10.6 of Form N–2? For example, should we expressly require disclosure of the basis upon which ratings are issued by the credit rating agency or disclosure of any conditions or guidelines imposed by a credit rating agency for the registrant to maintain a credit rating? Is it appropriate, as proposed, to permit closed-end funds to include the proposed disclosure in the statement of additional information, rather than the prospectus, if the prospectus relates to securities other than senior securities of the registrant that have been rated by a credit rating agency unless the rating criteria will materially affect the registrant's investment policies?

(b) Potential Conflicts of Interest

We also are proposing to require disclosure regarding credit ratings that would address potential conflicts of interest.[75] Specifically, our proposed rules would require disclosure of the identity of the party who is compensating the credit rating agency for providing the credit rating. In addition, if during the registrant's last completed fiscal year and any subsequent interim period up to the date of the filing, the credit rating agency or its affiliates has provided non-rating services to the registrant or its affiliates, the proposed rules would require a description of the other non-rating services and separate disclosure of the fee paid for the credit rating required to be disclosed and the aggregate fees paid for any other non-rating services provided during such period.

We believe that the proposed disclosure regarding fees and services would alert investors to potential conflicts of interest that may have influenced the rating decision of the credit rating agency. We believe investors should know who paid for the rating since that may influence their assessment of the impartiality of the credit rating agency in assigning the rating. For example, many of the NRSROs are paid by the registrants for whom they are providing the credit rating. This business model can create a conflict of interest because the NRSRO providing the credit rating may be concerned that if it issues a lower rating than the registrant expects, the registrant would no longer seek credit ratings from that NRSRO. As a result, an NRSRO that is paid by a registrant may have an incentive to give a higher credit rating than it would have if no potential conflict of interest existed. In addition, we believe that the disclosure we are proposing to require regarding non-rating services and related fees paid to the credit rating agency should help investors gauge whether the credit rating agency's decision may have been influenced by a desire to gain or retain other business from the registrant.[76]

We are not proposing to require disclosure of the fee paid for the credit rating unless disclosure of other non-rating services is required as described above. We preliminarily believe that when no such other non-rating services are provided, disclosure of the source of the payment for the rating as proposed would sufficiently convey the potential conflict of interest. We are requesting comment, however, on whether we should require the amount of the fee to be disclosed in all cases.[77]

Request for Comments

• We have proposed to require disclosure of information related to the party paying for the rating, as well as any additional non-rating services provided by the credit rating agency or its affiliates to the registrant or its affiliates. Would the proposed disclosure provide helpful information for investors in order for them to judge whether potential conflicts of interest may have impacted the rating? Is the provision of other services indicative of

[75] There are rules applicable to NRSROs currently in place that are designed to address certain conflicts of interest of NRSROs. Pursuant to Exchange Act Rule 17g–5 [17 CFR 240.17g–5], an NRSRO must disclose and manage certain conflicts of interest, while certain other conflicts are prohibited outright. Paragraph (b) of Rule 17g–5 identifies nine types of conflicts to be disclosed and managed by an NRSRO, including a new type of conflict being adopted today by the Commission in a companion adopting release: issuing or maintaining a credit rating for a security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction that was paid for by the issuer, sponsor, or underwriter of the security or money market instrument. Paragraph (c) of Rule 17g–5 identifies seven conflicts of interest that are prohibited outright, including three added by the Commission in February 2009: issuing or maintaining a credit rating with respect to an obligor or security where the NRSRO or a person associated with the NRSRO made recommendations to the obligor or the issuer, underwriter, or sponsor of the security about the corporate or legal structure, assets, liabilities, or activities of the obligor or issuer of the security; issuing or maintaining a credit rating where the fee paid for the rating was negotiated, discussed, or arranged by a person within the NRSRO who has responsibility for participating in determining or approving credit ratings or for developing or approving procedures or methodologies used for determining credit ratings, including qualitative and quantitative models; and issuing or maintaining a credit rating where a credit analyst who participated in determining or monitoring the credit rating, or a person responsible for approving the credit rating received gifts, including entertainment, from the obligor being rated, or from the issuer, underwriter, or sponsor of the securities being rated, other than items provided in the context of normal business activities such as meetings that have an aggregate value greater that $25.

[76] *See* note 21 above.

[77] In a companion proposing release, the Commission is also today proposing a new rule that would require an NRSRO, on an annual basis, to make publicly available on its Internet Web site a consolidated report that shows three items of information with respect to each person that paid an NRSRO to issue or maintain a credit rating; specifically, (1) the percent of the net revenue attributable to the person that was earned by the NRSRO for that fiscal for year from providing services and products other than credit rating services; (2) the relative standing (top 10%, top 25%, top 50%, bottom 50%, and bottom 25%) of the person in terms of the person's contribution to the total net revenue of the NRSRO for the fiscal year as compared with other persons who provided the NRSRO with revenue; and (3) all outstanding credit ratings paid for by the person. The proposed rule also would provide that the NRSRO must include a generic disclosure statement each time the NRSRO publishes a credit rating or credit ratings indicating where on its Internet Web site the consolidated report is located. *See* the proposing release considered by the Commission on September 17, 2009 related to proposed new Rule 17g–7 under the Exchange Act.

potential conflicts of interest? Would requiring disclosure regarding other services decrease the other services being provided? Would that have an effect on the quality of ratings? If so, how? Is there other disclosure that would provide additional or better information regarding potential conflicts of interest? If so, what information would provide investors the ability to assess potential conflicts of interest?

• Is the information that we have proposed to require meaningful? Should we require additional context such as the percentage of revenue that the NRSRO or other credit rating agency earns from the registrant so that an investor would be aware of when a registrant accounts for a significant percentage of the NRSRO's revenue? Would requiring disclosure only if non-rating services are provided place too much emphasis on the mix of revenue that the registrant provides to the credit rating agency, rather than the total revenue earned from the registrant? In proposed Exchange Act Rule 17g–7, the Commission is proposing to require that NRSROs publish a report on an annual basis with respect to each person that paid an NRSRO to issue or maintain a rating disclosing (1) the percent of the net revenue attributable to the person that was earned by the NRSRO for that fiscal year from providing services and products other than credit rating services; (2) the relative standing (top 10%, top 25%, top 50%, bottom 50%, and bottom 25%) of the person in terms of the person's contribution to the total net revenue of the NRSRO for the fiscal year as compared with other persons who provided the NRSRO with revenue; and (3) all outstanding credit ratings paid for by the person. Should registrants be required to disclose the aggregate fees paid by the registrant to the credit rating agency for ratings and non-rating services, regardless of whether non-rating services have been provided, and the relative standing of the registrant in terms of the registrant's contribution to the total net revenue of the credit rating agency in registration statements? If we were to require this disclosure, should it be updated to the date of the registration statement instead of being provided as of the end of the last fiscal year? Would registrants have access to this information? If not, could they negotiate with the credit rating agency so that this information could be obtained from the credit rating agency, such as through the contract for services? What would the costs of providing such disclosure be? Would requiring this disclosure affect a registrant's ability to obtain a rating or to raise capital? Would investors benefit from having this information in the registration statement?

• Our proposed disclosure requirements relate only to fees paid to the credit rating agency. We are aware that there are other relationships that could present potential conflicts of interest. Item 509 of Regulation S–K [78] currently requires disclosure by a credit rating agency that is not an NRSRO when it (i) is paid on a contingent basis, (ii) has a substantial direct or indirect interest in the registrant, or (iii) has a connection to the registrant as a promoter, underwriter, officer, director or employee or voting trustee. Is this disclosure sufficient, or should there be a more specific disclosure requirement? For example, Exchange Act Rule 17g–5(a) and (b) provides that certain conflicts are permitted if they are disclosed and managed by the NRSRO. Such permitted conflicts include: Conflicts related to being paid by issuers for rating and non-rating services; conflicts related to subscription based services; conflicts related to ownership interests in entities being rated by the NRSRO; conflicts related to business relationships with issuers being rated by the NRSRO; conflicts related to the NRSRO having a broker or dealer associated with it; and any other conflict that would be material to the NRSRO. Should registrants be required to disclose conflicts: Conflicts related to being paid by a registrant for rating and non-rating services, regardless of whether non-rating services are being provided, paying the credit rating agency for subscription-based services, any ownership interest by the credit rating agency in the registrants or its affiliates, any business relationships between the credit rating agency and the registrant and its affiliates, any interest the credit rating agency has in a broker or dealer associated with it and any other material conflicts? Would all of the information be relevant to investors? Would registrants have access to this information? If not, could they negotiate with the credit rating agency so that this information could be obtained from the credit rating agency, such as through the contract for services? Rule 17g–5 currently requires annual reporting by NRSROs of these conflicts. If registrants were also required to disclose these types of conflicts, should we require the disclosure to be updated to the date of the registration statement? What would the costs of providing such disclosure be? Would requiring this disclosure affect a registrant's ability to obtain a rating or to raise capital? Would investors benefit from having this disclosure in the registration statement?

• Exchange Act Rule 17g–5(c) provides a category of conflicts that an NRSRO is prohibited from having with respect to a credit rating. These prohibited conflicts include: Providing a rating to an entity that accounted for 10% or more of the NRSRO's net revenue; direct ownership interests by the NRSRO or an analyst preparing the rating in the issuer; issuing or maintaining a rating on a person associated with the NRSRO; issuing or maintaining a rating where a person determining or approving the rating is an officer or director of the issuer; issuing or maintaining a rating where the NRSRO made recommendations with respect to the structure of the rating; issuing or maintaining a rating where the fee for such rating was discussed or negotiated by a person at the NRSRO with responsibility for determining or approving the rating; and issuing or maintaining a rating where a person determining or approving the rating received gifts in excess of $25. These prohibitions are only applicable to NRSROs. To the extent not otherwise required to be disclosed by Item 509 of Regulation S–K, should we require disclosure of the conflicts described above if credit rating agencies that are not NRSROs provide a rating to a registrant and if these conflicts exist or have existed during the registrant's previous two fiscal years through the date of the registration statement so that investors would be aware of such conflicts? Would registrants have this information? If not, could they negotiate with the credit rating agency so that this information could be obtained from the credit rating agency, such as through the contract for services? What would the costs of providing such disclosure be? Would requiring this disclosure affect a registrant's ability to obtain a rating or to raise capital? Would investors benefit from having this disclosure in the registration statement?

• Are there competitive or proprietary concerns that the proposed disclosed requirements should account for? If so, how? For example, will disclosing fees have any effect on the ability to negotiate for services?

• If non-rating services have been provided to the registrant or any of its affiliates by the credit rating agency or any of its affiliates, we have proposed to require a description of the other non-rating services and separate disclosure of the fee paid for the credit rating and the aggregate fees paid for any other non-rating services provided by the credit rating agency or its affiliates

[78] 17 CFR 229.509.

during the registrant's last completed fiscal year and any subsequent interim periods up to the filing date. Should we require disclosure for fees paid over a longer period such as two or five years? Should we require disclosure of fees for non-rating services that have been contracted and paid for but not yet delivered? Should we require disclosure for services that have been proposed or solicited but not yet finalized?

• Should we require disclosure of fees paid by the underwriter or its affiliates to the credit rating agency or its affiliates for non-rating services if the underwriter is the party paying for the rating? Should we require disclosure about services provided by the credit rating agency to the underwriter if the underwriter is paying for the rating? Should the underwriter be treated as acting on behalf of the issuer in such circumstances? Would the registrant be able to obtain this information? If not, should we consider initiating rulemaking to provide that underwriters shall make this information available to issuers upon reasonable request? Is there any additional information regarding credit rating agency fees that would be important to investors? Should we require disclosure of any current or anticipated arrangements or agreements regarding future services? If so, should we require an estimate of the fees to be paid for such services?

• Under our proposal, disclosure of fees would not be triggered if the services in addition to the credit rating are other credit rating services, such as fees to rate another security of the registrant. Is this approach appropriate? Do fees for other credit rating services raise conflict of interest issues similar to fees for non-rating services? Is the distinction between a credit rating service and a non-credit rating service sufficiently clear? Should we provide further guidance on this point? Should we reference the categories in Form NRSRO in this regard?

• Should we require disclosure of the fee paid for the credit rating regardless of whether additional services have been provided? Would this disclosure provide information that is important in evaluating potential conflicts of interest inherent in the issuer-paid ratings model? Is the information useful without additional context, such as the significance of the fee to the credit rating agency? If context is necessary to make the disclosure of fees meaningful, should we require disclosure of the significance of the fee to the credit rating agency? For example, should we require a registrant to disclose the percentage of revenue derived from the fee?[79] Would registrants have access to this information? Is there other information that would convey the significance of the fee to the credit rating agency? Should we require registrants to disclose the total amount of rating-related fees paid to the credit rating agency during the most recent fiscal year completed and any interim periods? During the two most recent fiscal years (or longer?) completed and any interim periods?

• Would disclosure of fees paid to credit rating agencies affect the amount of fees charged, or otherwise affect the competitive landscape for credit rating agencies?

• We note that there may be other factors that could influence the independence of the credit rating agency, such as a reliance on underwriters that refer business to the credit rating agency or the general importance of a particular registrant to the credit rating agency. Should we require disclosure of these sorts of relationships?

(c) Ratings Shopping

Reports that registrants, or persons acting on behalf of registrants, may engage in ''ratings shopping'' raise serious issues about the integrity of the credit ratings process.[80] We believe investors should be made aware of when a registrant (or a person acting on a registrant's behalf) may have engaged in ratings shopping.[81] It is our understanding that ratings shopping occurs because registrants, among others, can solicit preliminary credit ratings from a rating agency. If the registrant believes the preliminary rating is too low, the registrant can seek a different credit rating from another credit rating agency.[82] When a registrant can choose which ratings to disclose, including which final ratings to disclose, we believe the registrant will most likely choose the most favorable rating. If less favorable ratings are not disclosed, then investors may not have access to potentially important information that may suggest that the credit rating that is disclosed may be inflated.[83] Similarly, when the credit rating agency knows that the registrant will likely choose to use the credit rating agency that provides the most favorable rating, there may be an incentive for ratings to be inflated by the credit rating agency in order to keep the business of the registrant. Currently, our rules do not require disclosure of any credit ratings, whether preliminary or not. As a result, investors are not aware of when registrants seek a preliminary rating or when registrants obtain additional credit ratings but choose not to use them, and investors are not aware of any differences between the preliminary rating and the final rating.

We are proposing that if a registrant has obtained a credit rating and is required to disclose that credit rating, then all preliminary ratings of the same class of securities as the final rating that are obtained from credit rating agencies other than the credit rating agency providing the final rating must also be disclosed. In addition, we are proposing that if a rating is disclosed pursuant to the trigger described above, then any credit rating obtained by the registrant but not used must also be disclosed. We believe this disclosure requirement would provide investors with important information to assess whether any ratings shopping may have occurred, and whether any rating inflation may have occurred between the preliminary rating and the final rating obtained by a registrant as a result of the ratings shopping, or whether the registrant has other credit ratings that it has not used in connection with the offering.

We have not proposed to require disclosure of preliminary ratings obtained by a registrant from the credit rating agency that issues the final rating. We are concerned that such a disclosure requirement may impede useful communications between credit rating agencies and registrants as the credit rating agencies determine their initial ratings and perform continuing work related to monitoring the rating. In addition, there are rules applicable to NRSROs that are intended to prevent some of the problematic practices in this area. For example, Rule 17g–5 under the Exchange Act prohibits an NRSRO from issuing or maintaining a rating where it made recommendations with respect to the structure of the security.

When disclosure of any preliminary rating or unused final rating is required,

[79] *See* note 77 above.

[80] *See* note 24 above.

[81] In this regard, we note that three of the largest NRSROs entered into an agreement with the Attorney General for the State of New York in June 2008 that provides for certain disclosure regarding preliminary ratings. *See* Press Release, Office of the Attorney General, ''Attorney General Cuomo Announces Landmark Reform Agreements with the Nation's Three Principal Credit Rating Agencies,'' (June 5, 2008), at *http://www.oag.state.ny.us/media_center/2008/jun/june5a_08.html.* Our proposed rule, however, would apply to all credit rating agencies. In addition, because our proposed rules apply to registrants, investors would be able to find disclosure regarding preliminary ratings on a registrant-by-registrant and offering-by-offering basis instead of having to search the disclosure of the NRSROs.

[82] *See* Roger Lowenstein, *Triple-A Failure,* N.Y. Times Magazine, April 27, 2008.

[83] *See* Skreta and Veldkamp and Bolton, Freixas and Shapiro in note 24 above.

we are proposing to require similar disclosure as is proposed to be required for a final rating. Because preliminary ratings may vary in their form and level of detail, it is possible that all of the information required to be disclosed about a particular rating would not be available to the registrant. In preparing this disclosure, registrants would be able to rely on Securities Act Rule 409 [84] if the information otherwise required to be disclosed cannot be obtained without unreasonable effort or expense.

We believe disclosure of preliminary ratings as described above would provide important information for investors about potential ratings shopping. We believe registrants could identify any preliminary ratings required to be disclosed in the registration statement in a manner that would avoid confusion for investors. For example, registrants could disclose any preliminary ratings under a separate sub-heading, or the registrant could include written disclosure as to the limitations of preliminary ratings.

For purposes of this proposed disclosure requirement, a credit rating, including a preliminary credit rating, generally would be obtained from a credit rating agency if it is solicited by or on behalf of a registrant from a credit rating agency. For these purposes, we would view an underwriter and others involved in structuring a deal, such as a sponsor or depositor, who obtains a credit rating, including a preliminary credit rating, for a deal structure to be acting on behalf of the registrant.

We intend for the phrase ''preliminary credit rating'' to be read broadly and to include any rating that is not published, any range of ratings, any oral or other indications of a potential rating or range of ratings and all other preliminary indications of a rating. We believe that a broad reading would better facilitate the purpose of the proposed disclosure in order to alert investors if the registrant has obtained indications of a rating from one credit rating agency but chooses to use a credit rating from another. We are not proposing to limit the required disclosure of preliminary ratings to ratings specific to the registrant. For example, a preliminary rating would include ratings on a particular structure of a security even if not tied to a specific registrant or pool of assets.[85] As proposed, disclosure of a preliminary rating would be required even if there have been changes to the security for which a final rating is disclosed. We believe this disclosure would place the information about ratings in context.

Request for Comments

- Should we require disclosure of preliminary ratings, as proposed? Is there any other information regarding preliminary ratings that should be required to be disclosed? Would the rule as proposed capture all potential ratings shopping practices? As an alternative, should the rule require disclosure of contacts between the registrant and the credit rating agency as a means of disclosing preliminary ratings and negotiations between the registrant and the credit rating agency? [86] Would the rule reduce the number of preliminary ratings sought?
- We have expressed our concerns about ratings shopping by registrants and the potential for credit rating agencies to use less conservative rating methodologies in order to gain or retain business, presumably lessening the value of the ratings. As proposed, a registrant would only be required to provide disclosure of a preliminary rating if it is of the same class of securities as a final rating otherwise required to be disclosed by the rule and is received from a credit rating agency other than the credit rating agency providing the final rating. Are these limitations appropriate? Are there circumstances where disclosure of preliminary ratings would be important even if a final rating was never obtained? Should we require disclosure of all preliminary ratings obtained by a registrant, including from the credit rating agency that issues the final rating?
- We have proposed to require disclosure of unused final credit ratings obtained by a registrant if a credit rating is otherwise disclosed pursuant to the proposed rules so that investors would be aware of any potential ratings shopping by the registrant in choosing which credit rating to use. Would this provide important information for investors? Do registrants ever obtain final ratings but not use them? Why might a registrant choose not to use a credit rating? Would requiring disclosure of such ratings reveal potential ratings shopping practices of registrants? If not, is there other disclosure that would elicit disclosure about potential ratings shopping?
- Would requiring the proposed disclosure for preliminary or unused final ratings enhance investors' understanding of, and therefore the value of, the ratings? Would such disclosure help to address our concerns with ratings shopping? If you do not believe such disclosure would be helpful, how would you suggest that we address these concerns? Is disclosure of an indication from a credit rating agency of a likely or possible rating appropriate? What effect would our proposed rule have on ratings shopping? Would it encourage or discourage the practice? Why?
- To the extent that a preliminary rating that would be required to be disclosed pursuant to the proposed rule is not based on final and full information, to what extent would disclosure of such preliminary rating present a risk that investors could form a mistaken impression about the credit quality of the security or the registrant's ratings shopping?
- How would our proposed rule affect communications between registrants and credit rating agencies? Would the proposed requirement result in fewer discussions between credit rating agencies and registrants? Would it affect the quality of information provided by registrants to obtain a rating?
- What types of activities might replace the issuance of preliminary ratings if the proposed rule is adopted? To what extent might some alternative ratings shopping behavior develop?
- Would the proposal have a negative impact on smaller or newer credit rating agencies? Would smaller or newer credit rating agencies have a difficult time establishing their market position if registrants no longer seek multiple preliminary ratings? For example, would registrants be less likely to engage in initial conversations with smaller or newer credit rating agencies in order to understand their methodologies and procedures if we require the disclosure of preliminary ratings?
- How would changes in the structure of a security affect disclosure of preliminary ratings? Would it be difficult for registrants to track preliminary ratings?
- As proposed, a credit rating, including a preliminary credit rating, would be ''obtained'' if it is solicited by

[84] 17 CFR 230.409.

[85] For instance, an underwriter may approach a rating agency about a newly developed or refined structure for an asset-backed offering of a certain class of assets generally. In some cases, the rating agency may be asked to provide an indication of a rating on that structure without knowledge of the specific pool assets or names of the originators for the assets, although certain criteria for the assets could be outlined. The preliminary rating that is assigned to the structure would need to be disclosed under our proposal if a rating is used in connection with a registered offering of securities by the underwriter with that structure.

[86] For example, in the context of roll-up transactions, Item 911(a)(5) of Regulation S–K [17 CFR 229.911(a)(5)] requires disclosure of any contacts between the sponsor or general partner and a third party providing a report, opinion or appraisal on the roll-up transaction. *See also* Item 1005 of Regulation M–A [17 CFR 229.1105].

or on behalf of a registrant from a credit rating agency. Is this sufficient to capture all of the preliminary ratings sought from other credit rating agencies?

• Should we include additional guidance as to what constitutes a preliminary rating? Would additional guidance allow registrants and credit rating agencies to structure their dealings to avoid disclosure? Are there less formal preliminary indications given by credit rating agencies that should be included in the required disclosure? Would requiring disclosure of preliminary ratings interfere with other types of communications between registrants and credit rating agencies, such as discussions related to surveillance or maintenance ratings that credit rating agencies may provide on other classes of securities issued by the same registrant for which credit ratings have been provided? If so, how should we address this concern? Would the broad view of ''preliminary credit rating'' as proposed interfere with any non-rating services provided to the registrant? If so, how could we address this?

• Are there any concerns about the availability of the information about preliminary ratings that we are proposing registrants be required to disclose? Would credit rating agencies object to registrant's disclosure of preliminary ratings where no compensation was paid to the credit rating agency?

• Would disclosure of preliminary ratings have negative effects for investors, registrants or credit rating agencies? For example, would investors be confused by disclosure of preliminary ratings? Would disclosure of preliminary ratings be confusing or misleading? If so, how could we revise the proposal to reduce the risk that investors would be confused or misled? Would credit rating agencies change their practices if preliminary ratings are required to be disclosed? If so, how might their practices change?

• Should our proposed disclosure regarding preliminary ratings distinguish among issuers of corporate debt, structured finance products and/or closed-end funds? Do corporate issuers, issuers of structured finance products and closed-end funds engage in ratings shopping equally or in the same manner? What are the differences? Is there different information regarding preliminary ratings that would be relevant for corporate debt, structured finance products and closed-end funds?

D. Disclosure in Exchange Act Reports

We are proposing to amend Exchange Act reports and rules to require a registrant to provide investors with updated disclosure regarding changes to a previously disclosed credit rating.

If a credit rating that was previously disclosed under the rules proposed above has been changed, including when a rating has been withdrawn or is no longer being updated, that change would be required to be disclosed in a current report on Form 8–K.[87] We are proposing a new item requirement to Form 8–K, which would require a registrant (including a closed-end fund) to file a report within four business days of receiving a notice or other communication from any credit rating agency, that the organization has decided to change or withdraw a credit rating assigned to the registrant or any class of debt or preferred security or other indebtedness of the registrant (including securities or obligations as to which the registrant is a guarantor or has a contingent financial obligation) or take any similar action with respect to a credit rating that was previously disclosed pursuant to proposed Item 202(g) of Regulation S–K or proposed Item 10.6 of Form N–2.

As discussed above, we previously proposed in 2002 to require disclosure in current reports of changes in credit ratings when we amended the item requirements for current reports on Form 8–K. We did not adopt the proposal at the time.[88]

Under the proposed item, the registrant would have to disclose the date that the registrant received the credit rating agency's notice or communication, the name of the rating agency, and the nature of the rating agency's decision. We are not proposing to require the registrant also discuss the impact of the change or other decision on the registrant, though it would be permitted to do so. Rather, consistent with similar Form 8–K items, we believe that a discussion of any material impact of the change in credit rating would be required to be disclosed in a registrant's periodic reports.[89] We believe this would provide the registrant with additional time to analyze the impact of the rating change to the registrant between the filing of a current report and the filing of its next periodic reports. We note, though, that a change in a credit rating may require the registrant to make related disclosures under other Form 8–K items, such as Item 2.04—Triggering Events that Accelerate or Increase a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement.

Disclosure under this item would not be required until the rating agency notifies the registrant that the rating agency has made a decision to change the credit rating. If the registrant is still in negotiations or appealing a preliminary indication that a credit rating agency intends an action covered by the proposed item, no disclosure would be required. However, once good faith negotiations and appeals cease, disclosure would be required.

As noted above, we believe the application of our current rules would require a registrant to disclose in its periodic reports the impact on it, if material, of any change in a rating that was previously disclosed under the rules proposed above.[90] For example, if a credit rating agency withdraws or stops updating a rating, the registrant would be required by the proposed amendment to disclose that fact in a current report on Form 8–K, and our current rule requirements would require the registrant to discuss the impact of the change on the company, if material, either in MD&A or in an appropriate location in its next periodic report.

We have proposed to limit the disclosure regarding changes to a credit rating in a current report to credit ratings that were disclosed previously pursuant to the rules we propose today. Thus, a registrant would not be subject to the new requirement to disclose changes to credit ratings that were obtained or used prior to the effectiveness of any new disclosure requirements adopted as a result of this proposal. We believe this distinction

[87] As discussed in this section, we are proposing that foreign private issuers be required to provide disclosure regarding credit rating changes in their annual reports on Form 20–F. As a result, the disclosure for foreign private issuers would not be required to be made within four business days of the rating change.

[88] *See* note 39 above and the related discussion.

[89] When revisions were adopted to the 8–K reporting requirements in 2004, the Commission noted that it was not adopting requirements for certain new items such as Item 2.04—Triggering Events that Accelerate or Increase a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement that would have required registrants to provide a management's analysis of the change to be included in the Form 8–K. The Commission noted that the analysis might be difficult to provide in the time period required for the filing of the 8–K and that the analysis might be more relevant and complete in the context of financial statements. The Commission reminded registrants, however, that any disclosure made in a report on Form 8–K must include all other material information, if any, that is necessary to make the required disclosure, in the light of the circumstances under which it is made, not misleading. *See Additional Form 8–K Disclosure Requirements and Acceleration of Filing Date* in note 43 above.

[90] As proposed, this new item in Form 8–K would also be applicable to asset-backed issuers. However, such issuers are unlikely to have additional disclosure in their periodic reports because a change in a rating of an asset-backed issuer's own securities typically does not affect that issuer.

strikes an appropriate balance between the burden on registrants in preparing the disclosure and the needs of investors for information about credit ratings. Although our new requirements would not be applicable in that setting, we note that disclosure of credit ratings and changes in ratings may be required in periodic reports under our current rules as discussed above.[91]

We are proposing to require closed-end funds to make the same disclosures regarding changes to a credit rating as other registrants because we believe that this information is of similar relevance to investors in closed-end funds and other registrants. Specifically, we propose to amend Exchange Act Rules 13a–11(b)[92] and 15d–11(b)[93] to require a closed-end fund to file a current report on Form 8–K containing the disclosures regarding changes to a credit rating within the period specified in Form 8–K unless substantially the same information has been previously reported by the fund.[94]

We are proposing to require foreign private issuers to provide disclosure regarding changes to a credit rating annually in their reports on Form 20–F. While the disclosure would not be required as frequently or timely as it would be for domestic issuers, investors would still have access to the information in a foreign private issuer's annual report.

In proposing these amendments, we recognize that credit rating changes can be important information to an investor in making investment and voting decisions. Credit rating agencies typically disclose rating changes publicly via press release at the same time or shortly after they notify affected companies of the changes. Therefore, investors already can obtain access to information about rating changes if they know where to find the press releases and are willing to routinely monitor these releases to find information about particular companies and securities. However, we believe some investors may not routinely monitor all press releases issued by credit rating agencies and therefore likely would benefit from disclosure about ratings changes filed by companies on Form 8–K.

Once a credit rating agency stops rating the securities, a registrant would be required to disclose that information in a current report, update a prospectus if necessary, and include any relevant analysis in its next periodic report but would then have no further disclosure obligation related to that rating in subsequent filings.

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- As proposed, we would require disclosure about changes to previously disclosed credit ratings in a registrant's Exchange Act reports, including whether a rating has been withdrawn or will no longer be updated. Would the proposed disclosure provide helpful information for investors? Is there other information about ratings that would be more important to investors? For example, should we include a requirement that the reason for the change in rating be disclosed? Would the disclosure increase reliance on credit ratings? If so, how?
- We have proposed to limit the disclosure regarding changes to a rating to ratings previously disclosed pursuant to proposed Item 202(g) of Regulation S–K or proposed Item 10.6 of Form N–2. As a result, changes to ratings that were obtained prior to the effectiveness of the rule, if adopted, will not be required to be disclosed. Should we expand the scope of the proposed rule to require that all changes to ratings be disclosed regardless of whether they were disclosed previously? Would this create a burden on registrants not in the public interest? Why or why not? How could this information be disclosed at the least cost to registrants?
- Is a requirement to file a current report on Form 8–K necessary in view of the typical practice by credit rating agencies to promptly issue press releases about rating changes under the subscriber paid model? Is current disclosure by credit rating agencies through press releases adequate? Would investors benefit from having companies disclose this information in a uniform place?
- Could registrants provide an analysis of the credit rating change in a Form 8–K in the time allowed for filing a Form 8–K? How does this disclosure compare to disclosure of other matters such as the acceleration of a direct or off-balance sheet obligation where disclosure of the event is required in a Form 8–K, and analysis of the impact is allowed to be deferred to the next periodic report?
- We believe our current rules would require registrants to discuss the significance of a credit rating change in its next periodic report if the impact would be material to the company. Are there circumstances where a credit rating change would not trigger disclosure in the next periodic report? Should we adopt an explicit requirement that any credit rating change disclosed on Form 8–K would be required to be analyzed and discussed in the following periodic report?
- We have proposed to require disclosure when a rating has changed. Should we also require disclosure of other ratings actions, such as placing an issuer on ''credit watch'' or assigning a different outlook to the registrant's rating? Are these actions viewed as important by investors? Would requiring this disclosure create a burden for registrants not in the public interest?
- The proposed disclosure would apply only to credit ratings originally used in connection with registered offerings. Are there reasons that disclosure should be limited to registered offerings? Should we require disclosure of credit ratings used in connection with private offerings? Are there any concerns regarding disclosure of credit ratings related to private offerings?
- Is it appropriate to require closed-end funds to file reports on Form 8–K disclosing credit rating changes? Instead of filing reports on Form 8–K, should closed-end funds be permitted to disclose changes to credit ratings through other methods, such as a different filing with the Commission or a notice posted on an internet Web site and/or issuance of a press release? Is there empirical or other evidence demonstrating that one or more of those other methods would provide better dissemination of the information with respect to closed-end funds? What would be the disadvantages, if any, of not requiring a filing that would be available in the Commission's EDGAR system?
- Is the content of the proposed disclosure requirements on Form 8–K appropriate for closed-end funds or should it be modified? Are there additional disclosures regarding changes to a credit rating that closed-end funds should be required to make? For example, closed-end funds are not required to include MD&A in their periodic reports. Should a closed-end fund be required to disclose in a Form

[91] Disclosure may also be required pursuant to Exchange Act Rule 12b–20 [17 CFR 240.12b–20], which requires that in addition to the information expressly required to be included in a report, the report is required to include any further material information necessary to make the required statements, in the light of the circumstances under which they are made not misleading.

[92] 17 CFR 240.13a–11(b).

[93] 17 CFR 240.15d–11(b).

[94] Under Regulation FD [17 CFR 243.100 *et seq.*], closed-end funds are currently required to make public disclosure of certain material information on Form 8–K unless they disseminate the information through other methods of disclosure that are reasonably designed to provide broad, non-exclusionary distribution of the information to the public. In addition, pursuant to Rule 104 of Regulation BTR [17 CFR 245.104], closed-end funds are required to file notice of a blackout period, if any, on Form 8–K.

8–K or Form N–CSR[95] the impact on it, if material, of any change in a credit rating that was previously disclosed under proposed Item 10.6 of Form N–2?

• Are the proposed amendments for foreign private issuers appropriate? Should they be modified? Are there additional disclosures that foreign private issuers should make? Is the information relevant to investors if it is only required in the next annual report?

II. General Request for Comments

We request and encourage any interested person to submit comments regarding:

• The proposed amendments that are the subject of this release;

• additional or different changes; or

• other matters that may have an effect on the proposals contained in this release.

We request comment from the point of view of companies, investors, and other market participants, including NRSROs and other credit rating agencies. With regard to any comments, we note that such comments are of great assistance to our rulemaking initiative if accompanied by supporting data and analysis of the issues addressed in those comments.

In addition, we request comment on the following:

• Should the Commission include a phase-in for registrants beyond the effective date to accommodate pending offerings? As proposed, compliance with the new standards would begin on the effective date of the new rules. Will a significant number of registrants have their offerings limited by the proposed rules? If a phase-in is appropriate, should it be for a certain period of time (for example, six months or one year or longer) or only for the term of a pending registration statement?

III. Paperwork Reduction Act

A. Background

Certain provisions of the proposed rule amendments contain a ''collection of information'' within the meaning of the Paperwork Reduction Act of 1995 (PRA).[96] The Commission is submitting these proposed amendments and proposed rules to the Office of Management and Budget (OMB) for review in accordance with the PRA. An agency may not conduct or sponsor, and a person is not required to comply with, a collection of information unless it displays a currently valid control number. The titles for the collections of information are:[97]

''Regulation S–K'' (OMB Control No. 3235–0071);
''Form S–1'' (OMB Control No. 3235–0065);
''Form S–3'' (OMB Control No. 3235–0073);
''Form S–4'' (OMB Control No. 3235–0324);
''Form S–8'' (OMB Control No. 3235–0066);
''Form S–11'' (OMB Control No. 3235–0067);
''Form 10'' (OMB Control No. 3235–0064);
''Form 8–A'' (OMB Control No. 3235–0056);
''Form 8–K'' (OMB Control No. 3235–0060);
''Form F–1'' (OMB Control No. 3235–0258);
''Form F–3'' (OMB Control No. 3235–0256);
''Form F–4'' (OMB Control No. 3235–0325);
''Form 20–F'' (OMB Control No. 3235–0288); and
''Form N–2'' (OMB Control No. 3235–0026).

We adopted all of the existing regulations and forms pursuant to the Securities Act, the Exchange Act or the Investment Company Act. These regulations and forms set forth the disclosure requirements for registration statements and Exchange Act reports that are prepared by registrants to provide investors with information to make investment decisions in registered offerings and in secondary market transactions.

The hours and costs associated with preparing disclosure, filing forms, and retaining records constitute reporting and cost burdens imposed by the collection of information. There is no mandatory retention period for the information disclosed, and the information disclosed would be made publicly available on the EDGAR filing system.

B. Summary of Collection of Information Requirements

We are proposing to amend Item 202 of Regulation S–K to mandate disclosure by registrants regarding their credit ratings in their registration statements when a credit rating is used in connection with a registered offering. We are proposing parallel amendments for closed-end funds and foreign private issuers. We are also proposing to amend Exchange Act reporting requirements to require disclosure when there has been a change to a previously disclosed credit rating.

If a credit rating is used by the registrant, a selling securityholder, an underwriter or a member of a selling group in connection with a registered offering, then the registrant would be required to provide information about the credit rating in the registration statement. Such information would include general information about the rating, including any scope limitations on the rating, the identity of the person paying for the rating, a description of any non-rating services provided to the registrant within a specified period of time, including disclosure of the fees paid for such non-rating services, and disclosure of preliminary ratings obtained from a credit rating agency other than the credit rating agency providing the final rating and unused final ratings. A registrant would also be required to update the prospectus if a final rating is changed or is not available until after the effectiveness of the registration statement.

We are also proposing amendments to Form 8–K (for operating companies and closed-end funds) and to Form 20–F (for foreign private issuers) to require disclosure of changes in a credit rating, including when the rating is no longer being updated or has been withdrawn. For operating companies and closed-end funds, the change in a credit rating would be required to be reported within four business days on Form 8–K. For foreign private issuers, disclosure would be required annually on Form 20–F.

The proposals would increase existing disclosure burdens for Exchange Act reports on Form 8–K and registration statements by requiring disclosure of credit ratings, whether or not issued by an NRSRO, in registrants'' registration statements and reports.

C. Paperwork Reduction Act Burden Estimates

For purposes of the Paperwork Reduction Act, we estimate that over a three-year period the average annual incremental increase in the paperwork burden for non-investment company registrants to comply with our proposed collection of information requirements to be approximately 2,120 hours of in-house company personnel time and to be approximately $816,000 for the

[95] 17 CFR 249.331; 17 CFR 274.128. Form N–CSR is the periodic reporting form used by registered management investment companies.

[96] 44 U.S.C. 3501 *et seq.*; 5 CFR 1320.11.

[97] The paperwork burden from Regulation S–K is imposed through the forms that are subject to the requirements in those regulations and is reflected in the analysis of those forms. To avoid a Paperwork Reduction Act inventory reflecting duplicative burdens and for administrative convenience, we assign a one-hour burden to Regulation S–K.

services of outside professionals.[98] For closed-end funds, we estimate the annual incremental increase to be approximately 157 hours of in-house company personnel time and approximately $108,400 for the services of outside professionals. These estimates include the time and the cost of preparing and reviewing disclosure and filing documents. Our methodologies for deriving the above estimates are discussed below.[99]

Our methodologies for deriving the burden hour and cost estimates presented below represent the average burdens for all registrants who are required to provide the disclosure, both large and small. For registration statements, we estimate that 25% of the burden of preparation is carried by the company internally and that 75% of the burden is carried by outside professionals retained by the registrant at an average cost of $400 per hour.[100] The portion of the burden carried by outside professionals is reflected as a cost, while the portion of the burden carried by the company internally is reflected in hours.

Our estimates are based on the assumption that the proposed disclosure would add disclosure for a subset of affected registrants (*i.e.* those issuing rated securities). We further assume that the new disclosure requirement would not affect the number of registrants. For registration statements, we estimate that the proposed amendments would impose an average of a 60 minute burden of preparation carried by the company internally and a $1,200 cost for outside professionals retained by the registrant reflecting three hours of their time. This estimate includes the time necessary to obtain the relevant information, including certain information that would likely be provided by the credit rating agency such as the relative rank of the rating in the credit rating agency's classification system. Further, based on statistics related to the number of registration statements filed for debt offerings in fiscal years 2007 and 2008 from our Office of EDGAR Information and Analysis, we estimate that 500 registration statements on Forms S–1, S–3, and S–4 will be affected annually by the disclosure requirements.[101] We have attempted to be conservative in our estimates of affected filings. We recognize that not all debt offerings have credit ratings associated with them; however, given the relatively low number of debt filings over the past two fiscal years, we have included most of those filings within our estimate. For closed-end funds, we also estimate that approximately 82 registration statements on Form N–2 [102] would be affected annually by the disclosure requirements. For purposes of Form 20–F, there would be an increased burden in Forms 20–F used as registration statements and as annual reports. There were an average of 77 Forms 20–F filed as registration statements in fiscal years 2007 and 2008. Based on a review of a sample of these filings, we estimate that 20 Form 20–F registration statements would include the required disclosure and that 20 Form 20–F annual reports would include disclosure regarding changes to a credit rating.

For current reports on Form 8–K, including Forms 8–K filed by closed-end funds, we estimate that registrants spend, on average, five hours completing the form. We estimate that 75% of that burden is carried by the company while 25% is carried by outside counsel at a cost of $400 per hour. In order to estimate the number of additional Form 8–Ks that would be required to be filed pursuant to our proposed amendments, we have looked to the number of Forms 8–K filed with disclosure pursuant to Item 2.04-Triggering Events That Accelerate or Increase a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement. We believe that many rating changes may also accelerate financial obligations, so that looking to Item 2.04 gives some indication of the number of Forms 8–K that may be filed even though it does not cover the same disclosure. For example, we are aware that Item 2.04 likely would not be triggered by a credit rating upgrade. We solicit comment on better ways to estimate the number of 8–Ks that would be filed pursuant to our proposed requirements. In our fiscal year 2007 and 2008, there were an average of 396 Forms 8–K filed pursuant to Item 2.04. In addition, based on publicly available information concerning changes in credit ratings of senior securities issued by closed-end funds occurring during calendar years 2007 and 2008, Commission staff estimates that approximately 20 additional Forms 8–K would be filed annually by closed-end funds pursuant to proposed Item 3.04. As a result, we estimate that 420 additional Forms 8–K would be filed pursuant to proposed Item 3.04.

Table 1 below illustrates the incremental annual compliance burden in the collection of information in hours and cost for current reports and registration statements.[103]

[98] We calculated an annual average over a three-year period because OMB approval of Paperwork Reduction Act submissions covers a three-year period. For administrative convenience, the presentation of the totals related to the paperwork burden hours have been rounded to the nearest whole number and the cost totals have been rounded to the nearest thousand.

[99] The estimates reflect the burden of collecting and disclosing information under the PRA. Other costs associated with the proposed amendments are discussed in Section IV below.

[100] We estimate an hourly rate of $400 as the average cost of outside professionals that assist registrants in preparing disclosure and conducting registered offerings.

[101] All of the registration statements would be required to contain the proposed disclosure if the proposed trigger for the disclosure has been satisfied. We have assumed for purposes of this PRA analysis that the distribution of the estimated 500 filings will be proportional to the number of Forms S–1, S–3 and S–4 registration statements filed for debt offerings with approximately 60% of filings on Form S–3, 20% on Form S–1, and 20% on Form S–4. We have not included estimates for Form 10, Form S–8 and Form S–11 as we believe a negligible number of registrants use those forms to register debt securities.

[102] Based on Commission filings, we estimate that there are approximately 802 active registered closed-end funds and approximately 205 annual responses to Form N–2. According to statistics maintained by the Investment Company Institute, approximately 322 of these closed-end funds have issued senior securities. *See* Investment Company Institute, Total Net Assets of Closed-End Funds, 2009: Q1, *available at http://www.ici.org/pdf/cef_ql_09_sup_tables.pdf* (last visited on Aug. 17, 2009) (showing data as of Mar. 31, 2009). Based on the proportion of the number of closed-end funds that have issued senior securities to the total number of active registered closed-end funds, we have assumed, for purposes of the PRA, that approximately 40% (322 divided by 802) of the annual Form N–2 responses will involve closed-end funds that have issued senior securities. We have further assumed that all closed-end funds issuing senior securities also will be required to disclose credit ratings in their registration statements under the proposed amendments. Therefore, we estimate that approximately 82 (40% of 205) registration statements on Form N–2 filed annually would include disclosure of credit ratings under the proposed amendments.

[103] The number of responses for Form N–2 reflected in the table equals the actual number of forms filed with the Commission during the 2008 fiscal year. This amount is an increase from the current approved number of annual responses to Form N–2 of 200.

Form	Current Annual Responses	Proposed Annual Responses	Current Burden Hours	Increase in Burden Hours	Proposed Burden Hours	Current Professional Costs	Increase in Professional Costs	Proposed Professional Costs
8-K	108,424	108,844	406,590	1,575	408,165	$54,212,000	$210,000	$54,422,000
20-F	942	942	614,891	120	615,011	$737,868,600	$16,000	$737,884,600
S-1	768	768	182,392	100	182,492	$218,870,800	$120,000	$218,990,800
S-3	2,065	2,065	236,959	300	237,259	$284,350,500	$360,000	$284,710,500
S-4	619	619	628,904	100	629,004	$754,686,601	$120,000	$754,806,601
N-2	200	205	86,468	82	86,550	$3,531,600	$98,400	$3,630,000
Total	113,018	113,443	2,156,204	2,277	2,158,421	$2,053,520,101	$924,400	$2,054,444,501

D. Solicitation of Comments

We request comments in order to evaluate: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information would have practical utility; (2) the accuracy of our estimate of the burden of the proposed collection of information; (3) whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (4) whether there are ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.[104]

Any member of the public may direct to us any comments concerning the accuracy of these burden estimates and any suggestions for reducing these burdens. Persons submitting comments on the collection of information requirements should direct the comments to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should send a copy to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090, with reference to File No. S7–20–09. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7–20–09, and be submitted to the Securities and Exchange Commission, Records Management, Office of Filings and Information Services, 100 F Street, NE., Washington, DC 20549. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

[104] We request comment pursuant to 44 U.S.C. 3506(c)(2)(B).

IV. Cost-Benefit Analysis

A. Proposed Amendments

The proposed amendments would require disclosure regarding credit ratings by registrants in their registration statements under the Securities Act, Exchange Act and Investment Company Act if the registrant uses the rating in connection with the offer or sale of securities in a registered offering. Under proposed new paragraph (g) to Item 202 of Regulation S–K, Item 12 of Form 20–F and Item 10.6 of Form N–2, registrants would be required to disclose much of the specific disclosure currently permitted under Item 10(c) of Regulation S–K. The proposal would require disclosure of all material scope limitations of the credit rating and any related published designation, such as non-credit payment risks, assigned by the rating agency with respect to the security. The proposed changes would also require disclosure of the source of the payment for the credit rating. If any non-rating services have been provided by the credit rating agency to the registrant, disclosure of the fees paid for those services also would be required, so that investors would be aware of potential conflicts of interest with respect to the credit rating used by the registrant. Under the proposed amendments, if a registrant is required to disclose a credit rating, then it would also be required to disclose all preliminary ratings and unused final ratings it received from rating agencies other than the credit rating agency that provided the final rating. This disclosure is intended to provide investors with useful information to assess whether a registrant may have engaged in ratings shopping. In addition, we are proposing to amend Exchange Act reports to require disclosure of a change in previously disclosed credit rating.

The additional information and transparency provided by our proposed amendments are intended to help provide investors with the information they need about credit ratings to put the rating in the appropriate context. The proposed amendments are aimed at addressing concerns that investors may not have sufficient information to understand the scope or meaning of ratings being used to market various securities, that they may not fully appreciate the potential conflicts of interest faced by credit rating agencies and how these conflicts may impact ratings, that ratings shopping may be occurring and may be leading to inflated ratings, and that our current disclosure rules do not require certain basic information about a potentially key element of their investment decision.

The proposed amendments may affect economic behavior if the amendments alter (a) the use of ratings by investors, (b) registrants' security issuance and ratings-seeking behavior, and (c) the credit rating agencies' behavior when providing ratings, These effects will likely vary depending on the asset class (*e.g.*, corporate issues, structured finance products), the type of the registrant (*e.g.*, corporate registrant, sponsor of the financial product, closed-end funds), the type of credit rating agency (*e.g.*, subscriber-paid rating agencies, issuer-paid NRSROs, unregistered credit rating agencies), the type of investor (*e.g.*, retail investors, institutional investors), and the ongoing changes in the regulatory environment. The economic benefits and costs on market participants associated with these economic effects are discussed below.

B. Benefits

Benefits to investors resulting from increased contextual information about ratings

The proposed amendments would require disclosure of information related to the rating used in a registered offering, such as the relative rank of the credit rating within the assigning credit rating agency's overall classification system, all material scope limitations of the rating, and any published designation that reflects the results of any other evaluation done by the credit rating agency in connection with the credit rating. Some investors may benefit from an improved understanding of the meaning and scope of ratings resulting from these new disclosures. While much of this information is publicly available, requiring it to be presented in the registration statement may increase the degree to which investors understand what the rating means. Additionally, new information, such as changes in ratings, would be disclosed in Exchange Act reports. While ratings are typically public information, available through news services or from the credit rating agency, investors may find it easier to access ratings in a central repository that is available over time. Investors should be better able to put the ratings in context when ratings and the proposed disclosure are presented together with other information in the registration statement. Less sophisticated investors may benefit more from these disclosures, as sophisticated investors may already have absorbed this information from other sources.

Disclosure of potential conflicts of interests faced by credit rating agencies would provide information to investors that is not currently available. Potential conflicts of interest may arise when a credit rating agency derives significant revenue from a registrant whose securities it also rates. Credit rating agencies, in some cases, offer non-ratings services to registrants, such as consulting services.[105] Both sophisticated and unsophisticated investors could benefit from understanding whether the rating was received in the context of other services; in particular, they may place less weight on ratings in which the agency was substantially compensated for other services. This additional information may, in some cases, reduce the possibility of investors placing undue reliance on ratings. Alternatively, however, if new disclosures cause investors to believe that ratings are not subject to any potential conflict of interest, the additional disclosures may increase the degree to which investors rely on ratings.

The proposed amendments would enable investors to distinguish between solicited ratings (which can rely on both public and non-public information) and unsolicited ratings (which generally rely on only public information). Currently, it is not possible in every case for investors to make this distinction. Under the proposed amendments, if registrants use a rating to sell a security in a registered offering, it will be included in the registration statement; in other cases, it may not be. If a rating is disclosed in a registration statement, the registrant would be required to disclose who paid for the rating.

Benefits to Investors From Increased Informativeness of Ratings

The proposed amendments may have the long-term benefit of increasing the informativeness of credit ratings to investors, that is, the degree to which ratings correspond to the credit quality of the rated security or entity. Investors benefit from increased informativeness in several ways. Entities with different credit quality are exposed to distinct economic factors, and investors may take this fact into account when making investment decisions. Additionally, investors can use credit ratings in conducting fundamental analysis of individual securities. As a result, investors benefit from credit ratings that are more informative.

Increased informativeness of ratings can result from a reduction in ''ratings shopping.'' [106] Currently registrants may solicit more ratings than they intend to use, choosing from among ratings providers without making any disclosure regarding the other solicited ratings. Criteria for selecting ratings agencies include the reputation of the agency and the rating itself.[107] There may be other, non-shopping reasons for soliciting multiple ratings, such as obtaining multiple expert views on the registrant's financial health. If the proposed amendments are adopted and registrants continue to solicit more ratings than they intend to use, preliminary and unused final ratings would be made public if the registrant used a rating in connection with a registered offering. Credit rating agencies would know that their ratings would be disclosed if the registrant uses a final rating from a different credit rating agency in connection with a registered offering. Thus, the market could assess the relative informativeness of ratings used to sell the security and ratings from other agencies. This ability to compare a broader group of ratings, including preliminary ratings, for the same issue may allow investors to identify agencies whose ratings they perceive to be less reliable. This ability may be limited, however, as direct comparisons between preliminary ratings and final ratings may be affected by factors such as changes in information made available to the credit rating agency throughout the ratings process. The proposed disclosure could cause credit rating agencies to expend greater effort to examine the financial health of the underlying entity. Ultimately, increased efforts in the ratings process could improve ratings informativeness.

The proposed amendments may change the way rating agencies compete. This may indirectly improve ratings informativeness. Rating agencies may compete on the quality of ratings or they may engage in ratings-based competition that focuses on producing high ratings. Any potential reduction in ratings-based competition may result in credit rating agencies focusing on enhancing their reputations for producing quality ratings and competing on that basis, rather than competing to produce high ratings so that registrants select them. Rating agencies may have greater incentives to compete on the basis of the quality of ratings as they are likely to face reduced incentives to produce optimistic ratings in the hopes of being selected, since registrants'' incentives to obtain a higher rating would be reduced. These changes in registrants'' incentives and their consequent effect on credit rating agencies'' incentives, however, will be limited, to the extent that preliminary ratings are incomplete or based on less than full and final information, or that registrants replace the use of preliminary ratings for ratings shopping with new alternative mechanisms. Any potential reduction in the rating-based competition is likely to result in more informative ratings.[108]

[105] *See* Frank Partnoy, *How and Why Credit Rating Agencies are Not Like Other Gatekeepers,* (2006) *at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=900257* for a discussion of non-rating services provided by credit rating agencies.

[106] *See* Aaron Lucchetti and Serena Ng, *How Rating Firms' Calls Fueled Subprime Mess,* (Aug. 16, 2007), *at http://www.realestatejournal.com/buysell/mortgages/20070816-lucchetti.html. See also* Skreta and Veldkamp, and Bolton, Freixas and Shapiro in note 24 above.

[107] *See* Dion Bongaerts, Martijn Cremers, and William N. Goetzmann *Multiple Ratings and Credit Spreads* (June 30, 2009), *at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1307782.*

[108] *See* Becker and Milbourn in note 14 above.

Benefits to Certain Rating Agencies From Enhanced Competitive Position

The proposed amendments may benefit certain rating agencies by enhancing their competitive position, relative to others. Enhanced competitive position may result in these agencies charging higher fees, rating more securities, or being more selective in the securities they rate. These effects result from two factors. First, smaller agencies may be asked to provide preliminary ratings less frequently, and may therefore see information about fewer rated securities, thereby limiting their ability to assess the credit quality of the issue that they are rating relative to the rest of the rated issues.[109] Second, registrants may not choose to use ratings from smaller agencies if the registrants elect not to seek the smaller agencies'' preliminary ratings. Competitive realignment may represent a cost to the credit rating agencies who are not market leaders. Competitive effects are discussed in detail in the Costs section, below.

Reductions in Cost of Capital for Some Registrants

As discussed, the proposed amendments may increase the informativeness of ratings. Credit rating agencies interpret non-public information to which they have access, together with public information.[110] This practice may reduce the asymmetry of information between registrants and investors. Additionally, the mandatory disclosure of information about credit ratings used in connection with a registered offering could level the playing field for all registrants and would benefit registrants that in the past may have hesitated to provide such disclosure voluntarily. These reductions in the asymmetry of information between registrants and investors could reduce registrants'' cost of capital as investors may demand a lower risk premium when they have access to more information.[111]

If the proposed amendments have the effect of reducing ratings shopping and ratings inflation that may result from such shopping, ratings scales may shift downward that is, debt issues of the same credit quality may receive a lower rating than currently as an indirect effect of the proposed amendments. In some cases, because of ratings-based investment restrictions faced by some institutional investors, this may result in changes in the cost of capital for registrants, including potential increases and decreases. For example, registrants of securities that would currently be given an investment grade rating, but that would receive a lower rating as an indirect result of the proposed amendments, could face a higher cost of capital. Those registrants whose securities would be investment grade under both sets of circumstances may face a lower cost of capital. Reductions in cost of capital constitute benefits to registrants. Additional potential costs are discussed in more detail in the Costs section, below.

C. Costs

Costs of New Disclosures

Registrants will face costs associated with the process of preparing and reporting the proposed disclosures. For purposes of the Paperwork Reduction Act, we estimate that over a three-year period the average annual incremental increase in the paperwork burden for non-investment company registrants to comply with our proposed collection of information requirements to be approximately 2,120 hours of in-house company personnel time and to be approximately $816,000 for the services of outside professionals. For closed-end funds, we estimate the annual incremental increase to be approximately 157 hours of in-house company personnel time and approximately $108,400 for the services of outside professionals. These estimates include the time and the cost of preparing and reviewing disclosure and filing documents. These disclosure costs may be limited by the fact that close-end funds that disclose ratings in their registration statements are already subject to comparable disclosure requirements and that some operating companies may already be providing this information voluntarily.

Temporary Uncertainty Resulting From Potential Shift in Ratings

As discussed, the proposed amendments may cause ratings scales to shift downward; disclosure of preliminary and unused final ratings in certain circumstances may reduce ratings shopping, in turn reducing the upward bias in ratings resulting from registrants choosing the highest of several ratings. The amount of this shift is uncertain. This uncertainty represents a potential cost to investors, who may temporarily have fewer highly rated investment options. It also represents a cost to registrants, who may be less sure of the rating they will receive for securities.

Costs to Investors Resulting From Potential Undue Reliance on Ratings

Requiring ratings disclosure may reinforce the importance of ratings, possibly causing investors to place undue reliance on the rating. This effect may be mitigated by accompanying contextual disclosures, such as disclosures on ratings limitations and by any improvements in the quality of ratings.

Costs to Registrants Resulting From Increased Prices of Ratings

Any enhancement of the competitive position of market leaders that may arise in the medium- or long-term may result in higher prices for assigning ratings, both through a reduction in potential price competition among existing agencies and a reduction in the threat of entry by new agencies. Competitive effects of the proposed amendments are discussed below in this section, as well as in the Competition, Efficiency, and Capital Formation section.

Increases in Cost of Capital for Some Registrants Resulting From Potential Declines in the Level of Ratings

As mentioned in the Benefits section, in some cases, the proposed amendments may alter issuance behavior by affecting investor demand for securities with specific ratings. Some investors are limited, either by regulation or custom, to investing only in the highest rated securities, while others are limited to investing in ''investment grade'' securities. If ratings shift downward as a result of the proposed amendments, there may be fewer securities available meeting these investment criteria, potentially resulting in a larger price premium for top-rated securities and for investment-grade securities. These price premia may affect issuance behavior. For example, registrants of securities that would currently be given an investment grade

[109] *See* Jeremy Fons, *Rating Competition and Structured Finance,* J. Structured Fin. (Fall 2008), *at http://www.iijournals.com/doi/abs/10.3905/JSF.2008.14.3.007.*

[110] In the discussion of their rating methodologies, Standard and Poor's and Moody's explain how they use confidential non-public information that registrants provide for the purpose of assigning ratings. *See http://www2.standardandpoors.com/aboutcreditratings/RatingsManual_PrintGuide.html* for the Standard and Poor's rating methodology. *See http://v3.moodys.com/sites/products/AboutMoodysRatingsAttachments/2001400000389218.pdf?frameOfRef=corporate*for Moody's description of their use of non-public information.

[111] *See* David Easley and Maureen O'Hara, *Information and the Cost of Capital,* J. Fin. (2004) (arguing that the information composition between public and non-public information affects the cost of capital since investors demand a higher return from their investments when they face asymmetric information).

rating, but that would receive a lower rating as an indirect result of the proposed amendments, would potentially face a higher cost of capital, while those registrants whose securities would be investment grade under both sets of circumstances may face a lower cost of capital. These changes in cost of capital may, in turn, affect issuance decisions. In particular, registrants whose securities would no longer be considered investment grade may face greater difficulty in raising capital. These differences in the cost of capital across new classes of ''investment-grade'' and ''non-investment grade'' securities may diminish in the long-term. In the short-term, however, the differential in the cost of capital across these two classes of securities are likely to remain due to the limited access to ''non-investment grade'' securities by certain investors. Similar considerations apply to the ratings at the top of the scale. Some registrants may be effectively shut out from the commercial paper market, for example, if they can no longer obtain top ratings.

These effects depend on the rigidity of institutional ratings-based constraints. If ratings scale downward, these constraints may adapt. For example, a wider range of ratings may be considered investment grade, and the commercial paper market may become viable for lower rated registrants. Any such adaptation is more likely to occur in the long term, however, as ratings-based investment restrictions are costly to modify.

Costs to Certain Rating Agencies Resulting From Potential Changes in Competitive Environment

Although NRSROs and other credit rating agencies are not subject to the proposed amendments, some of these rating agencies may incur costs. As mentioned in the benefits section, established market leaders in ratings may indirectly benefit from the proposed amendments, at the expense of smaller, less established credit rating agencies. Currently, the credit ratings industry is highly concentrated. For ''corporate issuers'' in 2007, for example, Standard and Poor's, Moody's, and Fitch issued 39%, 33%, and 21% of outstanding credit ratings, respectively, for a total of 93% of outstanding credit ratings.[112] This concentration could increase in several ways as described below, such as an increase in market share of certain ratings agencies among the dominant agencies or a reduction in market share of the remaining agencies.

The proposed disclosure requirements for preliminary and unused final ratings may lead registrants to solicit fewer ratings, potentially only as many as they intend to ultimately use. In structured financial products, for example, the market may customarily require registrants to obtain two ratings, but registrants can solicit preliminary ratings from more than two agencies. If the registrant knows that preliminary ratings must be disclosed in certain circumstances, including the most optimistic ratings, then its incentive to shop for ratings may be reduced, because such a practice would become apparent to the market, and its selection of the higher rating may be discounted. Registrants may instead choose to initially solicit ratings only from agencies who are market leaders in the type of product they are issuing. Specifically, they may gravitate toward agencies that have established reputations for high quality ratings and agencies that, for other reasons, such as branding or market share, are best known to investors. They may choose to involve other credit rating agencies only if they do not meet specific ratings hurdles, such as the top rating category, or investment grade. Agencies who are not market leaders may, as a result, receive information about fewer issues, potentially affecting the perceived quality of their ratings. This may cause registrants to purchase fewer ratings from such agencies. Ultimately, this could strengthen the relative position of market leaders and potentially harm the competitive position of other rating agencies. Relatedly, registrants' conversations with smaller, less-established NRSROs and other credit rating agencies may help them to understand the agencies' methodologies and procedures; these conversations may help smaller NRSROs introduce themselves to registrants. To the extent that registrants contact only established NRSROs, they may not develop this understanding of other agencies' methodologies.

The effect on market leaders' competitive position could be mitigated by an additional factor. A decrease in ratings shopping depends in part on the ability of investors to easily compare final and preliminary ratings. However, investors may feel that they cannot easily compare these ratings. When rating agencies make preliminary ratings, they do so with a more limited set of information. As the ratings process proceeds to a final rating, more information can become available. For example, as time passes, material information about the industry or registrant from public sources may become available. Additionally, the registrant (or those acting on its behalf) may continue to share information with rating agencies. Consequently, investors may consider preliminary ratings to be informative only in a limited sense, and registrants may not experience a significant penalty for using a final rating that is substantially different than preliminary ratings.[113] Thus, to some degree, registrants may still shop for ratings, and agencies may continue to compete based on the level of ratings.

The changes in the competitive position of rating agencies discussed above may not occur for structured finance products because of the amendments to Rule 17g–5 being adopted today, since all NRSRO's would be entitled to receive information about all such issues.[114] This would depend, however, on whether credit rating agencies choose to access this information. Access comes with certain obligations, including the obligation to rate 10% of the securities for which information is received.

Another factor that could potentially impact the competitive forces among the credit rating agencies is the mandatory disclosure that a fee was paid for the credit rating and the aggregate fees paid for any other non-rating services provided during such period. This disclosure may present some costs to the extent that it reveals competitive or proprietary information about the business model of the credit rating agency proving the credit rating. To the extent that there are negative competitive effects, some rating agencies may stop providing some of these non-rating services which could result in declines in their revenues.

V. Consideration of Burden on Competition and Promotion of Efficiency, Competition, and Capital Formation

Section 23(a) of the Exchange Act [115] requires the Commission, when making rules and regulations under the Exchange Act, to consider the impact a new rule would have on competition. Section 23(a)(2) prohibits the Commission from adopting any rule which would impose a burden on competition not necessary or appropriate in furtherance of the

[112] *See* Annual Report on Nationally Recognized Statistical Rating Organizations (2008) *at http://www.sec.gov/divisions/marketreg/ratingagency/nrsroannrep0608.pdf.*

[113] These factors would also reduce the efficacy of ratings shopping, however, since registrants would also face some uncertainty about what the final rating would be.

[114] *See* the proposing release related to Rule 17g–5 under the Exchange Act considered by the Commission on September 17, 2009.

[115] 15 U.S.C. 78w(a).

purposes of the Exchange Act. Section 2(b) of the Securities Act,[116] Section 3(f) of the Exchange Act,[117] and Section 2(c) of the Investment Company Act [118] require the Commission, when engaging in rulemaking that requires it to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action would promote efficiency, competition, and capital formation.

The proposed amendments would require registrants to make specified disclosure to investors regarding credit ratings if credit ratings are used in connection with a registered offering. We believe these disclosures would help investors understand the limits and purposes of credit ratings as well as potential conflicts of interest or ratings shopping practices that could affect the quality of the credit rating. Therefore, if adopted, the Commission believes that the disclosure required by these amendments would promote investor protection. We believe that if investors have more information regarding credit ratings, including the scope of the rating, they will be better able to place the rating in its proper context. The Commission anticipates that these proposed amendments could improve investors' ability to make informed investment decisions, which will, therefore, lead to potential increased efficiency and competitiveness of the U.S. capital markets. The Commission expects that this increased market efficiency and investor confidence also may encourage more efficient capital formation for the reasons discussed below and in Section IV above. Specifically, the proposed amendments would enhance the availability of information to investors and the markets with regard to credit ratings so that investors will more clearly understand the terms of the credit rating and its limitations.

As discussed in more detail in Section IV, the proposed amendments may reduce the level of ratings-based competition among credit rating agencies. This may indirectly improve ratings informativeness. Any potential reduction in ratings-based competition may result in credit rating agencies increasingly focusing on enhancing their reputations for producing quality ratings and competing on that basis, rather than competing to produce high ratings so that registrants select them. These changes in registrants' incentives and their consequent effect on credit rating agencies' incentives, however, will be limited, to the extent that preliminary ratings are incomplete or based on less than full and final information, or that registrants replace the use of preliminary ratings for ratings shopping with new alternative mechanisms.

Furthermore, the proposed amendments may also increase the informativeness of ratings by reducing the asymmetry of information between registrants and investors. The mandatory disclosure of credit ratings in registration documents would level the playing field for all companies and would benefit companies that in the past may have hesitated to provide such disclosure voluntarily, thereby promoting competition. Furthermore, these reductions in the asymmetry of information between registrants and investors could reduce registrants' cost of capital as investors may demand a lower risk premium when they have access to more information.

Market efficiency and capital formation may be enhanced by more informative ratings because investors would have access to better information and could act on that information accordingly.

The Commission recognizes that requiring disclosure of preliminary ratings and unused final ratings could have an effect on competition among the credit rating agencies. To the extent that the proposed disclosure reduces ratings shopping, then competition among credit rating agencies may be reduced as registrants seek only ratings they intend to use and do not shop around among many agencies. The proposed amendments may benefit the competitive position of certain rating agencies if, for example, registrants seek fewer credit ratings. Enhanced competitive position would enable these agencies to charge higher fees, to rate more securities, or to be more selective in the securities they rate. Competitive realignment may represent a cost to the credit rating agencies who are not market leaders. This may increase the cost of capital for issuers who use smaller credit rating agencies if they are unable to pay the increased fees of the larger credit rating agencies or if the larger credit rating agencies elect not to rate them.

If the proposed amendments have the effect of reducing ratings shopping and ratings inflation resulting from such shopping, rating scales may shift downward—that is, debt issues may receive a lower rating than currently as an indirect effect of the proposed amendments. In some cases, because of ratings-based investment restrictions faced by some institutional investors, this may result in changes in the cost of capital for registrants, including potential increases and decreases. For example, registrants of securities that would currently be given an investment grade rating, but that would receive a lower rating as an indirect result of the proposed amendments, would potentially face a higher cost of capital, while those registrants whose securities would be investment grade under both sets of circumstances may face a lower cost of capital.

The Commission solicits comment on the effects of the proposed amendments on efficiency, competition, and capital formation. The Commission requests comment on whether the required disclosure of ratings in registration statements, especially ratings that a registrant would otherwise choose not to disclose, may affect positively or negatively registrants' ability to raise capital. The Commission requests comment on the anticipated effect of the new disclosure requirements on competition in the market for credit rating agencies. The Commission requests commenters to provide empirical data and other factual support for their views, if possible.

VI. Initial Regulatory Flexibility Act Analysis

This Initial Regulatory Flexibility Analysis (IRFA) has been prepared in accordance with the Regulatory Flexibility Act.[119] It relates to proposed revisions to Regulation S–K, rules under the Securities Act, and forms under the Exchange Act, the Securities Act, and the Investment Company Act regarding disclosure regarding credit ratings.

A. Reasons for, and Objectives of, the Proposed Action

As discussed throughout the release, we are proposing amendments to our rules to require disclosure of information regarding credit ratings used by registrants in connection with a registered offering of securities so that investors will better understand the credit rating and its limitations. The amendments we are proposing today also would require additional disclosure that would inform investors about potential conflicts of interest that could affect the credit rating. In addition, we are proposing amendments to require disclosure of preliminary credit ratings and unused final ratings in certain circumstances so that investors have enhanced information about the credit ratings process that may bear on the quality or reliability of the rating. The

[116] 15 U.S.C. 77b(b).

[117] 15 U.S.C. 78c(f).

[118] 15 U.S.C. 8a–2(c).

[119] 5 U.S.C. 601.

proposed amendments would be applicable to registration statements filed under the Securities Act, the Securities Exchange Act and the Investment Company Act, and Forms 8–K and 20–F.

B. Legal Basis

We are proposing the amendments contained in this document under the authority set forth in Sections 6, 7, 10, and 19(a) of the Securities Act, Sections 12, 13, 15(d) and 23(a) of the Exchange Act, and Sections 8, 24(a), 30, and 38 of the Investment Company Act.

C. Small Entities Subject to the Proposed Action

The proposed amendments could affect some companies that are small entities. The disclosure requirements as proposed would apply to any registrant that uses a credit rating in connection with a registered offering, though based on the staff's observations of market practice, we believe it is unlikely that a small entity would use a credit rating in connection with a registered offering. The Regulatory Flexibility Act defines ''small entity'' to mean ''small business,'' ''small organization,'' or ''small governmental jurisdiction.'' [120] The Commission's rules define ''small business'' and ''small organization'' for purposes of the Regulatory Flexibility Act for each of the types of entities regulated by the Commission. Securities Act Rule 157 [121] and Exchange Act Rule 0–10(a) [122] defines a company, other than an investment company, to be a ''small business'' or ''small organization'' if it had total assets of $5 million or less on the last day of its most recent fiscal year. We estimate that there are approximately 1,229 companies, other than registered investment companies, that may be considered small entities. Investment Company Act Rule 0–10(a) [123] defines a ''small business'' or ''small organization'' for purposes of the Investment Company Act as 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. We estimate that there are approximately 30 registered closed-end funds that may be considered small entities. The proposed amendments could affect small entities that have a class of securities that are registered under Section 12 of the Exchange Act or that are required to file reports under Section 15(d) of the Exchange Act or Section 30 of the Investment Company Act. In addition, the proposals also could affect small entities that file, or have filed, a registration statement that has not yet become effective under the Securities Act or the Investment Company Act and that has not been withdrawn.

D. Reporting, Recordkeeping, and Other Compliance Requirements

The disclosure requirements we are proposing today are intended to enhance credit rating disclosure so that investors will better understand credit ratings and their limitations. These amendments would require small entities that are operating companies or closed-end funds to provide the same disclosure as larger entities if they use a credit rating in connection with a registered offering. The disclosure required would include general information about the credit rating, including all material scope limitations of the credit rating and any related published designation, such as non-credit payment risks, assigned by the rating organization with respect to the security. In addition, the proposed amendments would require disclosure of additional non-rating services provided by the credit rating agency and its affiliates to the registrant and its affiliates, including disclosure of the fees paid for those services, so that investors will be aware of potential conflicts of interest with respect to the credit rating obtained by the registrant. Small entities would be required to include the disclosure in their Securities Act, Exchange Act, and Investment Company Act registration statements. In addition, small entities would be required to provide updating of the rating disclosure. In certain circumstances, small entities would be required to provide disclosure of preliminary ratings or unused final ratings so that investors will be informed of when a registrant may have engaged in ratings shopping.

E. Duplicative, Overlapping, or Conflicting Federal Rules

We believe the proposed amendments would not duplicate, overlap, or conflict with other federal rules.

F. Significant Alternatives

The Regulatory Flexibility Act directs us to consider alternatives that would accomplish our stated objectives, while minimizing any significant adverse impact on small entities subject to the rules. In connection with the proposed disclosure amendments, we considered the following alternatives:

- Establishing different compliance or reporting requirements or timetables that take into account the resources available to small entities;
- Clarifying, consolidating or simplifying compliance and reporting requirements under the rules for small entities;
- Use of performance rather than design standards; and
- Exempting small entities from all or part of the requirements.

The proposed amendments would provide investors with more information regarding credit ratings and their limitations so that investors will be able to place the credit rating in its appropriate context. We do not believe these disclosures will create a significant new burden on smaller entities subject to the proposed amendments. To the extent that a small entity must comply with the proposed amendments, we believe uniform, comparable disclosures across all companies will help investors and the markets. Therefore, we are not proposing special requirements, standards or exemptions for small entities. However, because small entities rarely receive credit ratings from credit rating agencies in connection with their offerings, it is unlikely that the proposed amendments would have a significant impact on a substantial number of small entities.

G. Solicitation of Comments

We encourage the submission of comments with respect to any aspect of this Initial Regulatory Flexibility Analysis. In particular, we request comments regarding:

- How the proposed amendments can achieve their objective while lowering the burden on smaller entities subject to the rules;
- The number of small entity companies that may be affected by the proposed amendments;
- The existence or nature of the potential impact of the proposed amendments on small entity companies discussed in the analysis; and
- How to quantify the impact of the proposed amendments.

Respondents are asked to describe the nature of any impact and provide empirical data supporting the extent of the impact. Such comments will be considered in the preparation of the Final Regulatory Flexibility Analysis, if the proposed rule amendments are adopted, and will be placed in the same public file as comments on the proposed amendments themselves.

[120] 5 U.S.C. 601(6).

[121] 17 CFR 230.157.

[122] 17 CFR 240.0–10(a).

[123] 15 U.S.C. 270.0–10(a)

VII. Small Business Regulatory Enforcement Fairness Act

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996,[124] *a rule is ''major'' if it has resulted, or is likely to result in:*

- An annual effect on the U.S. economy of $100 million or more;
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effects on competition, investment, or innovation.

We request comment on whether our proposal would be a ''major rule'' for purposes of the Small Business Regulatory Enforcement Fairness Act. *We solicit comment and empirical data on:*

- The potential effect on the U.S. economy on an annual basis;
- Any potential increase in costs or prices for consumers or individual industries; and
- Any potential effect on competition, investment, or innovation.

VIII. Statutory Authority and Text of Rule and Form Amendments

We are proposing the amendments contained in this document under the authority set forth in Sections 6, 7, 10, and 19(a) of the Securities Act; Sections 12, 13, 15(d) and 23(a) of the Exchange Act; and Sections 8, 24(a), 30, and 38 of the Investment Company Act.

List of Subjects

17 CFR Parts 229, 239, 240, 249 and 274

Reporting and recordkeeping requirements, Securities.

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

PART 229—STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975—REGULATION S–K

1. The authority citation for part 229 continues to read in part as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z–2, 77z–3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 777iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78*l*, 78m, 78n, 78o, 78u–5, 78w, 78*ll*, 78mm, 80a–8, 80a–9, 80a–20, 80a–29, 80a–30, 80a–31(c), 80a–37, 80a–38(a), 80a–39, 80b–11, and 7201 *et seq.*; 18 U.S.C. 1350, unless otherwise noted.

* * * * *

[124] Pub. L. No. 104–121, Title II, 110 Stat. 857 (1996).

§ 229.10 [Amended]

2. Amend § 229.10 by removing and reserving paragraph (c).

3. Amend § 229.202 by:

a. Adding paragraph (g); and

b. Adding Instructions 1 through 5 to Item 202(g).

The additions read as follows:

§ 229.202 (Item 202) Description of registrant's securities.

* * * * *

(g) *Credit ratings.* If a registrant, any selling security holder, any underwriter, or any member of a selling group in a registered offering uses a credit rating, as that term is defined in 15 U.S.C. 78c(a)(60), from a credit rating agency, as that term is defined in 15 U.S.C. 78c(a)(61), with respect to the registrant or a class of securities issued by the registrant, in connection with a registered offering, the registrant shall disclose the following information for each rating used:

(1) The identity of the credit rating agency assigning the credit rating and whether such organization is a nationally recognized statistical rating organization as that term is defined in 15 U.S.C. 78c(a)(62);

(2) The credit rating assigned;

(3) The relative rank of the credit rating within the assigning credit rating agency's overall classification system;

(4) The date the credit rating was assigned;

(5) The credit rating agency's definition or description of the category in which the credit rating agency rated the class of securities;

(6) The identity of the party who is compensating the credit rating agency for providing the credit rating;

(7) A description of any other non-rating services provided by the credit rating agency or its affiliates to the registrant or its affiliates, and if such other services have been provided, separate disclosure of the fee paid for the credit rating required to be disclosed and the aggregate fees paid for any other non-rating services provided during the registrant's last completed fiscal year and any subsequent interim period up to the date of the filing;

(8) All material scope limitations of the credit rating;

(9) How any contingencies related to the securities are or are not reflected in the credit rating;

(10) Any published designation reflecting the results of any other evaluation done by the credit rating agency in connection with the credit rating, along with an explanation of the designation's meaning and the relative rank of the designation;

(11) Any material differences between the terms of the securities as assumed or considered by the credit rating agency in rating the securities and:

(i) The minimum obligations of the security as specified in the governing instruments of the security; and

(ii) The terms of the securities as used in any marketing or selling efforts;

(12) A statement informing investors that a credit rating is not a recommendation to buy, sell, or hold securities; that it may be subject to revision or withdrawal at any time by the assigning credit rating agency; that each credit rating is applicable only to the specific security to which it applies; and that investors should make their own evaluation as to whether an investment in the security is appropriate;

(13) A description of a final rating obtained by the registrant but not used in connection with the offering, including the information set forth in paragraphs (g)(1) through (12) of this section; and

(14) A description of any preliminary rating of the class of securities that received the rating being disclosed pursuant to this Item 202(g) of this part if such preliminary rating was obtained by or on behalf of the registrant and received from a credit rating agency other than the credit rating agency that provided the credit rating disclosed pursuant to this Item 202(g) of this part. Such description shall include:

(i) The identity of the credit rating agency that determined or indicated the rating and an indication of whether such organization is a nationally recognized statistical rating organization as that term is defined in 15 U.S.C. 78c(a)(62);

(ii) The preliminary rating determined or indicated or a description of the category or range of categories in which the preliminary credit rating agency placed the class of securities;

(iii) The date the preliminary rating was conveyed to the registrant, any party acting on the registrant's behalf or the underwriters;

(iv) The relative rank of the preliminary rating within the preliminary credit rating agency's overall classification system;

(v) Any material scope limitations of the preliminary rating; and

(vi) Any material differences between the terms of the securities on which the preliminary rating was determined and the terms of the securities on which the final rating was determined.

* * * * *

Instructions to Item 202(g):

1. Disclosure is not required by this Item 202(g) if the only disclosure of a credit rating in a filing with the

Commission relates to changes to a credit rating, liquidity of the registrant, the cost of funds of a registrant or the terms of agreements that refer to credit ratings, and the credit rating is not otherwise used in connection with a registered offering.

2. If a registrant includes information about credit ratings in a prospectus pursuant to this Item 202(g) and the rating has not yet been issued in final form, the registrant shall update the description of each rating as set forth below:

A. If a change in a rating, including the assignment of a final rating, already included in the prospectus is available subsequent to the filing of the registration statement, but prior to its effectiveness, the registrant shall convey to the purchaser the rating change.

B. If an additional rating, including a final rating, that the registrant is required to disclose, or if a material change in a rating already included, becomes available during any period in which offers or sales are being made, the registrant shall disclose such additional rating or rating change by means of a post-effective amendment, or supplement to the prospectus pursuant to § 230.424(b) of this chapter, unless, in the case of a registration statement on Form S–3 (§ 239.13 of this chapter), it has been disclosed in a document incorporated by reference into the registration statement subsequent to its effectiveness and prior to the termination of the offering or completion of sales.

3. For purposes of this Item 202(g), a credit rating is ''used in connection with a registered offering of securities'' in circumstances, including but limited to, when such rating is used in connection with an unregistered offering of securities, and the securities offered privately are subsequently exchanged for substantially similar registered securities even if the credit rating was not used in connection with the registered exchange offering.

4. A preliminary rating includes any rating that is not published, any range of ratings, any oral or other indications of a potential rating or range of ratings and all other preliminary indications of a rating. A preliminary rating includes ratings on a particular structure of a security even if not tied to a specific registrant or group of assets. Disclosure of a preliminary rating is required even if there have been changes to the security for which a final rating is disclosed pursuant to this Item 202(g).

5. For purposes of determining whether disclosure of any preliminary rating or unused final rating is required, a credit rating is obtained from a credit rating agency if it is solicited by or on behalf of a registrant from a credit rating agency.

* * * * *

PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

4. The authority citation for part 239 continues to read in part as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z–2, 77z–3, 77sss, 78c, 78*l*, 78m, 78n, 78o(d), 78u–5, 78w(a), 78*ll*, 78mm, 80a–2(a), 80a–3, 80a–8, 80a–9, 80a–10, 80a–13, 80a–24, 80a–26, 80a–29, 80a–30, and 80a–37, unless otherwise noted.

* * * * *

5. Amend Form S–3 (referenced in § 239.13) by revising Part I, Item 9 to read as follows:

Note The text of Form S–3 does not, and this amendment will not, appear in the Code of Federal Regulations.

FORM S–3

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

* * * * *

Item 9. Description of Securities To Be Registered

Furnish the information required by Item 202 of Regulation S–K (§ 229.202 of this chapter), unless capital stock is to be registered and securities of the same class are registered pursuant to Section 12 of the Exchange Act, in which case furnish only the information required by Item 202(g) of Regulation S–K.

* * * * *

6. Amend Form S–4 (referenced in § 239.25) by revising Part I, Item 4(a)(3) to read as follows:

Note The text of Form S–4 does not, and this amendment will not, appear in the Code of Federal Regulations.

FORM S–4

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

* * * * *

Item 4. Terms of the Transaction

(a) Furnish a summary of the material features of the proposed transaction. The summary should include, where applicable:

* * * * *

(3) The information required by Item 202 of Regulation S–K (§ 229.202 of this chapter), description of registrant's securities, unless: (i) The registrant would meet the requirements for use of Form S–3, (ii) capital stock is to be registered and (iii) securities of the same class are registered pursuant to Section 12 of the Exchange Act and (i) listed for trading or admitted to unlisted trading privileges on a national securities exchange; or (ii) are securities for which bid and offer quotations are reported in an automated quotations system operated by a national securities association. Notwithstanding the foregoing, furnish the information required by Item 202(g) of Regulation S–K.

* * * * *

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

7. The authority citation for part 240 continues to read, in part, as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78l, 78m, 78n, 78o, 78p, 78q, 78s, 78u–5, 78w, 78x, 78*ll*, 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201, *et seq.*; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

8. Amend § 240.13a–11 by revising paragraph (b) to read as follows:

§ 240.13a–11 Current reports on Form 8–K (§ 249.308 of this chapter).

* * * * *

(b) This section shall not apply to foreign governments, foreign private issuers required to make reports on Form 6–K (17 CFR 249.306) pursuant to § 240.13a–16, issuers of American Depositary Receipts for securities of any foreign issuer, or investment companies required to file reports pursuant to § 270.30b1–1 of this chapter under the Investment Company Act of 1940, except:

(1) Where such investment companies are required to file notice of a blackout period pursuant to § 245.104 of this chapter; and

(2) A closed-end company (as defined in 15 U.S.C. 80a–5(a)(2)) is required to file a current report on Form 8–K containing the information required by Item 3.04 of Form 8–K within the period specified in that form unless substantially the same information as required by that item has been previously reported by the registrant.

* * * * *

9. Amend § 240.15d–11 by revising paragraph (b) to read as follows:

§ 240.15d–11 Current reports on Form 8–K (§ 249.308 of this chapter).

* * * * *

(b) This section shall not apply to foreign governments, foreign private issuers required to make reports on Form 6–K (17 CFR 249.306) pursuant to § 240.15d–16, issuers of American Depositary Receipts for securities of any

foreign issuer, or investment companies required to file reports pursuant to § 270.30b1–1 of this chapter under the Investment Company Act of 1940, except:

(1) Where such investment companies are required to file notice of a blackout period pursuant to § 245.104 of this chapter; and

(2) A closed-end company (as defined in 15 U.S.C. 80a–5(a)(2)) is required to file a current report on Form 8–K containing the information required by Item 3.04 of Form 8–K within the period specified in that form unless substantially the same information as required by that item has been previously reported by the registrant.

* * * * *

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

10. The authority citation for part 249 continues to read in part as follows:

Authority: 15 U.S.C. 78a *et seq.*, 7201 *et seq.*, and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

11. Amend Form 20–F (referenced in § 249.220f) by redesignating Instruction 3 to Item 10 as Instruction 4, adding new Instruction 3 to Item 10, redesignating Items 12.C. and 12.D. as Items 12.D. and 12.E., adding new Item 12.C. and the Instructions to Item 12.C., and revising Instruction 1 to Item 12. to read as follows:

Note: The text of Form 20–F does not, and this amendment will not, appear in the Code of Federal Regulations.

FORM 20–F

* * * * *

Item 10. Additional Information

* * * * *

Instructions to Item 10

* * * * *

3. In registration statements filed under the Securities Act or Exchange Act that relate to a class of preferred securities for which a credit rating, as that term is defined in 15 U.S.C. 78c(a)(60), from a credit rating agency, as that term is defined in 15 U.S.C. 78c(a)(61), is being used in connection with the registered offering, disclose the information required under Item 12.C.1 of Form 20–F. If filing Form 20–F as an annual report, furnish the information required by Item 12.C.2 of Form 20–F if there have been any changes to a rating required to be disclosed by Item 12.C.1 of Form 20–F.

* * * * *

Item 12. Description of Securities Other than Equity Securities

* * * * *

C. *Credit ratings.*

1. If a company, any selling security holder, any underwriter, or any member of a selling group in a registered offering uses use a credit rating, as that term is defined in 15 U.S.C. 78c(a)(60), from a credit rating agency, as that term is defined in 15 U.S.C. 78c(a)(61), with respect to the company or a class of securities issued by the company, in connection with a registered offering, the company shall disclose the following information for each rating used:

(a) The identity of the credit rating agency assigning the credit rating and whether such organization is a nationally recognized statistical rating organization as that term is defined in 15 U.S.C. 78c(a)(62);

(b) The credit rating assigned;

(c) The relative rank of the credit rating within the assigning credit rating agency's overall classification system;

(d) The date the credit rating was assigned;

(e) The credit rating agency's definition or description of the category in which the credit rating agency rated the class of securities;

(f) The identity of the party who is compensating the credit rating agency for providing the rating;

(g) A description of any other non-rating services provided by the credit rating agency or its affiliates to the company or its affiliates, and if such other services have been provided, separate disclosure of the fee paid for the credit rating required to be disclosed and the aggregate fees paid for any other non-rating services provided during the company's last completed fiscal year and any subsequent interim period up to the date of the filing;

(h) All material scope limitations of the credit rating;

(i) How any contingencies related to the securities are or are not reflected in the credit rating;

(j) Any published designation reflecting the results of any other evaluation done by the credit rating agency in connection with the credit rating, along with an explanation of the designation's meaning and the relative rank of the designation;

(k) Any material differences between the terms of the securities as assumed or considered by the credit rating agency in rating the securities and:

(i) The minimum obligations of the security as specified in the governing instruments of the security; and

(ii) The terms of the securities as used in any marketing or selling efforts;

(l) A statement informing investors that a credit rating is not a recommendation to buy, sell, or hold securities; that it may be subject to revision or withdrawal at any time by the assigning credit rating agency; that each credit rating is applicable only to the specific security to which it applies; and that investors should make their own evaluation as to whether an investment in the security is appropriate;

(m) A description of a final rating obtained by the company but not used in connection with the offering, including the information set forth in paragraphs (a)–(l) of this item; and

(n) A description of any preliminary rating of the class of securities that received the rating being disclosed pursuant to this Item 12 if such preliminary rating was obtained by or on behalf of the company and received from a credit rating agency other than the credit rating agency that provided the credit rating disclosed pursuant to this Item 12. Such description shall include:

(i) The identity of the credit rating agency that determined or indicated the rating and whether such organization is a nationally recognized statistical rating organization as that term is defined in 15 U.S.C. 78c(a)(62);

(ii) The preliminary rating determined or indicated or a description of the category or range of categories in which the preliminary credit rating agency placed the class of securities;

(iii) The date the preliminary rating was conveyed to the company, any party acting on the company's behalf or the underwriters;

(iv) The relative rank of the preliminary rating within the preliminary credit rating agency's overall classification system;

(v) Any material scope limitations of the preliminary rating; and

(vi) Any material differences between the terms of the securities on which the preliminary rating was determined and the terms of the securities on which the final rating was determined.

2. Credit rating agency decisions.

(a) Disclose the information required by paragraph (b) of this Item 12.C.2. if the company is notified by, or receives any communication from, any credit rating agency to the effect that the organization has decided to change or withdraw the credit rating assigned to the company or any class of debt or preferred security or other indebtedness of the company (including securities or obligations as to which the company is a guarantor, or may become directly or contingently liable for arising out of an off-balance sheet arrangement) that was

previously required to be disclosed pursuant to Item 12.C.1 of this Form.

(b) If the registrant has received any notification or other communication as described in paragraph (a) of this Item 12.C.2., file the notice as an exhibit to the annual report on Form 20–F and disclose the following information:

(i) The date the company received the notification or communication;

(ii) The name of the credit rating agency and whether such organization is a nationally recognized statistical rating organization as that term is defined in 15 U.S.C. 78c(a)(62); and

(iii) The nature of the rating agency's decision.

* * * * *

Instructions to Item 12

1. You do not need to provide the information called for by this Item 12 if you are using the form as an annual report for your fiscal years ending before December 15, 2009. For your fiscal years ending on or after December 15, 2009, except for Item 12.C.2, Item 12.E.3. and Item 12.E.4 of this Form, you do not need to provide the information called for by this Item 12 if you are using this form as an annual report. You do not need to provide the information required by Item 12.C.2. of this Form if you are using the form as a registration statement.

* * * * *

Instructions to Item 12.C.1.

1. Disclosure is not required by this Item 12.C.1. of this Form if the only disclosure of a credit rating in a filing with the Commission relates to changes to a credit rating, liquidity of the company, the cost of funds of a company or terms of agreements that refer to credit ratings, and the credit rating is not otherwise used in connection with a registered offering.

2. If a company includes information about credit ratings in a prospectus pursuant to Item 12.C.1. of this Form and the rating has not yet been issued in final form, the company shall update the description of each rating as set forth below:

A. If a change in a rating, including the assignment of a final rating, already included in the prospectus is available subsequent to the filing of the registration statement, but prior to its effectiveness, the company shall convey to the purchaser the rating change.

B. If an additional rating, including a final rating, that the company is required to disclose, or if a material change in a rating already included, becomes available during any period in which offers or sales are being made, the company shall disclose such additional rating or rating change by means of a post-effective amendment, or supplement to the prospectus pursuant to Rule 424(b) under the Securities Act (§ 230.424(b) of this chapter), unless, in the case of a registration statement on Form F–3 under the Securities Act (referenced in § 239.33 of this chapter), it has been disclosed in a document incorporated by reference into the registration statement subsequent to its effectiveness and prior to the termination of the offering or completion of sales.

3. For purposes of this Item 12, a credit rating is ''used in connection with a registered offering'' in circumstances, including but limited to, when such rating is used in connection with an unregistered offering of securities, and the securities offered privately are subsequently exchanged for substantially similar registered securities even if the credit rating was not used in connection with the registered exchange offering.

4. A preliminary rating includes any rating that is not published, any range of ratings, any oral or other indications of a potential rating or range of ratings and all other preliminary indications of a rating. A preliminary rating includes ratings on a particular structure of a security even if not tied to a specific company or group of assets. Disclosure of a preliminary rating is required even if there have been changes to the security for which a final rating is disclosed pursuant to this Item 12.

5. For purposes of determining whether disclosure of any preliminary rating or unused final rating is required, a credit rating is obtained from a credit rating agency if it is solicited by or on behalf of a company from a credit rating agency.

Instructions to Item 12.C.2.

1. No disclosure need be made under Item 12.C.2. of this Form during any discussions between the company and any credit rating agency regarding any decision required to be disclosed unless and until the credit rating agency notifies the company that the credit rating agency has made a final decision to take such action.

2. For purposes of Item 12.C.2. of this Form, the term ''credit rating agency'' has the meaning set forth in Section 3(a)(60) of the Exchange Act [15 U.S.C. 78c(a)(60].

3. For purposes of Item 12.C.2. of this Form, off-balance sheet arrangement has the meaning set forth in Item 5.E.2. of this Form.

* * * * *

12. Amend Form 8–K (referenced in § 249.308) by revising Section 3—Securities and Trading Markets to add Item 3.04 to read as follows:

Note: The text of Form 8–K does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 8–K

* * * * *

Item 3.04. Credit Rating Agency Decisions

(a) Furnish the information required by paragraph (b) of this Item 3.04 if the registrant is notified by, or receives any communication from, any credit rating agency to the effect that the organization has decided to change or withdraw the credit rating assigned to the registrant or any class of debt or preferred security or other indebtedness of the registrant (including securities or obligations as to which the registrant is a guarantor or may become directly or contingently liable for arising out of an off-balance sheet arrangement) that was previously required to be disclosed pursuant to Item 202(g) of Regulation S–K or Item 10.6 of Form N–2.

(b) If the registrant has received any notification or other communication as described in paragraph (a) of this Item 3.04, file the notice as an exhibit to the report on Form 8–K and furnish the following information:

(1) The date the registrant received the notification or communication;

(2) The name of the credit rating agency and whether such organization is a nationally recognized statistical rating organization as that term is defined in 15 U.S.C. 78c(a)(62); and

(3) The nature of the rating agency's decision.

Instructions to Item 3.04

1. No disclosure need be made under this Item 3.04 during any discussions between the registrant and any credit rating agency regarding any decision required to be disclosed unless and until the credit rating agency notifies the registrant that the credit rating agency has made a final decision to take such action.

2. For purposes of this Item 3.04, the term ''credit rating agency'' has the meaning set forth in Section 3(a)(60) of the Exchange Act [15 U.S.C. 78c(a)(60].

3. For purposes of this Item 3.04, off-balance sheet arrangement has the meaning set forth in Item 303(a)(4)(ii) of Regulation S–K [17 CFR 229.303(a)(4)(ii)].

* * * * *

PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

PART 274—FORMS PRESCRIBED UNDER THE INVESTMENT COMPANY ACT OF 1940

13. The authority citation for part 274 continues to read in part as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 78c(b), 78*l*, 78m, 78n, 78o(d), 80a–8, 80a–24, 80a–26, and 80a–29, unless otherwise noted.

* * * * *

14. Amend Form N–2 (referenced in §§ 239.14 and 274.11a–1), Item 10 by revising paragraph 6 and Instructions to read as follows:

Note: The text of Form N–2 does not, and these amendments will not, appear in the Code of Federal Regulations.

FORM N–2

* * * * *

Item 10. Capital Stock, Long-Term Debt, and Other Securities

* * * * *

6. *Credit ratings:* If the Registrant, any selling security holder, any underwriter, or any member of a selling group in a registered offering uses a credit rating, as that term is defined in section 3(a)(60) of the Exchange Act [15 U.S.C. 78c(a)(60)], from a credit rating agency, as that term is defined in section 3(a)(61) of the Exchange Act [15 U.S.C. 78c(a)(61)], with respect to the registrant or a class of securities issued by the Registrant, in connection with a registered offering, the Registrant shall disclose the following information for each rating used:

a. The identity of the credit rating agency assigning the credit rating and whether such organization is a nationally recognized statistical rating organization as that term is defined in section 3(a)(62) of the Exchange Act [15 U.S.C. 78c(a)(62)];

b. The credit rating assigned;

c. The relative rank of the credit rating within the assigning credit rating agency's overall classification system;

d. The date the credit rating was assigned;

e. The credit rating agency's definition or description of the category in which the credit rating agency rated the class of securities;

f. The identity of the party who is compensating the credit rating agency for providing the credit rating;

g. A description of any other non-rating services provided by the credit rating agency or its affiliates to the Registrant or its affiliates, and if such other services have been provided, separate disclosure of the fee paid for the credit rating required to be disclosed and the aggregate fees paid for any other non-rating services provided during the Registrant's last completed fiscal year and any subsequent interim period up to the date of the filing;

h. All material scope limitations of the credit rating;

i. How any contingencies related to the securities are or are not reflected in the credit rating;

j. Any published designation reflecting the results of any other evaluation done by the credit rating agency in connection with the credit rating, along with an explanation of the designation's meaning and the relative rank of the designation;

k. Any material differences between the terms of the securities as assumed or considered by the credit rating agency in rating the securities and (1) the minimum obligations of the security as specified in the governing instruments of the security; and (2) the terms of the securities as used in any marketing or selling efforts;

l. A statement informing investors that a credit rating is not a recommendation to buy, sell, or hold securities; that it may be subject to revision or withdrawal at any time by the assigning credit rating agency; that each credit rating is applicable only to the specific security to which it applies; and that investors should make their own evaluation as to whether an investment in the security is appropriate;

m. A description of a final rating obtained by the registrant but not used in connection with the offering, including the information set forth in paragraphs (a)–(l) of this item; and

n. A description of any preliminary rating of the class of securities that received the rating being disclosed pursuant to this paragraph 6 if such preliminary rating was obtained by or on behalf of the Registrant and received from a credit rating agency other than the credit rating agency that provided the credit rating disclosed pursuant to this paragraph 6. Such description shall include:

(1) The identity of the credit rating agency that determined or indicated the rating and an indication of whether such organization is a nationally recognized statistical rating organization as that term is defined in section 3(a)(62) of the Exchange Act [15 U.S.C. 78c(a)(62)];

(2) The preliminary rating determined or indicated or a description of the category or range of categories in which the preliminary credit rating agency placed the class of securities;

(3) The date the preliminary rating was conveyed to the Registrant, any party acting on the Registrant's behalf, or the underwriters;

(4) The relative rank of the preliminary rating within the preliminary credit rating agency's overall classification system;

(5) Any material scope limitations of the preliminary rating; and

(6) Any material differences between the terms of the securities on which the preliminary rating was determined and the terms of the securities on which the final rating was determined.

Instructions:

1. Disclosure is not required by paragraph 6 of this item if the only disclosure of a credit rating in a filing with the Commission relates to changes to a credit rating, liquidity of the Registrant, the cost of funds of a Registrant or the terms of agreements that refer to credit ratings, and the credit rating is not otherwise used in connection with a registered offering.

2. If a Registrant includes information about credit ratings in a prospectus pursuant to paragraph 6 of this item and the rating has not yet been issued in final form, the Registrant shall update the description of each rating as set forth below:

a. If a change in a rating, including the assignment of a final rating, already included in the prospectus is available subsequent to the filing of the registration statement, but prior to its effectiveness, the Registrant shall convey to the purchaser the rating change.

b. If an additional rating, including a final rating, that the Registrant is required to disclose, or if a material change in a rating already included, becomes available during any period in which offers or sales are being made, the Registrant shall disclose such additional rating or rating change by means of a post-effective amendment, or supplement to the prospectus pursuant to Rule 497 under the 1933 Act [17 CFR 230.497].

3. For purposes of paragraph 6 of this item, a credit rating is ''used in connection with a registered offering of securities'' in circumstances, including but limited to, when such rating is used in connection with an unregistered offering of securities, and the securities offered privately are subsequently exchanged for substantially similar registered securities even if the credit rating was not used in connection with the registered exchange offering.

4. A preliminary rating includes any rating that is not published, any range of ratings, any oral or other indications of a potential rating or range of ratings

and all other preliminary indications of a rating. A preliminary rating includes ratings on a particular structure of a security even if not tied to a specific registrant or group of assets. Disclosure of a preliminary rating is required even if there have been changes to the security for which a final rating is disclosed pursuant to this paragraph 6.

5. For purposes of determining whether disclosure of any preliminary rating or unused final rating is required, a credit rating is obtained from a credit rating agency if it is solicited by or on behalf of a Registrant from a credit rating agency.

6. If the prospectus relates to securities other than senior securities of the Registrant that have been assigned a credit rating by a credit rating agency, the information required by this paragraph may be provided in the Statement of Additional Information unless the rating criteria will materially affect the investment policies of the Registrant (*e.g.*, if the rating agency establishes criteria for selection of the Registrant's portfolio securities with which the Registrant intends to comply), in which case it should be included in the prospectus.

* * * * *

By the Commission.

Dated: October 7, 2009.

Elizabeth M. Murphy,

Secretary.

[FR Doc. E9–24546 Filed 10–14–09; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 220

[Release Nos. 33–9071; 34–60798; IC–28943; File No. S7–21–09]

RIN 3235–AK45

Concept Release on Possible Rescission of Rule 436(g) Under The Securities Act of 1933

AGENCY: Securities and Exchange Commission.

ACTION: Concept release; request for comments.

SUMMARY: As part of the Commission's review of the role of credit rating agencies in the operation of the securities markets, and in light of disclosure regarding credit ratings that is being proposed in a companion release, the Commission is seeking comment on whether Rule 436(g) under the Securities Act of 1933 should be rescinded. In particular, we would like to understand whether there continues to be a sufficient basis to exempt nationally recognized statistical rating organizations from Section 7 and 11 of the Securities Act.

DATES: Comments should be received on or before December 14, 2009.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/concept.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number S7–21–09 on the subject line; or
- Use the Federal eRulemaking Portal (*http://www.regulations.gov*). Follow the instructions for submitting comments.

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 S7–21–09. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Web site (*http://www.sec.gov/rules/concept.shtml*). Comments are also available for public 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.. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Blair F. Petrillo, Special Counsel in the Office of Rulemaking, Division of Corporation Finance, at (202) 551–3430, 100 F Street, NE., Washington, DC 20549.

SUPPLEMENTARY INFORMATION: In a companion release,[1] the Commission is proposing amendments to rules under the Securities Exchange Act of 1934[2] and Regulation S–K,[3] and forms under the Securities Act of 1933,[4] the Exchange Act and the Investment Company Act of 1940[5] to require disclosure by registrants regarding credit ratings in their registration statements under the Securities Act and the Exchange Act, and by closed-end management investment companies in registration statements under the Securities Act and the Investment Company Act, if the registrant uses the rating in connection with a registered offering. In connection with the proposed amendments, we are soliciting comment on whether the Commission should rescind Rule 436(g) under the Securities Act.[6]

I. Introduction

We are considering whether we should propose rescinding Rule 436(g) under the Securities Act. Rule 436(g) provides an exemption for credit ratings provided by nationally recognized statistical rating organizations (''NRSROs'') from being considered a part of the registration statement prepared or certified by a person within the meaning of Sections 7[7] and 11[8] of the Securities Act. The exemption currently does not apply to credit rating agencies that are not NRSROs. We are concerned that there is no longer a sufficient basis to exempt NRSROs and to distinguish between NRSROs and credit rating agencies that are not NRSROs for purposes of liability under Section 11 of the Securities Act. Rescinding the exemption would cause NRSROs to be included in the liability scheme for experts set forth in Section 11, as is currently the case for credit rating agencies that are not NRSROs.

We solicit comment on what impact removing the rule would have on markets and their participants. Scrutiny of credit ratings and the process of obtaining a credit rating appears to have increased as a result of the turmoil in the credit markets over the past few years. As discussed below and in the companion release proposing to require disclosure regarding credit ratings, as credit ratings have become more significant, we have sought to protect investors while recognizing the role credit ratings play in the offer and sale of securities. In that regard, we are now exploring whether Rule 436(g) is still appropriate in light of the growth and development of the credit rating industry and investors' use of credit ratings. We are mindful of the potential significant impact that rescinding Rule 436(g) could have on registrants,

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[1] *See* the proposing release considered by the Commission on September 17, 2009 regarding proposed disclosure regarding credit ratings in registration statements.

[2] 15 U.S.C. 78a *et seq.*

[3] 17 CFR 229.10 through 1123.

[4] 15 U.S.C. 77a *et seq.*

[5] 15 U.S.C. 80a–1 *et seq.*

[6] 17 CFR 220.436(g).

[7] 15 U.S.C. 77g.

[8] 15 U.S.C. 77k.

NRSROs and other credit rating agencies, investors and the financial markets in general, and we seek comment on any burdens or benefits that may result. Therefore, we are requesting input on the possible elimination of Rule 436(g) from all market participants and other members of the public.

A. Section 7 and Section 11 of the Securities Act

Section 7 of the Securities Act provides that ''[i]f any accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, is named as having prepared or certified any part of the registration statement, or is named as having prepared or certified a report or valuation for use in connection with the registration statement, the written consent of such person shall be filed with the registration statement.'' [9] These persons are referred to as experts for purposes of the securities laws. Registrants are required to file the consents of experts as exhibits to their registration statements.

Section 11 of the Securities Act imposes liability on various parties who are involved in the preparation of registration statements filed under the Securities Act. Section 11 was enacted so that those persons with a direct role in a registered offering would be subject to a rigorous standard of liability to assure that disclosure regarding securities is accurate.[10] It was also designed to give investors additional protection not available under common law due to the barriers to recovery presented by the common law fraud requirements of scienter, reliance and causation. Liability under Section 11 extends to the issuer, officers and directors who sign the registration statement, underwriters, and persons who prepare or certify any part of the registration statement or who are named as having prepared or certified a report or valuation for use in connection with the registration statement.[11] Section 11 provides that an expert may be held liable if, when the registration statement became effective, the part of the registration statement purporting to be made on his or her authority contained an untrue statement of material fact or omitted to state a material fact necessary to make the statements therein not misleading, unless he can establish that he had, after reasonable investigation, reasonable grounds to believe and did believe at the time such part of the registration statement became effective, that the statements in the registration statement were true and that there was no omission to state a material fact necessary to make the statements therein not misleading.[12] Under Section 11, persons other than the issuer may be able to assert as a defense to Section 11 liability that they relied upon an expert that consented to be named in the registration statement (the ''experts' defense'').[13]

B. Background of Rule 436(g)

Securities Act Rule 436(g) provides that a credit rating assigned by an NRSRO to a class of debt securities, a class of convertible debt securities, or a class of preferred stock is not a part of a registration statement prepared or certified by a person within the meaning of Sections 7 and 11 of the Securities Act. With one limited exception arising in connection with our Multijurisdictional Disclosure System with Canada, there is no similar provision for credit rating agencies that are not NRSROs.[14] As a result, disclosure of credit ratings in a registration statement currently results in different treatment for NRSROs and for credit rating agencies that are not NRSROs. By virtue of Rule 436(g), an NRSRO is not subject to liability under Section 11 even if its rating is disclosed in a registration statement. A registrant is not required to file consent of an NRSRO with its registration statement, and the experts' defense is not available to other persons involved in the registration statement, regardless of whether they relied on the expertized portion of the registration statement. By contrast, if a credit rating assigned by a credit rating agency that is not an NRSRO is disclosed in a registration statement, the credit rating agency would be subject to potential liability under Section 11. The registrant is required to file the credit rating agency's consent with its registration statement, and the experts' defense may be available.

In 1977, the Commission published a concept release announcing that it was considering a change in policy to permit disclosure of credit ratings in documents filed with the Commission.[15] In that release the Commission solicited comment on whether an NRSRO is the type of person from whom a consent would be required under Section 7 of the Securities Act (thereby also subjecting it to liability under Section 11). That release contained a list of questions regarding the Commission's then-current policy of discouraging the disclosure of credit ratings and whether the Commission should change that policy or retain it.[16] According to the 1981 release ultimately announcing the Commission's change in position, commenters on the 1977 release generally were opposed to subjecting NRSROs to liability under Section 11 and argued, among other things, that it would interfere with the substance and timing of the registration process, that it would result in changes to the way credit ratings were issued, and that it would result in increased costs and uncertainty over the scope of liability.[17] The NRSROs in existence in 1977 indicated that they would not provide consents to be named in the registration statement.[18] The 1981 release also indicated that commenters were concerned that requiring consent and subjecting NRSROs to Section 11 liability would affect their independence if they were ''participants'' in the offering and would lessen the quality of ratings because NRSROs likely would rely only on

[9] *See* Section 7 of the Securities Act in note 7 above.

[10] *See* William O. Douglas and George E. Bates, *The Federal Securities Act of 1933,* 43 Yale L.J. 171 (1933); *Herman & Maclean* v. *Huddleston,* 459 U.S. 375 (1983).

[11] *See* Section 11 of the Securities Act in note 8 above.

[12] *See* Section 11(b) of the Securities Act [15 U.S.C. 77k(b)].

[13] *See* Section 11(b)(3)(C) of the Securities Act [15 U.S.C. 77k(b)(3)(C)].

[14] Rule 436(g) applies to ratings disclosed in Form F–9 [17 CFR 239.39.] registration statements by ratings organizations specified in the Instruction to paragraph (a)(2) of General Instruction I of that form. Form F–9 is the Multijurisdictional Disclosure System (''MJDS'') form used to register investment grade debt or preferred securities under the Securities Act by eligible Canadian issuers. Under Form F–9, securities are deemed to be investment grade if, at the time of sale, at least one NRSRO or Approved Rating Organization, as specified in the above-referenced Instruction, has rated the securities in a category signifying investment grade.

[15] *See* Disclosure of Security Ratings, Release No. 33–5882 (Nov. 9, 1977) [42 FR 58414].

[16] The Commission sought comment on two questions regarding NRSROs and liability under Section 11 of the Securities Act:

A. (5) Is an entity issuing a security rating the type of person referred to in Section 7 of the Securities Act of 1933 whose consent is required to be filed by the issuer of the security? If so, what costs or other burdens may be associated with the issuer obtaining a consent from the rating agency or, in the case of multiple ratings, from all the rating agencies involved? Assuming, arguendo, that such consents may be waived by the Commission under Section 7, should waivers be granted and, if so, under what circumstances?

A. (6) What impact may result, directly or indirectly, from a rating entity being subject to Section 11 under the Securities Act of 1933, with respect to its rating being disclosed in a prospectus?

See the 1977 Release in note 15 above.

[17] *See Disclosure of Ratings in Registration Statements,* Release No. 33–6336 (Aug. 6, 1981) [46 FR 42024].

[18] *Id.*

objective, quantifiable information.[19] The commenters in favor of subjecting NRSROs to liability under Section 11 cited the incentive that NRSROs would take more care in determining ratings.[20]

As noted above, in 1981, the Commission announced the shift in policy to permit, but not require, disclosure of credit ratings in registration statements. In addition, the Commission proposed Securities Act Rule 436(g) to provide that a security rating assigned to a class of debt securities, a class of convertible debt securities, or a class of preferred stock by an NRSRO would not be considered a part of the registration statement prepared or certified by a person within the meaning of Section 7 and Section 11 of the Securities Act.[21] In proposing Rule 436(g), the Commission noted that if NRSROs refused to provide consents, then disclosure of credit ratings would not be provided even if permitted by the Commission. As a result, the Commission proposed Rule 436(g) in order to make its new policy position on the disclosure of credit ratings meaningful.[22] The Commission also cited the fact that NRSROs already were subject to substantial liability under the antifraud provisions of the securities laws and to regulation by the Commission under the Investment Advisers Act of 1940.[23] The Commission then expected that, because of antifraud liability, NRSROs would be required ''to adhere to the highest professional standards in determining security ratings.'' [24] When Rule 436(g) was adopted in 1982, the Commission stated its belief that exempting NRSROs from liability under Section 11 of the Securities Act was appropriate and cited the rationale provided in the proposing release that practical problems would arise in obtaining the consents and that NRSROs were subject to the antifraud provisions of the securities laws.[25]

In 1986, the Commission proposed to expand the Rule 436(g) exemption to include ratings assigned by NRSROs to money market funds.[26] In proposing the rule, the Commission stated ''because money market fund shares are equity securities, a money market fund which has received an NRSRO rating must obtain the consent of the NRSRO or seek a waiver of consent under Rule 437 [17 CFR 230.437] before using the rating in its registration statement.'' [27] The Commission did not act on this proposal, and Rule 436(g) was not amended.

In 1994, the Commission proposed to require disclosure about credit ratings in registration statements.[28] In the 1994 release, the Commission noted that the policy announced in 1981 created a distinction between NRSROs and credit rating agencies that were not NRSROs. The Commission noted that the distinction was most significant in the context of Rule 436(g). While an NRSRO would not be required to provide a consent if its rating was disclosed in a registration statement pursuant to Rule 436(g), ''[a]ny non-NRSRO rating organization must furnish a consent and take on expert liability under the Securities Act if its rating is included in the registration statement and prospectus.'' [29]

The 1994 release did not propose any change to Rule 436(g), but it did solicit comment on whether there should continue to be a distinction between NRSROs and credit rating agencies that are not NRSROs for purposes of Rule 436(g). The release also sought comment on whether Rule 436(g) should be expanded to include credit rating agencies that are not NRSROs or whether the rule should be rescinded. Commenters generally were opposed to subjecting NRSROs and other credit rating agencies to liability under Section 11 of the Securities Act. In particular, one commenter provided several arguments as to why Section 11 liability was not appropriate for NRSROs.[30] Among other things, the commenter argued that: Ratings published by NRSROs ''are expressions of opinion about risk, not statements,'' and even if the security defaults in an individual case, it would not necessarily be an indication that the opinion was wrong; [31] Section 11 liability would violate the NRSROs' First Amendment rights; [32] and Section 11 liability could eliminate the disclosure of security ratings in prospectuses.[33] The Commission did not act on the proposals in the 1994 release.

In July 2008, the Commission proposed to amend Rule 436(g) to extend the exemption to ratings provided by any ''credit rating agency,'' as defined in 15 U.S.C. 78c(a)(61),[34] rather than only to ratings provided by NRSROs. The Commission cited its belief that, among other things, amending Rule 436(g) would foster competition between credit rating agencies. Only three commenters addressed the proposed amendment to Rule 436(g). One commenter opposed it because credit rating agencies that are not NRSROs are not subject to Commission oversight.[35] Another commenter supported extending the exemption in Rule 436(g) to credit rating agencies that are not NRSROs.[36] That commenter did not believe references to ratings should be considered ''expertized.'' The commenter also cited the costs that registrants have to incur absent the amendment of Rule 436(g) to obtain a consent from a credit rating agency that was not an NRSRO. In addition, the commenter discussed the possibility that a rating obtained from a credit rating agency that was not an NRSRO would be omitted, thus offering investors an incomplete view of the ratings for a particular security. A third commenter objected to requiring disclosure of credit rating agency information without the consent of the relevant credit rating agency but did not cite any concerns about liability.[37] The Commission did not adopt the proposal.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] 15 U.S.C. 80b–1 *et seq.* At the time Rule 436(g) was proposed, NRSROs generally were required to register as investment advisers. Congress provided an exclusion from the Advisers Act for NRSROs when it passed the Credit Rating Agency Reform Act of 2006, Public Law. 109–291, 120 Stat. 1327 (Sept. 29, 2006). *See* Section 202(a)(11)(F) of the Advisers Act [15 U.S.C. 80b–202(a)(11)(F)].

[24] *See Disclosure of Ratings in Registration Statements* in note 17 above.

[25] *See Adoption of Integrated Disclosure System,* Release No. 33–6383 (Mar. 3, 1982) [47 FR 11380].

[26] *See* Disclosure of Security Ratings by Money Market Funds, Release No. 33–6630 (March 21, 1986) [51 FR 9838].

[27] *Id.*

[28] *See Disclosure of Security Ratings,* Release No. 33–7086 (Aug. 31, 1994) [59 FR 46304].

[29] *Id.*

[30] *See* letter regarding File No. S7–24–94 of Moody's Investor Service, Inc. (Dec. 5, 1994). *See also* letter regarding File No. S7–24–94 of Fitch Investors Service Inc. (Dec. 6, 1994).

[31] *Id.*

[32] NRSROs have taken the position that they ''publish'' their ratings and that their ratings are protected under the First Amendment. Cases in which NRSROs have asserted this position include: *Compuware Corp.* v. *Moody's Inv. Servs., Inc.,* 499 F.3d 520 (6th Cir. 2007); *Jefferson County Sch. Dist. No. R–1* v. *Moody's Inv. Servs., Inc.,* 175 F.3d 848 (10th Cir. 1999); *First Equity Corp.* v. *Standard & Poor's Corp.*, 690 F.Supp. 256 (S.D.N.Y. 1988); and *Abu Dhabi Commer. Bank* v. *Morgan Stanley & Co. et al.,* 2009 U.S. Dist. Lexis 79607 (S.D.N.Y. 2009).

[33] *See* note 30 above.

[34] *See Security Ratings* Release No. 33–8940 (July 1, 2008) [73 FR 40106].

[35] *See* letter regarding File No. S7–17–08 of American Securitization Forum (Sept. 5, 2008), *at http://www.sec.gov/comments/s7-18-08/s71808.shtml.*

[36] *See* letter regarding File No. S7–17–08 of the American Bar Association (Oct. 10, 2008), *at http://www.sec.gov/comments/s7-18-08/s71808.shtml.*

[37] *See* letter regarding File No. S7–17–08 of Realpoint LLC (Sept. 8, 2008), *at http://www.sec.gov/comments/s7-18-08/s71808.shtml.* The commenter appears to be concerned with the potential negative ramifications for subscriber-paid credit rating agencies whose ratings are disclosed publicly in a registration statement.

In April 2009, the Commission hosted a roundtable regarding the oversight of credit rating agencies. In connection with the roundtable, the Commission also solicited comment on the topics to be covered at the roundtable, including the appropriate oversight and liability for NRSROs and credit rating agencies that are not NRSROs.[38] One commenter suggested that the Commission reconsider the exemption from liability for NRSROs.[39] That commenter also expressed skepticism regarding the First Amendment arguments asserted by NRSROs against being held liable for their credit ratings because credit rating agencies have become involved in the structuring of complex securities and no longer rate most or all securities, regardless of whether or not they have been hired to do so.[40] In addition, another commenter commissioned a white paper in connection with the roundtable discussion.[41] The paper argues that in order to make NRSROs more accountable, they must be subject to a credible threat of liability. Some commenters expressed concern regarding any liability that would allow for second-guessing of judgments made by credit rating agencies.[42]

II. Solicitation of Comment on Rescinding Rule 436(g)

In light of market developments and our proposal to require disclosure of credit ratings and information about credit ratings, we are considering proposing to rescind Rule 436(g) under the Securities Act, and we solicit comment on what impact removing the rule would have on market participants. If we were to rescind Rule 436(g), then NRSROs and credit rating agencies that are not NRSROs would be treated in the same manner for purposes of liability under Section 11 of the Securities Act if their credit ratings are disclosed in registration statements. If we adopt the amendments to require certain disclosure regarding credit ratings in registration statements, and if we were to rescind Rule 436(g), then a registrant who uses a credit rating assigned by an NRSRO or a credit rating agency that is not an NRSRO in connection with a registered offering would be required to file the consent of the rating agency as an exhibit to its registration statement. As a result, both NRSROs and credit rating agencies that are not NRSROs would be subject to potential liability under Section 11 of the Securities Act.

We believe that it may be appropriate to rescind Rule 436(g) for four primary reasons. First, we believe that the original reasons supporting adoption of Rule 436(g) may no longer provide a sufficient basis to continue to provide the exemption to NRSROs. If this is the case, then we believe it is appropriate to reconsider whether NRSROs should continue to be insulated from liability under Section 11. In the nearly 30 years that Rule 436(g) has been in place, the credit ratings industry has grown dramatically in terms of the number of ratings issued and the types of securities being rated.[43] We believe that it is now appropriate to revisit the purposes underlying the adoption of Rule 436(g), particularly in light of the disclosure regarding credit ratings that we are proposing in a companion release. The Commission, in proposing Rule 436(g), stated that the rule was necessary to make its policy of permitting voluntary disclosure about security ratings meaningful. Without the exemption provided by Rule 436(g), the Commission was concerned that registrants would not voluntarily disclose security ratings in their registration statements because of the liability concerns of the NRSROs who provided the ratings. If we adopt the proposal to require disclosure regarding credit ratings if they are used in connection with a registered offering of securities, then we believe the rationale cited by the Commission in 1981 is no longer applicable because we would no longer need to provide a means to encourage disclosure about credit ratings. Registrants would be required to provide such disclosure if they use a credit rating in connection with a registered offering. In addition, when Rule 436(g) was adopted, the Commission believed that the liability that was already applicable to NRSROs was sufficient for the protection of investors.[44] At the time, the Commission noted that NRSROs were subject to liability under both Section 10(b) of the Exchange Act and the Investment Advisers Act.[45] As noted above, NRSROs are no longer required to register under the Investment Advisers Act.[46] NRSROs remain subject to liability under Section 10(b) of the Exchange Act, but they are held liable infrequently.[47] In addition, questions could be raised about whether NRSROs' performance has ''adhere[d] to the highest professional standards in determining security ratings'' that the Commission expected when Rule 436(g) was adopted.[48]

Second, we believe that when credit ratings are used to sell securities, investors rely on NRSROs and other credit rating agencies as experts and that it may be appropriate for our liability scheme for experts to apply to them. In our view, NRSROs represent themselves to registrants and investors as experts at analyzing credit and risk.[49] Investors rely on the information provided by credit rating agencies for a key part of their investment decision. NRSROs describe the credit ratings that they provide as opinions with respect to the registrant or security of the registrant, and the Commission notes that other professionals provide opinions upon which investors rely, such as legal opinions, valuation opinions, fairness opinions and audit reports, and we treat these opinions as subject to the Securities Act's provisions for experts, including our requirements that registrants include the consents of such professionals if their reports are referenced in registration statements. It appears to us that NRSROs and other credit rating agencies are experts similar to other parties subject to liability under Section 11 and that it may no longer be

[38] *See* Roundtable on Oversight of Credit Rating Agencies, Release No. 34–59753 (Apr. 13, 2009) [74 FR 17698].

[39] *See* Statement regarding File No. S7–04–09 of Investment Company Institute (Apr. 15, 2009), *at http://www.sec.gov/comments/4-579/4-579.shtml.*

[40] *Id.*

[41] *See* Frank Partnoy, *Rethinking Regulation of Credit Rating Agencies: An Institutional Investor Perspective,* April 2009, *at http://www.cii.org/UserFiles/file/CRAWhitePaper04-14-09.pdf* (white paper commissioned by Council of Institutional Investors).

[42] *See e.g.* statement regarding File No. S7–04–09 of Standard & Poor's (Apr. 15, 2009) *at http://www.sec.gov/comments/4-579/4-579.shtml* (noting that some percentage of securities will default and that such a default does not automatically mean the credit rating was inappropriate).

[43] *See* Roger Lowenstein, *Triple-A Failure,* N.Y. Times Magazine, Apr. 27, 2008 (discussing the dramatic growth in revenues of NRSROs). *See also Summary Report of Issues Identified in the Commission Staff's Examinations of Select Credit Rating Agencies* (July 2008), *at http://www.sec.gov/news/studies/2008/craexamination070808.pdf* (noting that some rating agencies struggled with the substantial growth of the number of deals to be rated beginning in 2002); Marco Pagano and Paolo Volpin, *Credit Ratings Failures: Causes and Policy Options, Working Paper (Feb. 9, 2009), at http://www.italianacademy.columbia.edu/publications/working_papers/2008_2009/pagano_volpin_seminar_IA.pdf* (discussing the role of credit rating agencies in the growth of the market for structured products).

[44] *See* note 17 above.

[45] *See* note 23 above.

[46] *Id.*

[47] *See e.g.* Partnoy in note 41 above (noting that credit rating agencies ''have been sued relatively infrequently, and rarely have been held liable'').

[48] *See* note 24 above and the related discussion.

[49] We are aware that NRSROs generally do not consider themselves as experts because they believe they are providing opinions on risk. *See* letter of Moody's Investor Service, Inc. in note 30 above. We do not at this time believe, however, that the nature of the credit rating provided by a credit rating agency, including an NRSRO, is in and of itself so distinct from the parts of registration statements provided by other experts that they should be subject to a different standard of liability.

consistent with investor protection to exempt NRSROs from the provisions of the Securities Act applicable to experts.[50]

Third, we believe that rescinding Rule 436(g), and therefore potentially increasing the risk of liability under the federal securities laws, could significantly improve investor protection. Enhancing the accountability of NRSROs may help to address concerns about the quality of credit ratings. In light of the proposal to require mandatory disclosure of information about credit ratings, rescinding Rule 436(g) could encourage both NRSROs and credit rating agencies that are not NRSROs to improve the quality of their ratings and analysis in order to reduce the risk of liability under Section 11. An improvement in the quality of credit ratings should, consistent with the goals of the federal securities laws, better protect investors. Of course, we are mindful of the possibility that a risk of greater NRSRO liability as a result of subjecting NRSROs to Section 11 may undermine competition if credit rating agencies decide that they are unable to bear the risk of liability and thus exit the ratings business. Similarly, firms considering entering the ratings business may reconsider in the face of an increased risk of legal liability. The threat of liability may particularly affect smaller, less-established rating agencies that may find it more difficult to negotiate for indemnification or bear the risk of additional liability. It also is possible that, in response to the rescission of Rule 436(g), registrants would begin to take greater advantage of private placements instead of public offerings.

Finally, we believe that the distinction in Rule 436(g) between NRSROs and credit rating agencies that are not NRSROs may contribute to competitive disadvantages. We understand that investors rely on credit ratings issued by NRSROs as much as, if not more than, credit ratings issued by credit rating agencies that are not NRSROs, particularly because the NRSROs dominate the credit rating market.[51] Distinguishing between NRSROs and credit rating agencies that are not NRSROs may create a competitive barrier for those credit rating agencies because they are subject to a higher standard of liability under the securities laws than NRSROs. For credit ratings disclosed in registration statements, it may be more time consuming or costly for a credit rating agency that is not an NRSRO to provide a credit rating to a registrant than it would be for an NRSRO to provide a credit rating because of the potential for liability under Section 11 for the credit rating agency that is not an NRSRO. As discussed above, in 2008 we proposed to amend Rule 436(g) to extend the exemption to cover ratings issued by credit rating agencies that are not NRSROs in order to foster competition in the credit rating agency industry. We did not at that time, however, propose to require disclosure regarding credit ratings. In light of the proposal to require disclosure regarding credit ratings used in connection with registered offerings, we believe that the rationale for extending the exemption to credit rating agencies that are not NRSROs may be achieved by eliminating Rule 436(g) and subjecting both NRSROs and credit rating agencies that are not NRSROs to potential liability under Section 11 of the Securities Act. We now believe this approach to fostering competition may be preferable in order to protect investors by including the proposed disclosure of the credit rating within the liability scheme of Section 11 of the Securities Act to which similar disclosure is subject. At the same time, we are mindful that the increased risk of legal liability could undercut competition if certain NRSROs are unable to bear the risk of increased liability.

We are aware that rescinding Rule 436(g) may have significant impact on the market and on market participants. We want to be cognizant of all the implications of our proposed amendments to require disclosure regarding credit ratings as well as a possible future proposal to rescind Rule 436(g). Therefore we are soliciting comments on all of the potential implications that a rescission of Rule 436(g) might have.

We solicit comment below on whether rescinding Rule 436(g) might increase reliance on credit ratings. Preliminarily, we do not believe that requiring registrants to obtain consents from NRSROs and treating NRSROs as experts under the federal securities laws should increase reliance on credit ratings. Rescinding Rule 436(g) would not change the fundamental nature of what a credit rating is. The information credit rating agencies provide is already being relied upon by investors. Rescinding Rule 436(g) would require that, before such information can be used in connection with a registered offering, the registrant would have to obtain the NRSROs' consent to take responsibility for it (in addition to any liability that would be applicable pursuant to Section 10(b) of the Exchange Act).[52]

While we believe that elimination of Rule 436(g) may have important benefits, as discussed above, we also recognize that NRSROs have in the past expressed an unwillingness to be subject to Section 11 liability. However, we are also aware that providing credit ratings for registrants is the key component of revenues for NRSROs. As a result, we seek comment on how NRSROs would adapt if Rule 436(g) were rescinded and whether they would, in fact, stop issuing credit ratings permanently.

If we were to propose the elimination of Rule 436(g) and require disclosure regarding credit ratings as proposed, we recognize that obtaining and filing consents of all credit rating agencies may raise some practical and timing concerns. Assuming NRSROs are willing to grant consents, we do not wish to create a process that is unduly costly and burdensome or that unnecessarily delays completion of offerings. We have outlined below a potential approach to the question of when consents would be required to be filed and when a new consent would be required to be obtained. We solicit comment on whether this approach would be workable, whether there is a better approach and what other changes to our rules may have to be made in order for this process to work.[53]

[50] In the merger context, for example, if the fairness opinion provided by the investment banker is disclosed in the registration statement, then the party preparing the opinion must consent to be named as an expert in the registration statement. We note that fairness opinions generally include language that the financial advisor relied upon information provided by the parties to the business combination. In this regard, *see* In re Global Crossing, Ltd. Sec. Litig., 313 F.Supp. 2d 189 (S.D.N.Y. 2003) and *In re AOL Time Warner, Inc. Sec. and ERISA Litig.,* 381 F.Supp 2d 192 (S.D.N.Y. 2004). *See also Virginia Bankshares, Inc.* v. *Sandberg,* 501 U.S. 1083 (1991).

[51] For ''corporate issuers'' in 2007, for example, Standard and Poor's, Moody's, and Fitch issued 39%, 33%, and 21% of outstanding credit ratings, respectively, for a total of 93% of outstanding credit ratings. *See* Annual Report on Nationally Recognized Statistical Rating Organizations (2008), *at http://www.sec.gov/divisions/marketreg/ratingagency/nrsroannrep0608.pdf.*

[52] In the companion release proposing to require disclosure regarding credit ratings, we are proposing to require disclosure of preliminary ratings under certain circumstances. At this stage, we preliminarily believe we should not require consents regarding disclosure of preliminary ratings or unused final ratings. The preliminary rating may be based on preliminary information and may not have been subject to all of the credit rating agency's internal processes for determining credit ratings.

[53] As noted in the companion release proposing to require disclosure regarding credit ratings, the proposed disclosure requirement regarding credit

The question of when consents need to be filed may turn, in part, on what the credit rating relates to and what form is being used to register the offering. We believe an offering registered on Form S–1, for example, would require a consent for the offering, and the consent would need to be filed prior to the effectiveness of the registration statement. In the context of registered offerings made on a delayed or continuous basis in reliance on Rule 415 under the Securities Act,[54] prospectus supplements are used rather than stand-alone registration statements. As a result, the following different types of ratings may result in different consent filing requirements: (1) A credit rating that is applicable to the issuer and does not necessarily change with each offering; (2) a credit rating that applies to a specific program or type of security, such as a credit rating assigned to a medium-term note program or one for long-term debt and one for short-term debt; and (3) credit ratings that are specific to each issuance of a security. In the first instance, we believe the rating would be disclosed in the prospectus that is part of a registration statement, and the consent would need to be filed prior to the time the registration statement is declared effective.

Rule 430B[55] and Rule 430C[56] under the Securities Act deem information contained in prospectus supplements to be part of and included in the registration statement. The prospectus supplement filing does not create a new effective date for experts, and we believe it would not require the filing of a consent, unless the prospectus supplement (including incorporated Exchange Act reports such as current reports on Form 8–K) includes a new report or opinion of an expert. Thus, in the case of an issuer rating or a rating on a class of securities such as a medium-term note facility, we believe only a new or changed rating issued after the date of the last consent by the rating agency or change in any other information as to which the rating agency is an expert would require a new consent. We believe a new consent would always be required in the case of a credit rating that is specific to each issuance of a security.[57]

Request for Comments

We request comment below on specific aspects of a possible proposal to rescind Rule 436(g). While we have grouped comments by how any such proposal might affect a group of market participants, we encourage all market participants to comment on all aspects of this concept release.

Impact on Registrants and Access to Capital

- If we were to subject all credit rating agencies to Sections 7 and 11 of the Securities Act by rescinding Rule 436(g), would registrants be able to obtain the consent required to use ratings in connection with registered offerings of rated securities? What effects would rescinding Rule 436(g) have on the practice of offering securities? In particular, would doing so affect the use of credit ratings in registered offerings, affect investor reliance on credit ratings, affect the cost of obtaining a credit rating, or affect the decisions of registrants and investors regarding whether to raise capital in registered or unregistered offerings?
- Would access to capital be disrupted if Rule 436(g) were rescinded, or would market participants adjust their practices to accommodate the change? How long would it take market participants to adjust their practices? Would a long phase-in period help to mitigate any disruptions in access to capital? Why or why not? Would a phase-in period of 12 months be sufficient? How long would the phase-in period need to be?
- Would registrants be able to obtain the consent if the rating is not available until after the registration statement goes effective? Are there circumstances where the rating would be available prior to effectiveness?
- Would smaller companies be able to afford any increased costs to obtain a credit rating? What alternatives would these companies have for raising capital? What could we do to help limit any such impact?
- If we propose to rescind Rule 436(g), should we distinguish among issuers of corporate debt, issuers of structured products and closed-end management investment company securities? Are there differences among the markets for corporate debt, structured products and closed-end management investment companies that justify treating the same NRSRO as an expert for purposes of Sections 7 and 11 of the Securities Act for ratings issued on some kinds of securities but not others?
- If the proposal to require disclosure regarding credit ratings is adopted, and we do not eliminate Rule 436(g), officers, directors and underwriters will not be able to rely on NRSROs as experts with respect to the disclosure of credit ratings. Is this appropriate? Why or why not?
- Are there circumstances where a credit rating agency issuing a preliminary rating should be treated as an expert?
- Practically speaking, how would the filing of a consent work in the context of a shelf offering if we propose to rescind Rule 436(g)? Would the approach outlined above work? What other changes to our rules would be necessary?
- Do rating agencies view the issuance of each security issued by a company they rate, including each issuance within a class of securities, as the issuance of a new rating? Do investors or registrants view the issuance of each security by a company as the issuance of a new rating by the rating agency? For instance, does each issuance under a medium-term note facility constitute the issuance of a new rating that should require a consent?
- In the context of an issuer rating, are there concerns for the rating agencies with not having to provide a consent each time the registrant issues a new security?
- We believe investors would view a credit rating as current when it is used in connection with an offering of securities off a shelf registration statement. If that is the case, should we require a new consent for each take-down regardless of the type of rating or type of security? If issuing a new consent each time would be too burdensome, should we propose a rule that would deem the consent filed each time a take-down is made?
- Should a new consent be required if the company has been put on a watch list or the company has been given a positive outlook or negative outlook

ratings would not be triggered if the only disclosure of a credit rating in a filing with the Commission is related to changes to a credit rating, the liquidity of the registrant, the cost of funds for a registrant or the terms of agreements that refer to credit ratings, and the credit rating is not otherwise used in connection with a registered offering. We preliminarily believe that a consent would not be required for such disclosure.

[54] 17 CFR 230.415.

[55] 17 CFR 230.430B.

[56] 17 CFR 230.430C.

[57] In the event a new consent is required, we anticipate that the consent could be filed by a post-effective amendment to the registration statement or by filing an Exchange Act report, such as an annual report on Form 10–K or a report on Form 8–K or Form 6–K, which is incorporated by reference into the registration statement. The consent would need to be filed prior to the filing of a prospectus under Rule 424 of the Securities Act. Rule 424 requires a prospectus to be filed not later than the second business day following the earlier of the date of the determination of the offering price or the date the prospectus is first used after effectiveness in connection with a public offering or sale of securities. We also anticipate that a new consent would be required for an update pursuant to Section 10(a)(3) of the Securities Act. *See* 15 U.S.C. 77j(a)(3).

designation, or there has been some change other than an actual change in the rating?

• If the proposal to require disclosure regarding credit ratings is adopted, regardless of whether we rescind Rule 436(g), would market practices develop in the context of a take-down from a shelf registration statement where underwriters or other parties would require the credit rating agency to re-affirm its rating?

• In the context of asset-backed securities, if Rule 436(g) is eliminated, should we retain our requirement to disclose whether an issuance is conditioned on the assignment of that rating and the minimum rating that must be assigned? Should we require a consent related to the expected rating [58] and then require a subsequent consent for the final rating only if that rating changes? Should we instead treat the consent similar to pricing information under 430A [59] so that it may be filed as part of a pricing supplement but would relate back to the effective date?

• Form F–9 is the MJDS form used by eligible Canadian issuers to register investment grade debt or preferred securities. Under the MJDS, Canadian MJDS filers are largely permitted to use their Canadian provincial disclosure documents when registering their securities with the Commission, although the liability provisions under the Securities Act apply whether or not the registration statement is filed under the MJDS. If we eliminate Rule 436(g) in its entirety, a Form F–9 filer would need to obtain the consent of an NRSRO or Approved Rating Organization in the same circumstances as a similarly situated U.S. issuer, notwithstanding that the Canadian filer may not be required to do so under Canadian provincial law or regulation. How would the elimination of Rule 436(g) affect Form F–9 filers, and why? Should the Rule 436(g) exemption be retained in connection with an NRSRO or Approved Rating Organization rating disclosed in a Form F–9 to maintain consistency of consent requirements with Canadian provincial law or regulation? Should the exemption be retained for an Approved Rating Organization rating only, and eliminated for an NRSRO rating, disclosed in a Form F–9 registration statement? Or, insofar as Rule 436(g) concerns the allocation of liability for portions of a registrations statement, and liability under the Securities Act applies without regard to whether a registration statement is filed pursuant to the MJDS, should we eliminate completely the Rule 436(g) exemption for ratings disclosed in a Form F–9?

Impact on NRSROs and Credit Rating Agencies

• Are there reasons to continue to distinguish between NRSROs and credit rating agencies that are not NRSROs for purposes of Section 11 liability? Is the fact that NRSROs are subject to Commission oversight, a reasonable basis upon which to distinguish between NRSROs and credit rating agencies that are not NRSROs for this purpose?

• How would the financial markets be affected if NRSROs and other credit rating agencies temporarily or permanently stopped issuing credit ratings in registered offerings?

• As noted above, NRSROs have previously indicated that they would not provide consent. However, because we are proposing to require disclosure regarding credit ratings in registration statements, we are seeking to understand the practical implications that requiring a consent would have on NRSROs. Would NRSROs and other credit rating agencies initially or permanently refuse to provide consent? Would they initially or permanently stop issuing credit ratings in registered offerings? How would NRSROs adapt if Rule 436(g) were rescinded? How long is it likely such adaptation would take? Are NRSROs likely to adapt in different ways?

• Would rescinding Rule 436(g) reduce or eliminate the incentive for a credit rating agency to become an NRSRO?

• How would rescission of Rule 436(g) affect the process of issuing a credit rating? Would the process take longer? Would the NRSROs and credit rating agencies that are not NRSROs change their procedures? If so, how? Would credit rating agencies seek more, less or different information from registrants in order to provide a credit rating? How would requiring consents from both NRSROs and credit rating agencies that are not NRSROs affect their interactions with registrants and underwriters? Would there be any inflation or deflation of ratings? Why or why not?

• Would rescinding Rule 436(g) affect the types of products that credit rating agencies are willing to rate? How? Would they be less likely to rate lower grade products or products issued by smaller or less well-established registrants?

• Would any additional disclosure be necessary in order for the rating and other statements regarding the rating not to contain an untrue statement of a material fact or fail to state a material fact required to be stated in order to make the statements therein not misleading? What other information would be necessary to make the disclosure not misleading? Should we revise the proposed disclosure in the companion release to include additional items?

• What costs would potential liability under Section 11 impose on NRSROs and other credit rating agencies? Would those costs be passed on to registrants or, ultimately, to investors? What steps would NRSROs and other credit rating agencies take to protect themselves from potential liability under Section 11?

• If we propose to rescind Rule 436(g), should we specify that the credit rating itself would be considered prepared or certified by a person, or a report or valuation prepared or certified by a person within the meaning of Sections 7 and 11 of the Securities Act? Should it include more than just the actual rating? Are there other parts of the registration statement that would be considered prepared or certified by the credit rating agency? How would determining which portions of the registration statement would be considered prepared or certified by a person, or a report or valuation prepared or certified by a person impact other potential defendants who might rely on that portion as a defense to liability?

• Are there issues related to the liability of other experts, such as lawyers, investment bankers and accountants, that we should consider in deciding whether to rescind Rule 436(g)? Are credit rating agencies different from other types of experts from whom we require consent? If so, how? What steps could we take to account for those differences? How would the elimination of Rule 436(g) change the standard of liability to which NRSROs are currently subject for the use of credit ratings in connection with a registered offering? Is there any reason to believe the liability standards applicable to other experts may be applied differently to NRSROs and credit rating agencies that are not NRSROs?

• Is Section 11 liability appropriate for NRSROs and credit rating agencies that are not NRSROs? What is the expected standard of liability for a credit rating to be actionable under Section 11, and how does it compare to the standard of liability under Section 10(b) of the Exchange Act? If Section 11 were applicable, what is the practical impact of the different pleading standards under Section 10(b) of the Exchange Act and Section 11 of the

[58] *See* Item 1120 of Regulation AB.

[59] 17 CFR 220.430A.

Securities Act? How would any claims of First Amendment protection applicable to NRSROs be impacted by potential Section 11 liability?

• To reduce the risk of legal liability, would NRSROs issue more ''defensive'' ratings than are warranted? If so, how would this affect the cost of capital for registrants?

Impact on Investors

• Would eliminating the exemption in Rule 436(g) so that NRSROs are subject to potential liability under Section 11 be beneficial to investors? What effects would there be for investors if we eliminate the exemption for NRSROs in Rule 436(g)? Would the protections afforded by potential Section 11 liability for NRSROs be offset by any changes in the credit rating process, such as possible increases in the use of unregistered offerings or potential disruptions to registrants' access to capital?

• To what extent do the concerns expressed regarding possible undue reliance by investors on credit ratings suggest that investors actually do consider NRSROs to be persons whose profession gives authority to statements they make, as contemplated by Sections 7 and 11 of the Securities Act?

• How would the elimination of Rule 436(g) affect the quality of credit ratings? Would potential liability under Section 11 provide an incentive for NRSROs to provide higher-quality ratings? Would quality decline? Why?

• If credit rating agencies, including NRSROs, initially refuse to provide consent or stop issuing credit ratings, how would investors be affected? [60] Would investors with guidelines that require them to invest in rated securities be able to continue to invest? Would such investors change their investing guidelines? How long would it take for any such changes to be implemented?

• What effect would rescinding Rule 436(g) have on investors' reliance on credit ratings? Would any investors rely more or less on credit ratings? Would investors view credit ratings as more reliable?

Impact on Competition

• How would rescinding Rule 436(g) affect competition among credit rating agencies? Would treating NRSROs and credit rating agencies that are not NRSROs the same for purposes of liability under Section 11 of the Securities Act lower competitive barriers for credit rating agencies that are not NRSROs? Would it have any impact on the number of companies seeking to be an NRSRO?

• If NRSROs are unable to absorb the litigation costs and risks of Section 11 liability, and competition is reduced as a result, what impact, if any, would that reduced competition have on investor protection?

• Would rescinding Rule 436(g) have negative consequences for smaller NRSROs? Would it increase their costs of doing business? Would it make registrants more likely to seek ratings from the larger NRSROs? Would it make smaller NRSROs unable to issue ratings in connection with registered offerings? Would smaller NRSROs be able to adapt to the changes that might occur? Are there ways to mitigate negative competitive consequences if Rule 436(g) were eliminated?

III. General Request for Comments

We request and encourage any interested person to submit comments regarding:

• The concepts that are the subject of this release;

• additional or different changes; or

• other matters that may have an effect on the concepts contained in this release.

We request comment from the point of view of companies, investors, and other market participants, including NRSROs and other credit rating agencies. With regard to any comments, we note that such comments are of greater assistance to us if accompanied by supporting data and analysis of the issues addressed in those comments.

By the Commission.

Dated: October 7, 2009.

Elizabeth M. Murphy,

Secretary.

[FR Doc. E9–24547 Filed 10–14–09; 8:45 am]

BILLING CODE 8011–01–P

[60] Should NRSROs refuse to issue ratings, money market funds subject to Rule 2a–7 [17 CFR 270.2a–7] under the Investment Company Act may, for example, be affected to the extent the rule requires certain securities in which they invest to be rated by an NRSRO. *See* Rule 2a–7(a)(10)(ii)(A) (long-term security with a remaining maturity of less than 397 days that does not have a short-term rating is not an ''eligible security'' unless it has at least one long-term rating from an NRSRO); Rule 2a–7(a)(10)(ii) (asset backed security must be rated by an NRSRO to be an ''eligible security''); and Rules 2a–7(c)(3)(iii) and (a)(10)(iii)(A) (together permitting funds to substitute the credit quality of a guarantor for the credit quality of the issuer only if the guarantee (or guarantor) is rated by an NRSRO). The Commission has requested comment on whether use of these ratings requirements ought to be removed from Rule 2a–7. *See* Money Market Fund Reform, Release No. IC–28807 (June 30, 2009) [74 FR 32688].

Federal Register

Thursday,
October 15, 2009

Part IV

Federal Trade Commission

16 CFR 255

Guides Concerning the Use of Endorsements and Testimonials in Advertising Federal Acquisition Regulation; Final Rule

FEDERAL TRADE COMMISSION

16 CFR Part 255

Guides Concerning the Use of Endorsements and Testimonials in Advertising

AGENCY: Federal Trade Commission.

ACTION: Final Rule; Notice of adoption of revised Guides.

SUMMARY: The Federal Trade Commission (''FTC'' or ''Commission'') is adopting revised Guides Concerning the Use of Endorsements and Testimonials in Advertising (''the Guides'').

DATES: Effective December 1, 2009.

FOR FURTHER INFORMATION CONTACT: Shira Modell, Attorney, Division of Advertising Practices, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C., 20580; (202) 326-3116.

SUPPLEMENTARY INFORMATION:

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IV. REVISED ENDORSEMENT AND TESTIMONIAL GUIDES

I. OVERVIEW OF THE COMMISSION'S REVIEW OF THE GUIDES

The Commission began a review of the Guides pursuant to the agency's ongoing regulatory review of all current rules and guides. In January 2007, the Commission published a **FEDERAL REGISTER** notice seeking comment on the overall costs, benefits, and regulatory and economic impact of the Guides. 72 FR 2214 (Jan. 18, 2007). The Commission also requested comment on consumer research it commissioned regarding the messages conveyed by consumer endorsements and on several other specific issues, the most significant of which was the use of so-called ''disclaimers of typicality'' accompanying testimonials that do not represent experiences that consumers can generally achieve with the advertised product or service. Specifically, the Commission asked about the potential effect on advertisers and consumers if the Guides required clear and conspicuous disclosure of the generally expected performance whenever the testimonial is not generally representative of what consumers can expect. Twenty-two comments were filed in response to this notice.

In November 2008, the Commission published a **FEDERAL REGISTER** notice, 73 FR 72374 (Nov. 28, 2008), that discussed the comments it had received in 2007, proposed certain revisions to the Guides, and requested comment on those revisions. Seventeen comments were filed.[1] After reviewing those comments, the Commission is now making additional changes to the Guides, and adopting the resulting revised Guides as final.[2]The revised Guides include additional changes not incorporated in the proposed revisions published for public comment in November 2008. See 73 FR 72374 (Nov. 28, 2008).

II. REVIEW OF COMMENTS ON PROPOSED REVISIONS TO THE GUIDES

Nearly all of the comments received by the Commission took issue with, or raised questions about, one or more of the changes included in the proposed revised Guides.[3] Several argued that there was no need for the Guides to be revised at all, and that the 1980 Guides, combined with continued industry self-regulation and the Commission's case-by-case law enforcement, would adequately balance the needs of advertisers and the interest of consumer protection.[4] As discussed below, others argued that the evidence in the record did not support the proposed changes,[5] that the proposed revisions to the Guides could have a negative affect on emerging media channels and impede the ability of businesses to communicate with consumers through legitimate testimonials and endorsements,[6] and that the Commission should look to industry to address any problems in the marketplace and, where appropriate, to revise existing self-regulatory frameworks to address the evolving concerns posed by emerging digital advertising channels.[7] As discussed below, the application of the Guides to new media and the Commission's proposed elimination of the ''safe harbor'' afforded by the 1980 Guides to non-typical testimonials accompanied by disclaimers of typicality were issues addressed in a number of the comments.

A. Analysis of Comments Concerning What Communications Should Be Considered ''Endorsements'' Under § Section 255.0 of the Guides

1. General Issues

As proposed by the Commission in its November 2008 **FEDERAL REGISTER** notice, Section 255.0(b) of the Guides would state in part that:

> [A]n endorsement means any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser.

One commenter stated that defining endorsements based on a subjective measure of consumer understanding – that is, by the sole criterion of whether consumers are likely to believe the statement reflects the views of the

[1]Comments were submitted by the American Association of Advertising Agencies (''AAAA''), the American Advertising Federation (''AAF''), the Council for Responsible Nutrition (''CRN''), the Direct Marketing Association (''DMA''), the Direct Selling Association (''DSA''), the Electronic Retailing Association (''ERA''), the Interactive Advertising Bureau, Inc. (''IAB''), the Promotion Marketing Association, Inc. (''PMA''), the U.S. Chamber of Commerce (''C of C''), the Association of National Advertisers (''ANA''), the Public Relations Society of America (''PRSA''), Higher Power Marketing (''HPM''), the Natural Products Association (''NPA''), the National Association of Realtors (''NAR''), the Word of Mouth Marketing Association (''WOMMA''), BzzAgent, Inc. (''BzzAgent''), the Personal Care Products Council (''PCPC), Kelley Drye & Warren, LLP, Monyei-Hinson, and Heath-McLeod. In some cases, a comment was submitted by more than one party. Citations to these joint comments identify the individual commenters (*e.g.*, AAAA/AAF). In addition, several commenters signed on to more than one comment.

[2]The Guides represent administrative interpretations concerning the application of Section 5 of the FTC Act (15 U.S.C. 45) to the use of endorsements and testimonials in advertising. They are advisory in nature, and intended to give guidance to the public in conducting its affairs in conformity with Section 5.

[3]The exceptions were the comments filed by Monyei-Hinson (calling for stringent regulation of endorsements and new media, and specific rules regarding holding celebrities accountable and disclosing celebrity pay); and Heath-McLeod (agreeing overall with the proposed changes but calling for, among other things, minimum standards for the size and clarity of disclosures).

[4]AAAA/AAF, at 8, 10, 18; PRSA, at 2; ANA, at 2; DMA, at 3 (stating that the current approach should be continued ''[u]ntil there is a demonstrated market failure across all media channels'').

[5]PMA, at 3; DMA, at 3 (stating that there is an ''insufficient basis to support a conclusion that the current regulatory and market safeguards inadequately protect consumers'').

[6]DMA, at 1.

[7]IAB, at 3.

endorser, rather than that of advertiser – creates inherent uncertainty.[8]

The Guides have always defined ''endorsements'' by focusing on the message consumers take from the speech at issue.[9] Indeed, this focus on consumer takeaway is completely consistent with the approach the Commission uses to determine whether a practice is deceptive, and thus in violation of the FTC Act.[10] Accordingly, the Commission concludes that no additional changes to the proposed revised definition of ''endorsement'' are warranted.

2. New Media – Consumer-Generated Content as an ''Endorsement'' Within the Meaning of the Guides

The Commission's November 2008 proposal included several examples applying various Guide provisions to new forms of consumer-generated media, such as the use of blogs in word of mouth marketing campaigns, and several commenters focused specifically on these examples.[11] Some of the comments questioned whether statements in certain of these new media qualify as ''endorsements'' under the Guides, given, among other things, the advertiser's limited control over the messages disseminated to the public.[12] Other commenters argued that it was premature for the Commission to apply the Guides to these new media without the opportunity for further discussion about these media and guidance on the scope of the liability that the Guides would create for advertisers,[13] with some suggesting that the future growth of these new media wouldbe adversely affected if they were subject to the Guides because advertisers would be deterred from using them.[14] These commenters opined that the Commission should, instead, defer to industry self-regulation, as it has done in the past when industry has proven itself capable of protecting consumers.[15]

One commenter observed that the proposed Guides could leave the impression that any blog that speaks positively about a product would necessarily be covered by the Guides, and thus by Section 5, and that such an outcome would be wrong for a blog:

> that functions similarly to traditional media . . . if (1) the blog provides content that is editorially independent of any sponsor or marketer of a product or service, and (2) there is no material connection with the marketer of a product or service that is discussed in the blog that would call into question the editorial independence of the blog.[16]

Two commenters with particular interest in word of mouth marketing also addressed the application of the Guides to these new consumer-generated media. One noted the distinction between blogs that are just personal communication spaces, and those that are essentially commercial communication spaces, asserting that although an ''advertising message'' is intended by the latter – making it subject to the Guides – no such message is intended by the former and the Guides should not apply.[17]

Similarly, the other commenter noted that the Guides should not ''inadvertently regulate everyday word-of-mouth communications among actual consumers regardless of whether such communications take place in person, via e-mail or in new mediums such as blogs or social networking Web sites.''[18] This commenter stated that even if consumers participate in advertising sampling programs, their online comments about a particular product should not be considered commercial speech and these consumers should not be deemed ''endorsers'' when they are free to say whatever they want about the product (or not say anything at all) without the advertiser having any control over their statements.[19] By extension, this commenter contended that neither the advertiser nor the publisher should be liable for any false or unsubstantiated statements made by these consumer reviewers.[20]

The comments correctly point out that the recent development of a variety of consumer-generated media poses new questions about how to distinguish between communications that are considered ''endorsements'' within the meaning of the Guides and those that are not. The Commission disagrees, however, with those who suggest that there is not yet an adequate basis to provide guidance in this area. As set forth below, after considering the observations provided by various commenters, the Commission is setting forth a construct for analyzing whether or not consumer-generated content falls within the definition of an endorsement in Section 255.0(b) of the Guides. The Commission will, of course, consider each use of these new media on a case-by-case basis for purposes of law enforcement, as it does with all advertising.

The Commission does not believe that all uses of new consumer-generated

[8]PRSA, at 3.

[9]The proposed revised definition reflects only one change from the definition adopted in 1980: the addition of the phrase ''even if the views expressed by that party are identical to those of the sponsoring advertiser.''

[10]FTC Policy Statement on Deception, *appended to Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174, 175 (1984) (citation omitted) (hereafter ''Deception Policy Statement'') (stating that in determining whether a representation, omission, or practice is deceptive, ''we examine the practice from the perspective of a consumer acting reasonably in the circumstances'').

[11]WOMMA defines ''word of mouth marketing'' as ''Giving people a reason to talk about your products and services, and making it easier for that conversation to take place. It is the art and science of building active, mutually beneficial consumer-to-consumer and consumer-to-marketer communications.'' http://womma.org/womm101 (last visited Oct. 1, 2009).

[12] *E.g.,* BzzAgent, at 4-5.

[13]ERA/CRN, at 33; PMA, at 17 (citing the ''near-endless'' variety of possible relationships between bloggers and the companies about whose products they blog); *see also* DMA, at 4-5 (stating that the Commission should not apply the same principles ''addressing narrow concerns associated with endorsements made through a print medium to dynamic channels such as the Internet''; rather than apply the Guides to these new media, the Commission should address the issue by means of case-by-case law enforcement actions under the 1980 Guides, so it can give appropriate consideration to the unique characteristics of this particular medium of communication).

[14]IAB, at 3 (''If the Commission were to adopt guidelines addressing new media without a sufficient understanding of how such new technologies are being harnessed or may be used in the future, the Commission might risk dissuading the development of novel means of advertising that effectively serve the interests of consumers in ways not yet imagined.''); AAAA/AAF, at 17 (''[R]egulating these developing media too soon may have a chilling effect on blogs and other forms of viral marketing, as bloggers and other viral marketers will be discouraged from publishing content for fear of being held liable for any potentially misleading claim.''); DMA, at 5 (noting a potential ''chilling effect on the use of the Internet as a communication channel'').

[15] *E.g.*, IAB, at 3; C of C, at 5 (the industry has already successfully self-regulated).

[16]PCPC, at 1-2 (asserting that ''a magazine article or newspaper article that reviews a product is not an 'endorsement' for purposes of advertising law, so too is a blog that performs this same function,'' and that receipt by the blogger of a free product sample for review purposes does not change this analysis, ''provided that the product itself does not have such a high value that would make its receipt material *(e.g.,* a car), since the resulting editorial content – good or bad – is not controlled by the marketer''); *see also* IAB, at 4 (stating that bloggers, like movie critics, are provided free product because the marketer wants unbiased feedback).

[17]WOMMA, at 6.

[18]BzzAgent, at 1; *see also id.* at 4-5 (FTC should ''distinguish between honest word of mouth shared among *actual consumers* from marketing messages spread by controlled *consumer endorsers* ''; consumers who participate in BzzAgent network marketing program are the former).

[19]BzzAgent, at 6-8 (if mere provision of samples to honest reviewers is considered proxy for control, reviewers would inadvertently qualify as endorsers, even though their views are their own, not those of the company that provided the free product).

[20] *Id.* at 6-8 (noting that modern companies that distribute product samples to facilitate honest word of mouth communications are analogous to distributor who offers free samples to grocery shoppers, that participants in these network marketing program are analogous to supermarket shoppers who try the free sample and perhaps tell their friends about it, and that neither of these scenarios should be encompassed by the Guides).

media to discuss product attributes or consumer experiences should be deemed ''endorsements'' within the meaning of the Guides. Rather, in analyzing statements made via these new media, the fundamental question is whether, viewed objectively, the relationship between the advertiser and the speaker is such that the speaker's statement can be considered ''sponsored'' by the advertiser and therefore an ''advertising message.''In other words, in disseminating positive statements about a product or service, is the speaker: (1) acting solely independently, in which case there is no endorsement, or (2) acting on behalf of the advertiser or its agent, such that the speaker's statement is an ''endorsement'' that is part of an overall marketing campaign? The facts and circumstances that will determine the answer to this question are extremely varied and cannot be fully enumerated here, but would include: whether the speaker is compensated by the advertiser or its agent; whether the product or service in question was provided for free by the advertiser; the terms of any agreement; the length of the relationship; the previous receipt of products or services from the same or similar advertisers, or the likelihood of future receipt of such products or services; and the value of the items or services received. An advertiser's lack of control over the specific statement made via these new forms of consumer-generated media would not automatically disqualify that statement from being deemed an ''endorsement'' within the meaning of the Guides. Again, the issue is whether the consumer-generated statement can be considered ''sponsored.''

Thus, a consumer who purchases a product with his or her own money and praises it on a personal blog or on an electronic message board will not be deemed to be providing an endorsement.[21] In contrast, postings by a blogger who is paid to speak about an advertiser's product will be covered by the Guides, regardless of whether the blogger is paid directly by the marketer itself or by a third party on behalf of the marketer.

Although other situations between these two ends of the spectrum will depend on the specific facts present, the Commission believes that certain fact patterns are sufficiently clear cut to be addressed here. For example, a blogger could receive merchandise from a marketer with a request to review it, but with no compensation paid other than the value of the product itself. In this situation, whether or not any positive statement the blogger posts would be deemed an ''endorsement'' within the meaning of the Guides would depend on, among other things, the value of that product, and on whether the blogger routinely receives such requests. If that blogger frequently receives products from manufacturers because he or she is known to have wide readership within a particular demographic group that is the manufacturers' target market, the blogger's statements are likely to be deemed to be ''endorsements,'' as are postings by participants in network marketing programs. Similarly, consumers who join word of mouth marketing programs that periodically provide them products to review publicly (as opposed to simply giving feedback to the advertiser) will also likely be viewed as giving sponsored messages.[22]

Finally, the Commission disagrees with those who suggest that including in the Guides examples based on these new media would interfere with the vibrancy of these new forms of communication, or that the Commission should, instead, defer to industry self-regulation. Whether or not the Guides include examples based on these new media does not affect the potential liability of those who use these media to market their products and services. The Guides merely elucidate the Commission's interpretation of Section 5, but do not expand (or limit) its application to various forms of marketing. Furthermore, the Commission notes that spending on these new social media is projected to increase,[23] and the commenters who expressed concerns about the future of these new media if the Guides were applied to them did not submit any evidence supporting their concerns. Moreover, to the extent that consumers' willingness to trust social media depends on the ability of those media to retain their credibility as reliable sources of information, application of the general principles embodied in the Guides presumably would have a beneficial, not detrimental, effect. And although industry self-regulation certainly can play an important role in protecting consumers as these new forms of marketing continue to evolve and new ones are developed,[24] self-regulation works best when it is backed up by a strong law enforcement presence. Thus, for example, the National Advertising Division of the Council of Better Business Bureaus will refer matters to the Commission when advertisers refuse to participate in, or do not abide by the decisions of, NAD's self-regulatory review and dispute resolution process. The Commission believes that guidance as to the types of consumer-generated content that will be considered ''endorsements'' within the meaning of the Guides, and as to the responsibilities of the parties involved, informs both advertisers and endorsers of their attendant responsibilities in ensuring that advertising is truthful and non-misleading, and reduces potential misunderstanding of their obligations under Section 5 of the FTC Act.[25]

3. New Example

The Commission is adding a new Example 8 to Section 255.0 to provide additional guidance about application of the factors set forth in Part II.A.2 above to statements made in consumer-generated media. This example posits three different fact patterns in which a consumer writes a positive blog review about a new product she has tried. In the first hypothetical, her statement is not deemed to be an endorsement within the meaning of the Guides because of the lack of any relationship whatsoever between the speaker and the manufacturer. In the second hypothetical, a coupon for a free trial of the new product is generated by the store's computer, based on her purchases; again, given the absence of a

[21]Even if that consumer receives a single, unsolicited item from one manufacturer and writes positively about it on a personal blog or on a public message board, the review is not likely to be deemed an endorsement, given the absence of a course of dealing with that advertiser (or others) that would suggest that the consumer is disseminating a ''sponsored'' advertising message.

This is not to say that use of a personal blog means that the statements made therein would necessarily be deemed outside the scope of the Guides; the Commission would have to consider the rest of the indicia set forth above to determine if the speaker was essentially ''sponsored'' by the advertiser.

[22]The fact that the participants technically might be free not to say anything about any particular product they receive through the program does not change the Commission's view that positive statements would be deemed to be endorsements. The underlying purpose of these word of mouth marketing programs is to generate positive discussion about the advertiser's products.

[23]According to WOMMA, $1.35 billion was spent on social media marketing in 2007, and that figure is expected to reach $3.7 billion by 2011. (*http://www.ft.com/cms/s/0/9a58f44c-1fae-11de-a1df-00144feabdc0.html*) (last visited Oct. 1, 2009).

[24]Indeed, some industry groups have made established codes of ethics that are very much in line with the approach taken in the Guides. For example, WOMMA attached to its comment a copy of the Word of Mouth Marketing Ethics Code of Conduct.

[25]The examples involving new media included in the revised Guides are based on specific fact patterns that lend themselves to relatively clear answers. The Commission recognizes that many other hypotheticals could be posited that would be far more difficult to answer; those will have to be considered on a case-by-case basis.

relationship between the speaker and the manufacturer or other factors supporting the conclusion that she is acting on behalf of the manufacturer (*i.e.,* that her statement is ''sponsored''), her review would not be deemed to be an endorsement. In the third fact pattern, however, there is an ongoing relationship between the consumer and a network marketing program, and economic gain by the consumer based on the stream of products, thereby making the blog posting an endorsement within the meaning of the Guides.

4. Other Issues

Another commenter asked the Commission to address several questions. First, would a product review written by an employee of an organization to inform the organization's members about the availability, qualities, and features of particular products and services of interest to them be an endorsement by the organization within the meaning of the Guides?[26] Second, assuming such a review would not be covered by the Guides, would the use of that review (or of quotations from it), in an advertisement disseminated by the seller of that product create ''endorser'' liability for the organization if the organization did not consent to or otherwise participate in the seller's use of the product review?[27]

The answer to the first question is that such a review published in the organization's own journal would not be considered an endorsement because the Commission would not consider the review to be an advertisement, and there is no sponsoring advertiser. However, if that review was used in an ad disseminated by the manufacturer of a product that received a favorable review, the organization's statements would become an ''endorsement'' within the meaning of Section 255.0(d). (See Section 255.0, Example 1.) Nonetheless, assuming that the organization did not know about the manufacturer's plan to use that review and did not receive any compensation for its use, the organization would not be liable for its use, even if the review did not comply with the Guide provisions concerning endorsements by organizations. (See Section 255.4.)

B. Section 255.1 – General Considerations

Although no commenters addressed the General Considerations section of the Guides, the Commission is making two additional revisions to Section 255.1. First, a proposed cross-reference to Example 3 in Section 255.3 (endorsements by experts) is being deleted from Section 255.1(a). Second, a cross-reference to the Guide provisions in Section 255.3 that set forth the standards that expert endorsers must meet is being added to new Example 3 in Section 255.1.

C. Comments Concerning the Liability of Endorsers and Advertisers for Endorsements Disseminated Through New Media

Several comments questioned whether the advertiser should be liable for statements made by endorsers who use new media. One suggested that the advertiser should be liable for comments of an ''endorser'' only if the advertiser had the ability to control the consumer's statements.[28] Thus, if consumers are free to say what they wish about the product – or, if they choose, to say nothing about it – the advertiser should not face potential liability.[29]

Several comments specifically expressed concern about proposed new Example 5 to Section 255.1, with some concerned that the example suggests that bloggers potentially would be liable under Section 5 for simply giving their honest appraisal of a product and how it affected them personally.[30] Commenters also focused on the fact that the advertiser could be liable for statements made by the blogger.[31]

The Commission recognizes that because the advertiser does not disseminate the endorsements made using these new consumer-generated media, it does not have complete control over the contents of those statements. Nonetheless, if the advertiser initiated the process that led to these endorsements being made –*e.g.,* by providing products to well-known bloggers or to endorsers enrolled in word of mouth marketing programs – it potentially is liable for misleading statements made by those consumers.

Imposing liability in these circumstances hinges on the determination that the advertiser chose to sponsor the consumer-generated content such that it has established an endorser-sponsor relationship. It is foreseeable that an endorser may exaggerate the benefits of a free product or fail to disclose a material relationship where one exists. In employing this means of marketing, the advertiser has assumed the risk that an endorser may fail to disclose a material connection or misrepresent a product, and the potential liability that accompanies that risk. The Commission, however, in the exercise of its prosecutorial discretion, would consider the advertiser's efforts to advise these endorsers of their responsibilities and to monitor their online behavior in determining what action, if any, would be warranted.

New Example 5 should not be read to suggest that an advertiser is liable for any statement about its product made by any blogger, regardless of whether there is any relationship between the two. However, when the advertiser hires a blog advertising agency for the purpose of promoting its products – as posited by the specific facts set forth in this example – the Commission believes it is reasonable to hold the advertiser responsible for communicating approved claims to the service (which, in turn, would be responsible for communicating those claims to the blogger).

The commenters expressing concern that the blogger in new Example 5 potentially could be liable for giving her honest opinion of the product (that it cures eczema) and discussing her personal experience with it appear to have misread the example. The blogger did not either give her opinion about subjective product characteristics (*e.g.,* that she liked the fragrance) or relate her own experience with it (the example does not say that she had eczema). Rather, she made a blanket claim that the product ''cures'' eczema without having any substantiation for that claim. The Commission is revising new Example 5, however, to clarify that both the advertiser and the blogger are subject to liability for misleading or unsubstantiated representations made in the course of the blogger's endorsement.

D. Comments Addressing Celebrity Endorsements

The 1980 Guides did not explicitly state that endorsers, as well as advertisers, could be liable under the FTC Act for statements they make in an endorsement. To make that potential liability more apparent to those who might be considering making an endorsement (and to those counseling prospective endorsers), the Commission's proposed revised Guides included new language in Section

[26]NAR, at 1.

[27] *Id.* at 1-2.

[28]Bzz Agent, at 4-5; *see also* IAB, at 4 (stating that making marketers liable for ''actions of third parties over whom they exercise uncertain control'' could lead to unintended consequences).

[29]Bzz Agent, at 4-5.

[30]WOMMA, at 9; ANA, at 6.

[31]ANA, at 6 (stating that advertiser would be liable for blogger's statements and failure to disclose material connections); DMA, at 4-5 (stating that advertiser would be liable for statements made by blogger over whom it has no control); PMA, at 17 (stating that example appears to create liability for any company that sells a product that is reviewed by a blogger).

255.1(d) stating that ''Endorsers . . . may be liable for statements made in the course of their endorsements.''The Commission's proposal also included several new examples featuring celebrities and experts. (*See*, *e.g.*, Section 255.0, Example 6; Section 255.1, Examples 3 and 4.)

One comment asserted that proposed new Example 6 in Section 255.0[32] suggests that any recognizable figure who speaks about the attributes of a product or service would be considered an endorser, even if the celebrity's statements are clearly scripted and do not contain an expression of personal belief.[33] This commenter also asserted that ''under this new standard, when coupled with the proposed changes to endorser liability, a celebrity with a well-known voice who provides a scripted voice-over is just as liable for an advertisement's message as a celebrity who promotes a product with direct statements of endorsement, such as ''I use product X every day. It works for me.''[34]

Two commenters stated that the proposed revisions to the Guides could unfairly expose celebrities to liability for advertising claims that they lack the knowledge to verify or the authority to change; indeed, they noted, celebrities who attempted to deviate from the script they are given might be subject to legal action for breach of contract.[35] Because the proposed revised Guides provide little guidance about when celebrities would be liable for their endorsements, according to these commenters, celebrities might become concerned about potential liability; and if so, they could be deterred from endorsing products, thereby depriving advertisers of a long-standing and valuable advertising technique.[36]

Specifically, the commenters pointed out that celebrities are under contract to read the script that is provided to them, and do not have control over the content of the final ad, including how their endorsements will appear; nor do they possess the expertise needed to assess whether a particular claim violates the FTC Act.[37] The proposed Guide revisions, they asserted, could be interpreted as imposing an obligation on celebrity endorsers to ensure that claims made by the advertiser and communicated by the celebrities are independently verified and properly substantiated – thereby requiring celebrities to educate themselves not only on the product at issue, but also on the relevant industry and competition.[38] One comment opined that absent knowledge and control, celebrity liability based solely on participation in an ad would be contrary to existing case law.[39] Another stated that it was not necessary to include a celebrity liability provision in the Guides, but to the extent that the FTC determined that such a guide is necessary, a narrowly tailored provision enumerating the circumstances under which a celebrity may be held liable would accomplish the Commission's goals without creating an unnecessary chilling effect.[40]

The commenters also asked the Commission to reconsider new Example 4 to revised Section 255.l[41] because ''it could unfairly expose celebrities to liability for claims beyond his/her expertise or control.''[42] They pointed out not only does the celebrity have no control over the final version of the roasting bag infomercial, but even during filming there could be activities of which the celebrity was unaware and thus for which he or she should not be held liable.[43]

The addition of new Section 255.1(d) and the new examples featuring celebrities does not create new liability for celebrities,[44] but serves merely to let them (and their advisors) know about the potential liability associated with their endorsement activities. Indeed, as the Commission noted when it proposed Section 255.1(d), this new provision merely ''explicitly recognizes two principles that the Commission's law enforcement activities have already made clear,'' one of which is ''that endorsers may also be subject to liability for their statements.''73 FR at 72377.

Nor should Example 6 to Section 255.0 be read to suggest that every appearance by a well-known personality will be deemed an endorsement. As the Commission previously noted, this example was added ''to illustrate that the determination of whether a speaker's statement is an endorsement depends solely on whether consumers believe that it represents the endorser's own view.''*Id.* Example 6 does not expand the scope of potential endorser liability but merely ''clarifies that whether the person making the statement is speaking from a script, or giving the endorsement in his or her words, is irrelevant to the determination.''*Id.* In this example, the celebrity's statement that the home fitness system being advertised ''is the most effective and easy-to-use home exercise machine that she has ever tried'' would clearly be understood by consumers as an expression of personal belief. Moreover, new Example 7 to Section 255.0 presents a situation in which well-known persons who appear in advertising are *not* deemed to be endorsers.

The Commission is not persuaded that a celebrity endorser's contractual obligation to read the script he or she is given should confer immunity from liability for misrepresentations made in the course of that endorsement.[45] The celebrity has decided to earn money by providing an endorsement. With that opportunity comes the responsibility for the celebrity or his or her legal representative to ensure in advance that the celebrity does not say something that does not ''reflect [his or her] honest opinions, findings, beliefs, or experience.''*See* 16 CFR 255.1(a). Furthermore, because celebrity endorsers are liable for what they say, not for the rest of the advertisement, their lack of control over the final version of a commercial does not warrant the immunity sought by the commenters. Nor are they required to become experts on the product or the industry, although they may have an obligation to make reasonable inquiries of the advertiser that there is an

[32] In that example, an infomercial for a home fitness system is hosted by a well-known entertainer. The entertainer demonstrates the machine and states that it is the most effective and easy-to-use home exercise machine that she has ever tried. The example states that even if she is reading from a script, this statement would be an endorsement, because consumers are likely to believe it reflects the entertainer's views.

[33] PMA, at 12.

[34] *Id.*

[35] AAAA/AAF, at 11; PMA, at 13.

[36] AAAA/AAF, at 11; PMA, at 12.

[37] AAAA/AAF, at 11-13; PMA, at 13.

[38] AAAA/AAF, at 11-12; *see also* PMA, at 11.

[39] AAAA/AAF, at 13.

[40] PMA, at 13.

[41] In that example, a well-known celebrity appears in an infomercial for an oven roasting bag that purportedly cooks every chicken perfectly in thirty minutes. During the shooting of the infomercial, the celebrity watches five attempts to cook chickens using the bag. In each attempt, the chicken is undercooked after thirty minutes and requires sixty minutes of cooking time. In the commercial, the celebrity places an uncooked chicken in the roasting bag and places the bag in one oven. He then takes a bag from a second oven, removes what appears to be a perfectly cooked chicken, tastes it, and says that if you want perfect chicken every time, in just thirty minutes, this is the product you need.

[42] AAAA/AAF, at 13-14; *see also* PMA, at 14.

[43] AAAA/AAF, at 13-14; PMA, at 14 (stating that a celebrity cannot keep up with every element of production on infomercial set or know how final product will be edited).

[44] As the Commission noted in its November 2008 **FEDERAL REGISTER** notice, law enforcement actions have been brought against well-known personalities (*i.e.*, celebrities) who have acted as endorsers. 73 Fed Reg. at 72377 (citing *Cooga Mooga, Inc.*, 92 F.T.C. 310 (1978) (consent order)).

[45] *Cf. FTC v. Publishing Clearing House, Inc.*, 106 F.3d 407 (9 th Cir. 1997) (affirming liability for restitution of telephone solicitor who read facially deceptive script ''word for word'').

adequate basis for assertions that the script has them making.

The Commission believes that the commenters misread *FTC v. Garvey*, 383 F.3d 891 (9 th Cir. 2004). The Ninth Circuit noted that it had previously held that direct participation in the acts in question or authority to control them was sufficient to hold an individual liable for injunctive relief, although more was required to hold that person liable for restitution. *Id.* at 900. The only issue before the court was restitution because, as the court noted, the Stipulated Final Order entered by the district court ''apparently applies to the Garvey defendants and provides the FTC all of the injunctive relief it could get against [them] . . . . [A]ll the FTC stands to gain from the Garvey defendants here is restitution; the issue of injunctive relief is moot.''*Id.* at 900 n.10. Although the court ultimately concluded, contrary to the Commission's view, that the ''substantiation [Garvey] had was sufficient – at least for someone in [his] position'' to avoid liability for restitution, *id.* at 902 (footnote omitted), that decision was based solely on the facts of that case and does not foreclose ''participant'' liability for celebrities.

Finally, it should be noted that proposed new Example 4 sets forth a specific set of facts in which the celebrity is liable only for statements that he personally made that were clearly contrary to what he observed with his own eyes, not for things out of his control. That is not to say that a celebrity who participates in the making of a claim that he or she should realize is exceptional –*e.g.*, this product causes you to lose 10 pounds in 7 days – is excused from making reasonable inquiries as to the advertiser's basis for those claims, but Example 4 posits very different circumstances. Accordingly, the Commission has concluded that no additional changes should be made to proposed new Example 4.

E. Comments Addressing Revisions to Section 255.2 of the Guides – Use of Testimonials Reflecting Non-typical Consumer Experiences

Many of the comments submitted in response to the November 2008 **FEDERAL REGISTER** notice criticized the proposed changes to the provisions of Section 255.2 that address the use of testimonials that do not reflect the results consumers can generally expect to achieve using the advertised product or service.

The 1980 Guides said that a testimonial relating a consumer's experience with respect to a key attribute of the advertised product or service:

> will be interpreted as representing that the endorser's experience is representative of what consumers will generally achieve with the advertised product in actual, albeit variable, conditions of use. Therefore, unless the advertiser possesses and relies upon adequate substantiation for this representation, the advertisement should either clearly and conspicuously disclose what the generally expected performance would be in the depicted circumstances or clearly and conspicuously disclose the limited applicability of the endorser's experience to what consumers may generally expect to achieve.

As revised per the November 2008 **FEDERAL REGISTER** notice, Section 255.2 would state that an ad featuring consumer testimonials will likely convey that the testimonialists' experiences are representative of what consumers can generally expect from the product or service in actual, albeit variable, circumstances, and that:

> If the advertiser does not have substantiation that the endorser's experience is representative of what consumers will generally achieve, the advertisement should clearly and conspicuously disclose the generally expected performance in the depicted circumstances, and the advertiser must possess and rely on adequate substantiation for that representation.

73 FR at 72392 (footnote omitted). Thus, the proposed revisions would eliminate the safe harbor that the 1980 Guides extended to non-typical testimonials accompanied ≥by results not typical≥ disclaimers, and require advertisers to meet the same substantiation requirements that would apply if they made that performance claim directly, rather than through the means of a testimonial.

The comments argued that the Commission does not have an adequate basis for changing the Guides in this manner; that the change would impermissibly chill truthful speech in violation of the First Amendment; and that it would simultaneously limit the use of testimonials – to the detriment of both advertisers and consumers – and impose substantial burdens on those who continue to use them. For the most part, these arguments repeat criticisms made in response to the January 2007 **FEDERAL REGISTER** notice, and thus have already been considered by the Commission.

1. Comments Arguing That the Proposed Revisions to Section 255.2 Are Unwarranted and Not Supported by Reliable Evidence

Several commenters argued that the Commission lacks an adequate basis for its proposed change to Section 255.2 because the staff's two consumer research reports[46] are flawed and/or too limited in scope to warrant application to the entire advertising universe.[47] Others asserted that there is little evidence consumers are deceived by testimonials. According to these comments, consumers understand that aspirational testimonials are reflective of specific consumers' circumstances,[48] and many of the respondents in the Commission's studies who took away messages of typicality from the endorsements tested in those studies did not actually believe them, so the testimonials were not deceptive.[49] One commenter submitted the results of new consumer survey research purporting to show that changes to Section 255.2 are not needed because most consumers expect their results to differ from the featured consumer's or endorser's results, and that almost all believe that a number of factors influence the results that ordinary consumers have when using products advertised using testimonials.[50]

Two commenters noted that whether a particular disclaimer of typicality is sufficient is a determination that must be made based on the facts of the particular advertisement.[51] One argued

[46]The first report, ''The Effect of Consumer Testimonials and Disclosures of Ad Communication for a Dietary Supplement'' (hereafter ''Endorsement Booklet Study''), was designed to examine whether consumer endorsements communicate product efficacy and typicality, and whether any of several prominent disclosures qualify or limit the claims conveyed by the ads. The second report, ''Effects of Consumer Testimonials in Weight Loss, Dietary Supplement and Business Opportunity Advertisements,'' was designed to explore the communication of product efficacy and typicality by advertisements containing testimonials of individuals who claimed to have achieved specific (that is, numerically quantified) results with the advertised product or system.

[47]AAAA/AAF/CRN/DMA/DSA/ERA/IAB/PMA/C of C, at 3-4 (hereafter ''C of C''); AAAA/AAF, at 6-7; PMA, at 10-11; ANA, at 2-3; ERA/CRN, at 3-4, 25 (stating that it is improper to rely on two studies of print ads to develop federal policy for all advertisements containing testimonials in any type of media, including media that were not tested in these studies).

[48]AAAA/AAF, at 6-7.

[49]ERA/CRN, at 17-20; *see also* PRSA, at 3 (questioning premise that consumers would naturally assume that endorsement represents typical results).

[50]Kelley Drye, at 9.

[51]ERA/CRN, at 21-22; C of C, at 4 (stating that each ad containing a testimonial should be analyzed on its own merits); *see also* ANA, at 3

Continued

that there was no logical connection between the Commission's concern about the legibility of disclaimers and the proposed changes to Section 255.2, and that the appropriate remedy is requiring bigger, clearer disclaimers.[52]

The staff's two consumer research reports were put on the public record in January 2007, and comments criticizing those reports were considered by the Commission when it issued the November 2008 **FEDERAL REGISTER** notice. The Commission concluded that:

> After reviewing the staff's consumer research reports (including the new tables), as well as all of the issues raised by the commenters, the Commission believes that the results of the staff's studies do provide useful empirical evidence concerning the messages that testimonials convey to consumers and the effects of various types of disclaimers on the communication of efficacy and typicality claims.

73 FR at 72385 (footnote omitted). The current comments, including the newly submitted consumer research, do not persuade the Commission that its previous conclusion was incorrect.[53]

The Commission agrees that each ad must be evaluated on its own merits to determine whether it is misleading. The proposed revisions to Section 255.2 would not change that fundamental tenet of the Commission's approach to law enforcement. Nor would they prohibit the use of disclaimers of typicality.[54] The proposed revisions would eliminate the safe harbor for ''results not typical'' and similar disclaimers that developed following the issuance of the 1980 Guides, thereby putting advertisers who use testimonials on the same legal footing as those who convey the same claims to consumers directly (that is, without testimonials).

The Commission disagrees, however, with those who contend that, rather than proceed with the proposed changes to Section 255.2 and eliminate that safe harbor, it should simply require larger, clearer disclaimers.[55] Even disclaimers substantially larger than those that are typically used by advertisers would likely not be effective. Specifically, despite the presence of strongly worded, highly prominent disclaimers of typicality, between 44.1% and 70.5% of respondents in the Endorsement Booklet Study indicated that the dietary supplement in question would reduce breathing problems, increase energy levels, or relieve pain in at least half of the people who try it. Nor would mandating larger disclaimers comport with the Commission's longstanding preference for testimonials that either reflect generally expected results or are accompanied by clear and conspicuous disclosures of what the generally expected performance would be in the depicted circumstances. *See* 73 FR at 72379 (reviewing the history of Section 255.2).

2. Argument that the proposed revisions to Section 255.2 will chill truthful speech in contravention of First Amendment

Several commenters argued that the proposed changes to the Guides would deter advertisers from using truthful testimonials – either because they would be unable to generate adequate substantiation that those testimonials reflected the results consumers could generally expect or because they would be unwilling to risk a challenge by the Commission.[56] Either way, they contend, the advertiser's First Amendment rights will be infringed. One commenter making this argument noted that it might be virtually impossible for an advertiser to determine generally expected results to the FTC's satisfaction *a priori*. Another contended that as revised, the Guides would either be forcing speech or imposing significant costs on truthful speech (that is, the cost of research to test the effectiveness of a disclaimer), resulting either way in a chilling effect.[57] One asserted that the proposed change raises First Amendment concerns because there are less restrictive means available to achieve Commission's goal of preventing deception –*i.e.*, requiring that the current typicality disclaimer be displayed more prominently.[58]

Finally, other commenters suggested that, notwithstanding the Commission's statement in the revised Guides that it could not rule out the possibility that a disclaimer of typicality would not be deceptive, 73 FR at 72392 n.106, marketers would not, as a practical matter, be able to proceed with such a disclaimer, regardless of how clear and conspicuous it was.[59] Thus, according to the commenters, by suppressing the use of disclaimers of typicality, the revised Guides would have the effect of chilling commercial speech.[60]

The Commission has previously addressed arguments that its proposed elimination of the safe harbor afforded by the 1980 Guides to non-typical testimonials accompanied by disclaimers of typicality contravened the First Amendment. 73 FR at 72385-

(stating that revisions would put the Commission's traditional case-by-case law enforcement approach into doubt).

[52]ERA/CRN, at 8.

[53]Although Kelley Drye's survey does suggest some baseline level of scepticism about testimonials, several other points about this research should be noted. First, the survey used a probability sample to recruit participants. As a result, even though participants were asked whether they would expect to do better than, the same as, or worse than individuals who gave testimonials for weight-loss or money-making programs, the survey did not screen them to determine whether they were actually interested in losing weight or in joining a money-making program. (For example, 10% of the participants who said they would lose less weight than the testimonialist explained that they were not very overweight.) Consumers who were potentially interested in such programs might have given different responses.

Second, because it was conducted by telephone, the survey asked about testimonials in the abstract, rather than showing participants ads containing testimonials and actually assessing the messages conveyed by those ads. Consumers may bring pre-existing beliefs to the ads they encounter, but the relevant issue for determining whether an ad is deceptive under Section 5 is what claims they take away from those ads.

Third, even without the persuasive power of an actual testimonial, 31% of those who were asked about testimonials for weight loss programs and 24% of those who were asked about testimonials for money-making programs said they would do as well or better than the testimonialist.

Finally, the questions that purport to address whether consumers believe a variety of factors influence the results consumers have when using products advertised by testimonials were very leading. For example, one question was ≥I am now going to read you a statement, please tell me if you personally agree or disagree with that statement: when using a weight-loss program, the results people experience are influenced by a variety of factors, including how closely a person follows the program, a person's own metabolism, and other factors.≥ StrategyOne, *Testimonial Advertising Research*, at 9 (2009) (attached to Kelley Drye comment).

[54]See 73 FR at 72392 n.106.

[55]The 1980 Guides did not specify the size of, or language to be used in, disclaimers of typicality, calling instead for them to be ''clear and conspicuous.''The Commission frequently adopts such a performance standard for disclosures, because it recognizes that giving advertisers flexibility to meet the specific needs of their particular message is often preferable to attempting to mandate specific language, font, and other requirements applicable across-the-board to all ads. Advertisers thus have always been free under the Guides to make their disclaimers as large and clear as they deemed appropriate to convey the necessary information to consumers.

[56]C of C, at 2; *see also* HPM, at 1 (stating that Commission would be preventing truthful speech); ERA/CRN, at 4, 6 (stating that advertisers would have ''to accompany facially truthful testimonial statements with disclosures of information that may be unknowable'').

[57]ANA, at 1, 4.

[58]PMA, at 5.

[59]ANA, at 3-4 (citing FTC's reliance on the staff's studies); ERA/CRN, at 28, 30 (stating that an advertiser would face difficulty in proving that its disclaimer was not deceptive).

[60]ERA/CRN, at 28.

87. None of the arguments raised in this new round of comments changes the Commission's conclusion that its proposed change to the Guides withstands Constitutional scrutiny. However, the Commission believes that the following points warrant reiteration.

First, although the literal words of an individual testimonial may be truthful, those words cannot be viewed in isolation. It is well established that ''an ad may be amenable to more than one reasonable interpretation.''*Telebrands Corp.*, 140 F.T.C. 278, 290 (2005), *aff'd*, 457 F.3d 354 (4th Cir. 2006); *see, e.g.*, *Kraft, Inc.,* 114 F.T.C. 40, 120-21 n.8 (1991); *Thompson Medical Co.*, 104 F.T.C. 648, 787 n.7 (1984). Moreover, ''[w]here an ad conveys more than one meaning, only one of which is misleading, a seller is liable for the misleading interpretation even if nonmisleading interpretations are possible.''*Telebrands Corp.*, 140 F.T.C. at 290; *see, e.g., Bristol-Myers Co.*, 102 F.T.C. 21, 320 (1983), *aff'd*, 738 F.2d 554 (2d Cir. 1984); *National Comm'n on Egg Nutrition v. FTC*, 570 F.2d 157, 161 n.4 (7th Cir. 1977). A secondary message understood by reasonable consumers is actionable if deceptive, even though the primary message is accurate. *Deception Policy Statement*, 103 F.T.C. at 178 n.21; *see National Comm'n on Egg Nutrition*, 88 F.T.C. 89, 185 (1976), *enforced in part*, 570 F.2d 157 (7th Cir. 1977); *Jay Norris Corp.*, 91 F.T.C. 751, 836 (1978), *aff'd*, 598 F.2d 1244 (2d Cir. 1979).

The critical question for determining whether an ad is deceptive under Section 5 of the FTC Act – for all advertising, whether or not testimonials are involved – is what is the net impression consumers take away from the ad as a whole. The revised language in Section 255.2 would come into play only if a truthful testimonial: (1) conveys to consumers that the testimonialist's results are ''representative of what consumers will generally achieve with the advertised product or service in actual, albeit variable, conditions of use''; *and* (2) the advertiser does not have adequate substantiation for that claim. In other words, the Guides call for a disclosure only if the ad is misleading (and thus not protected by the First Amendment[61]) without a disclosure. On the other hand, if the advertisement, taken as a whole, does not convey an unsubstantiated, and thus misleading, message of typicality, no disclosure is necessary.

Second, as noted above, the revised Guides would not prohibit the use of disclaimers of typicality. Although the Commission is, admittedly, skeptical that most disclaimers of typicality will be effective in preventing deception, Section 255.2 does not rule out the possibility that a clear, conspicuous, and informative disclaimer could accomplish this goal. *See* 16 CFR 255.2 n.1 (noting also that this does not affect the Commission's burden of proof in litigation). An advertiser unable to disclose what consumers can generally expect from its product could conduct consumer research to determine whether its ad is misleading.

For the foregoing reasons, the Commission concludes that the revisions to Section 255.2 will not impermissibly chill truthful speech in violation of the First Amendment.

3. The Proposed Revisions to Section 255.2 Are Impractical and Burdensome

A number of commenters asserted that the Commission's revisions to Section 255.2(b) will be impractical for advertisers to implement, and that the net effect will be detrimental both to consumers and to new businesses that have not had enough sales to generate adequate substantiation.[62] To the extent that some of these arguments echo those already made in comments submitted in response to the Commission's January 2007 **FEDERAL REGISTER** notice, the Commission has already considered them once, but does so now again.

One commenter criticized the Commission's proposed revision of the sentence in the 1980 Guides that stated that testimonials about the performance of the advertised product ''will'' convey typicality claims; as revised, that phrase would state that they ''will . . . likely'' convey such claims.[63] In the view of this commenter, the new language will impose a burden on advertisers by making them responsible for determining how testimonials will be interpreted. As a result, many may decide to include generally representative disclaimers that are not actually necessary, thereby entailing expensive research costs to generate the needed data.

The revision in question would recognize that, depending on how a testimonial is crafted and used in a particular ad, it might not convey a typicality claim; thus, the comment correctly points out that advertisers who use testimonials will be responsible for knowing what messages consumers take away from their ads. But advertisers already bear this responsibility. Moreover, the revision actually makes the Guides less restrictive, by allowing for the possibility that a testimonial will not convey a typicality claim, and thus not require any further qualification.

Most of the commenters who addressed the proposed changes to Section 255.2, however, asserted that those changes are problematic because many advertisers – especially those in weight loss and health-related industries – would not be able to determine what the generally expected performance would be in the depicted circumstances, and thus would no longer be able to use aspirational testimonials. Specifically, they contend, determining generally expected results is impractical or extremely difficult for products whose results differ depending on the individual physiology of participants and their commitment to the program.[64] The hardship imposed by eliminating the use of disclaimers of typicality would be especially great, according to the commenters, for those small businesses and new companies that will not have sufficiently large pools of customers from whom generally expected results can be culled, and thus they will not be able to use testimonials.[65]

Other commenters raised questions about the nature and scope of the study that would satisfy the Commission for purposes of determining what results consumers can generally expect from the advertised product, including whether results from controlled studies could be used.[66] Two comments

[61] *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 566 (1980) (commercial speech that concerns unlawful activity or is misleading is not entitled to constitutional protection and may be freely regulated).

[62] *E.g.,* DMA, at 2 (stating that revisions would be a potential barrier to new businesses, or to introduction of new products); PRSA, at 5-6 (stating that removing safe harbor will work against consumers' best interests because requiring research to determine ''typical results'' could end up depriving them of important information).

[63] AAAA/AAF, at 4-5.

[64] *E.g.,* C of C, at 3; AAAA/AAF, at 9; ERA/CRN, at 5-6; *see also* NPA, at 1-2.

[65] PMA, at 11; ERA/CRN, at 3 (stating that requiring disclosure of ''generally expected results'' supported by the level of substantiation generally required of any other material claim ''will work substantial hardship on many advertisers for many products,'' especially advertisers of new products).

[66] NPA, at 2 (stating that the Commission's assertion in the November 2008 **FEDERAL REGISTER** notice that marketers would be able to design reliable studies of product efficacy did not appear to be based on anything other than optimism, and did not address whether data from controlled studies – that might differ from consumers' experiences in non-controlled settings – would be acceptable); PMA, at 7-8 (questioning whether the ''typical consumer'' includes everyone who signed up or only those who finished program); C of C, at 2 (stating that there is ''no way to be sure how real consumers will use an exercise device when no one is monitoring them''; ''it may not be feasible to generate typicality data that would meet the

Continued

asserted that any disclosure that attempted to explain all the factors that could affect the results consumers could generally expect from the advertised product could itself be deceptive.[67] In the end, the commenters contend, advertisers would either incur substantial costs trying to create substantiation that will meet the Commission's approval or cease using truthful, aspirational testimonials.[68] Based on these considerations, the commenters maintain that the FTC should continue to allow disclaimers of typicality.[69]

At the outset, the Commission notes that some of the comments misread the proposed revisions to Section 255.2 as requiring them to determine with precision what ''the typical consumer'' would achieve with the product.[70] This is not what the Commission intends.

Advertisers are not required to identify a ''typical consumer'' of their product and then determine what result that consumer achieved. Rather, the required disclosure in this circumstance is ''the *generally expected* performance in the *depicted circumstances*.''Thus, advertisers are provided some reasonable leeway to make this disclosure. For example, the term ''generally expected results'' is used rather than ''average'' in order to convey that this disclosure would not have to be based on an exact mathematical average of users of the product, such as might be developed from a valid survey of actual users. For example, substantiation for a ''generally expected results'' disclosure could be extrapolated from valid, well-controlled clinical studies of patients matching the profile of the persons in the ad, even though consumers' real world results are not likely to match exactly the results in the clinical study.[71] In some instances, advertisers may rely on generally accepted scientific principles (*e.g.,* the average individual needs a net calorie deficit of 3,500 calories to lose 1 pound) to determine generally expected results.

In other cases, the advertiser may be able to limit the scope of the disclosure by limiting the circumstances depicted in the advertisement. For example, if all of the testimonials used in an advertisement are clearly identified as persons who have been members of a weight loss clinic for at least one year, the disclosure can be based on performance data from that group.[72] In any event, the disclosure of generally expected results should clearly identify the group from which the data were obtained.[73]

The Commission recognizes that differences in physiology and commitment will affect the results that individual consumers will get from a particular weight loss or fitness product or program. The proposed revisions to Section 255.2 do not prescribe a uniform one-size-fits-all disclaimer, however, and an advertiser could take these factors into consideration in crafting a disclosure. With meaningful disclosures, consumers not only would have a realistic sense of what they can expect from a product or service, but could also take away the message that if they dedicate themselves as much as the testimonialist did, they might achieve even more.[74]

Nevertheless, as the Commission recognized in the November 2008 **FEDERAL REGISTER** notice, 73 FR at 72382, some advertisers may not have the information available to them to be able to disclose the generally expected performance of their product or service to consumers. In these cases, advertisers using testimonials need either to exercise care not to convey a typicality claim, or to rely on statements of general endorsement of the product, *e.g.,* ''I've tried many products and this was the best.''[75]

Disclosing the results consumers can generally expect from the advertised product under the circumstances depicted in the ad will entail costs associated with the data collection and analysis. Those costs, however, are no different from what the advertiser would incur if it made the same performance claim directly, rather than though a testimonial, and there is no reason why the substantiation requirements should differ between the two forms of advertising if the message conveyed to consumers is the same. Nor is there any reason why a new company that might not yet have data showing how well its product performs should be allowed to convey a performance claim through testimonials that it would not be able to substantiate if it made that claim directly.

The effect of the revision at issue is to treat ads that use testimonials the same as all other ads. Section 5 of the FTC Act requires advertisers to have substantiation for the messages that consumers reasonably take from their ads, which means they must first know what messages consumers take away from those ads. The Commission sees no

Commission's strict standards for the substantiation of such claims''); ERA/CRN, at 4-5 (stating that the FTC does not explain the basis for its confidence that methodologically sound means of determining generally expected results can be devised for most products; scientific tests may show nothing about average results consumers can expect when results derive from frequency, intensity and commitment with which consumers use the product in question); *see also* AAAA/AAF, at 8 (stating that the determinations required by the Guides would likely require costly studies).

[67]PRSA, at 6 (stating that disclosure would be confusing because of the amount of information advertisers would have to provide); PMA, at 3.

[68]ERA/CRN, at 6 (stating that the Commission would be setting up a Hobson's choice for marketers: abstain from using truthful testimonials because information about typical results is unobtainable, or risk FTC action); ANA, at 1 (stating that ''advertisers fearing FTC enforcement proceedings may be forced to incur substantial costs trying to create quantitative support for the typicality of a testimonial statement or to refrain from providing truthful information to consumers''); NPA, at 2 (stating that the fact that consumers' habits vary widely ''creates confusion about what constitutes a typical consumer in the first place'').

[69] *E.g.,* PMA, at 8 (stating that ''Because there is no 'typical' or 'average' consumer and there are so many variables impacting weight loss or medical conditions, a typicality disclaimer is in fact the best way to properly disclose the limited applicability of testimonial results.'').

[70]C of C, at 2 (stating that ''There may be no real doubt that the product is effective for consumers generally, and there may be no real doubt that the individual testimonials used in the advertisement are truthful. Yet, the advertiser would not be able to use such testimonials safely unless it could substantiate what the 'typical' consumer would achieve.'' (footnote omitted)); PMA, at 7 (stating that it is impossible to capture substantiation for the '''typical consumer' experience'' because there is no such thing as a typical consumer when it comes to weight loss or health care); *see also* PRSA, at 5-6 (noting the difficulty in determining ''typical results'').

[71]If such studies are adequate to reasonably substantiate the efficacy claim of the product for the target audience of the ad, there is no reason why they could not reasonably be relied on to substantiate a ''generally expected results'' disclosure, provided that the data generated by the studies are relevant to the subjects of the ad at issue and the disclosure is not otherwise misleading. For example, it would be problematic to extrapolate from a study using obese young men to an ad using testimonials from older overweight women.

[72]The disclosure should also describe the source of the data.

[73]As well as identifying the group for whom those data are relevant, the disclosure should set forth other information that would be meaningful in assessing the study's results, such as the duration of the study. For example, in an ad showing formerly overweight men, a disclosure might state ''in an 8-week clinical study, men who were at least 30 pounds overweight lost an average of 2 pounds per week.''

[74]Even truthful consumer testimonials provide only marginally useful information to consumers. In general, it is impossible for consumers to verify the reported experiences. Indeed, even the testimonialist may incorrectly attribute the performance benefit to the product. The additional disclosures will, on the whole, provide more useful information to consumers than the ritualistic ''results not typical'' disclaimers, even if they are not without some flaws.

[75]If the advertiser does not yet have sufficient information as to the results consumer can generally expect to achieve with its product, it can still use general testimonials –*i.e.,* testimonials that do not make specific performance claims – provided the net takeaway of the ad is not misleading. For example, a testimonialist might praise the taste of a company's reduced calorie foods, or the fact that a particular exercise video was the ''best ever.''

reason why an advertiser should be exempt from those basic obligations simply because it chooses to communicate its claims through the use of testimonials; yet, that is precisely the effect of the safe harbor afforded by the 1980 Guides. Accordingly, the Commission concludes that the safe harbor for non-typical testimonials accompanied by disclaimers of typicality should be eliminated, and the revisions to Section 255.2 of the Guides that were proposed in the November 2008 FEDERAL REGISTER notice should be adopted in final form without further revision, except for the addition of the phrase ''or service'' in Section 255.2(b) and the revisions to news Example 4 and 7 discussed below.

4. Revisions to Examples 4 and 7 in Section 255.2

The Commission is modifying and expanding a new example proposed in November 2008 in which a testimonialist touts the results she achieved using a product called WeightAway under an extreme regimen (exercising 6 hours daily and eating nothing but raw vegetables). Two new fact patterns added to the example demonstrate how the description of the circumstances under which a testimonialist achieved her results can determine the information that should be disclosed in the advertisement.

Thus, when the ad just features ''before'' and ''after'' pictures with the caption ''I lost 50 pounds in 6 months with WeightAway,'' the ad is likely to convey that her experience is representative of what consumers will generally achieve. Therefore, if consumers cannot generally expect to achieve such results, the ad should clearly and conspicuously disclose what they can expect to lose in the depicted circumstances (*e.g.,* ''most women who use WeightAway for 6 months lose at least 15 pounds''). Similarly, if the testimonialist in an ad with those two pictures simply says, ''I lost 50 pounds with WeightAway'' without any mention of how long it took to achieve those results, and WeightAway users generally do not lose 50 pounds, the ad should disclose what results they do generally achieve (*e.g.,* ''most women who use WeightAway lose 15 pounds'').

In November 2008, the Commission also proposed a new Example 7 to Section 255.2, in which theater patrons express their views about a movie they have just seen. The example stated that the advertiser ''does not need to have substantiation that their views are representative of the opinions that most consumers will have about the movie, because this advertisement is not likely to convey a typicality message.''The Commission is revising this example to explain that the reason no typicality message would be conveyed is that the patrons' statements would be understood to be the subjective personal opinions of only three people.

F. Section 255.3 – Expert Endorsements

Although no comments addressed this particular example, the Commission has decided to revise proposed new Example 6 to Section 255.3 because it could erroneously be read to suggest that a medical doctor or comparably qualified expert could properly make performance claims for a cholesterol-lowering drug based solely on consumer letters and the results of a study using an animal model. As revised, the example states that the doctor's endorsement would likely be deceptive because those materials are not what others with the same level of expertise would consider adequate to support those claims.

G. Comments Addressing Section 255.4 of the Guides – Endorsements by Organizations

Although the Commission's November 2008 FEDERAL REGISTER notice did not propose any changes to Section 255.4 of the Guides, one commenter asked a question about that provision, which states that ''an organization's endorsement must be reached by a process sufficient to ensure that the endorsement fairly reflects the collective judgment *of the organization*'' (emphasis added).[76] Specifically, the commenter requested confirmation that action by an organization's governing body, such as its Board of Directors, is not the kind of ''collective judgment'' required, and that ''an objective evaluation by a qualified and competent organization staff person, or group of staff members, is sufficient.''[77]

The Commission agrees that an organization's governing body need not necessarily participate in the process; however, the decision of a single staff person might not be sufficient to ensure that the process reflects the organization's ''collective judgment'' and certainly might not be ''generally free of the sort of subjective factors that vary from individual to individual.'' 16 C.F.R § 255.4.

The organization should have a process in place to ensure that its endorsements reflect the ''collective judgment of the organization.'' For example, the organization's management could adopt specific procedures and standards to be applied in the review process, including, for example, clear statements concerning the qualification of the individual(s) conducting the review,[78] the criteria against which products are to be judged, and any other requirements or prohibitions management deems appropriate (*e.g.,* prohibitions against staff members reviewing products in which they have a financial interest).

The Commission is also deleting an unnecessary cross-reference to Section 255.3 that previously appeared at the end of the example to Section 255.4.

H. Comments Addressing Revisions to Section 255.5 of the Guides – Disclosure of Material Connections Between Advertisers and Endorsers

The comments filed in response to the November 2008 FEDERAL REGISTER notice raise a number of issues concerning the disclosure of material connections between advertisers and endorsers: (1) whether, in the case of new, consumer-generated media, the disclosure obligation falls upon the advertiser or the endorser, and to the extent that the disclosure obligation falls on the endorser, whether the advertiser is potentially liable if the endorser fails to make that disclosure; (2) whether simply receiving a product, without any accompanying monetary payment, triggers a disclosure obligation; and (3) the potential implications of the Commission's proposed new Example 3 concerning celebrity endorsements in nontraditional media, and proposed new Examples 7-9, in which the obligation to disclose material connections is applied to endorsements made through certain new media.

1. Obligation to Disclose Material Connections in Endorsements Conveyed Through New Consumer-Generated Media

When the Commission adopted the Guides in 1980, endorsements were disseminated by advertisers – not by the endorsers themselves – through such traditional media as television commercials and print advertisements. With such media, the duty to disclose material connections between the advertiser and the endorser naturally fell on the advertiser.

[76] NAR, at 2.

[77] *Id.*

[78] Because of the specialized nature of some of the products that this organization might review, readers of its membership publication might view it as having expertise in these products. In that case, the organization would have to use an expert (who could be a staff member), or ''standards previously adopted by the organization and suitable for judging the relative merits of such products.''16 CFR 255.4.

The recent creation of consumer-generated media means that in many instances, endorsements are now disseminated by the endorser, rather than by the sponsoring advertiser. In these contexts, the Commission believes that the endorser is the party primarily responsible for disclosing material connections with the advertiser. However, advertisers who sponsor these endorsers (either by providing free products – directly or through a middleman – or otherwise) in order to generate positive word of mouth and spur sales should establish procedures to advise endorsers that they should make the necessary disclosures and to monitor the conduct of those endorsers.[79]

The Commission notes in this regard that the Word of Mouth Marketing Association's (''WOMMA'') code of ethics says that word of mouth advocates should disclose their relationship with marketers in their communications with other consumers; and that marketers should effectively monitor disclosure of their word of mouth advocates.[80] The WOMMA Code also requires advocates to disclose the source of product samples or incentives received from marketers.[81]

The development of these new media has, however, highlighted the need for additional revisions to Section 255.5, to clarify that one factor in determining whether the connection between an advertiser and its endorsers should be disclosed is the type of vehicle being used to disseminate that endorsement – specifically, whether or not the nature of that medium is such that consumers are likely to recognize the statement as an advertisement (that is, as sponsored speech). Thus, although disclosure of compensation may not be required when a celebrity or expert appears in a conventional television advertisement, endorsements by these individuals in other media might warrant such disclosure.

2. Does Receipt of a Product, Without Monetary Compensation, Constitute a Material Connection That Must Be Disclosed?

Several commenters asked whether an advertiser's provision of a free sample to a consumer in and of itself was a material connection that would have to be disclosed by that consumer and, if so, whether there was a monetary value associated with that item below which that obligation would not be triggered.[82] One commenter asserted that modern companies that distribute product samples to promote word of mouth are analogous to companies that distribute free samples in grocery stores.[83] That commenter further asserted that the Guides, as written, might cover both situations, even though neither distributor controls what is said about the products being distributed and the consumers are not compensated in either case.[84]

The threshold issue is whether the speaker's statement qualifies as an ''endorsement,'' under the Guides. If not, no disclosure need be made. However, if the statement does qualify as an ''endorsement'' under the construct set forth above for determining when statements in consumer-generated media will be deemed ''sponsored'' (see Section II.A.2 of this notice), disclosure of the connection between the speaker and the advertiser will likely be warranted regardless of the monetary value of the free product provided by the advertiser.[85] For example, an individual who regularly receives free samples of products for families with young children and discusses those products on his or her blog would likely have to disclose that he or she received for free the items being recommended. Although the monetary value of any particular product might not be exorbitant, knowledge of the blogger's receipt of a stream of free merchandise could affect the weight or credibility of his or her endorsement – the standard for disclosure in Section 255.5 – if that connection is not reasonably expected by readers of the blog. Similarly, receipt of a single high-priced item could also constitute a material connection between an advertiser and a ''sponsored'' endorser.

Participants in network marketing programs are also likely to be deemed to have material connections that warrant disclosure. The Commission disagrees with the assertion that modern network marketing programs are just updated versions of traditional supermarket sampling programs. The primary goal of those programs was to have the shopper who tasted the advertiser's product continue down the grocery store aisle and purchase the product. The primary goal of the new viral marketing programs is to have these individuals ''spread the word'' about the product, so that other consumers will buy it.

The Commission recognizes that, as a practical matter, if a consumer's review of a product disseminated via one of these new forms of consumer-generated media qualifies as an ''endorsement'' under the construct articulated above, that consumer will likely also be deemed to have material connections with the sponsoring advertiser that should be disclosed. That outcome is simply a function of the fact that if the relationship between the advertiser and the speaker is such that the speaker's statement, viewed objectively, can be considered ''sponsored,'' there inevitably exists a relationship that should be disclosed, and would not otherwise be apparent, because the endorsement is not contained in a traditional ad bearing the name of the advertiser.[86]

3. New Examples Applying Guide Principles Concerning Disclosure of Material Connection

a. New Example 3 – Celebrity Endorsements in Nontraditional Contexts

Several comments addressed proposed new Example 3, which applied the principles set forth in Section 255.5 to the situation in which a celebrity who has entered into a contract with a surgical clinic that calls for her to speak publicly about her own surgical experience praises that clinic during a television interview. The commenters stated that an advertiser cannot control what a celebrity says in

[79]The Commission's view that these endorsers have an obligation to disclose material connections with their sponsoring advertisers should not be seen as reflecting a desire on the part of the Commission either to deter consumers from sharing their views about products they like with others or as an indication the Commission intends to target consumer endorsers who use these new forms of consumer-generated media. As with traditional media, the Commission's law enforcement activities will continue to focus on advertisers.

[80]WOMMA, at 7.

[81] *Id.* at 8.

[82]BzzAgent, at 9 (stating that if consumers are under no obligation to say anything about the products they have received, the provision of those free samples might not be material to other consumers in evaluating that person's opinion); PCPC, at 2 (acknowledging that receipt of product with high value, such as a car, would be material).

[83]BzzAgent, at 7.

[84] *Id.* at 7-8.

[85]If the blogger is actually paid by the advertiser or a third party acting on its behalf, disclosure certainly will be warranted.

[86]Letter from Mary K. Engle, Associate Director for Advertising Practices, to Gary Ruskin, Commercial Alert, at 4 (Dec. 7, 2006) (''[I]n some word of mouth marketing contexts, it would appear that consumers may reasonably give more weight to statements that sponsored consumers make about their opinions or experiences with a product based on their assumed independence from the marketer,'' and that in those circumstances, ''it would appear that the failure to disclose the relationship between the marketer and the consumer would be deceptive unless the relationship were otherwise clear from the context.'') (footnote omitted).

a given interview, or whether the celebrity (or the interviewer) will make the necessary disclosure; therefore, they argue, the advertiser should not be liable either for misstatements made by the celebrity or for the failure of the relationship between the endorser and the advertiser to be disclosed.[87] One commenter also noted that the disclosure of the connection between the advertiser and the celebrity is unnecessary because ''if most people understand that celebrities are paid for touting products in advertisements, it stands to reason they also understand the nature of a paid spokesperson's relationship with advertisers.''[88] Commenters also noted that even if the celebrity disclosed his or her relationship with the advertiser, the show's producers could edit that disclosure out of the final version of the program that was ultimately aired. Imposing liability on the advertiser in such a situation, they contend, would be unfair.[89]

The Commission disagrees with the contention that disclosure in new Example 3 of the relationship between the celebrity and the clinic is unnecessary. Disclosure is appropriate because given the medium in which the celebrity praises the clinic – a talk show, not a conventional advertisement – consumers might not realize that the celebrity was a paid endorser, rather than just a satisfied customer.

The commenters are correct, however, that an advertiser does not have control over what a celebrity says in an interview. Nor can the advertiser prevent the producers of that program from editing out of the final version of the interview a disclosure that would have been sufficient to inform viewers of the celebrity's contractual relationship with the advertiser. However, if the advertiser has decided that it is advantageous to have the celebrity speak publicly about its product or service, the Commission believes that the advertiser has the concomitant responsibility to advise the celebrity in advance about what he or she should (and should not) say about that product or service, and about the need to disclose their relationship in the course of the interview.

Evidence that the advertiser did so would provide a strong argument for the exercise of the Commission's prosecutorial discretion in the event the celebrity failed to disclose his or her relationship with the advertiser or made unauthorized claims about the advertiser's product,[90] or if the celebrity properly disclosed the relationship but that disclosure was ultimately edited out of the program. Because the Commission considers each advertisement on a case-by-case basis, the particular facts of each situation would be considered in determining whether law enforcement action would be appropriate.

b. Examples 7-9 – New Media

Several commenters raised questions about, or suggested revisions to, proposed new Examples 7-9 in Section 255.5, in which the obligation to disclose material connections is applied to endorsements made through certain new media.[91] Two commenters argued that application of the principles of the Guides to new media would be inconsistent with the Commission's prior commitment to address word of mouth marketing issues on a case-by-case basis.[92] Others urged that they be deleted in their entirety from the final Guides, either because it is premature for the Commission to add them, or because of the potential adverse effect on the growth of these (and other) new media.[93] Two commenters said that industry self-regulation is sufficient.[94]

The Commission's inclusion of examples using these new media is not inconsistent with the staff's 2006 statement that it would determine on a case-by-case basis whether law enforcement investigations of ''buzz marketing'' were appropriate.[95] All Commission law enforcement decisions are, and will continue to be, made on a case-by-case basis, evaluating the specific facts at hand. Moreover, as noted above, the Guides do not expand the scope of liability under Section 5; they simply provide guidance as to how the Commission intends to apply governing law to various facts. In other words, the Commission could challenge the dissemination of deceptive representations made via these media regardless of whether the Guides contain these examples; thus, not including the new examples would simply deprive advertisers of guidance they otherwise could use in planning their marketing activities.[96]

The Commission is not restating here all of the individual questions and criticisms raised by the commenters with respect to these three examples. As noted above, a marketer presumably would not have initiated the process that led to endorsements being made in these new media had it not concluded that a financial benefit would accrue from doing so. Therefore, it is responsible for taking the appropriate measures to prevent those endorsements from deceiving consumers. The Commission is revising Example 7, however, to clarify two points. First, the reason this endorser should disclose that he received the video game system for free – even though he is known as an expert in the video gaming community – is that his consumer-generated endorsement appears in a medium that does not make his association with the advertiser apparent to consumers. Second, as revised, Example 7 states more clearly that although the blogger has primary responsibility for disclosing that he received the video game system for free, the manufacturer has an obligation to advise the blogger at the time it provides the gaming system that he should make the disclosure in any positive reviews of the system. The manufacturer also

[87]PMA, at 15 (stating that celebrity may make statement that is unsubstantiated or unauthorized by contract).

[88]PMA, at 16; *see also* AAAA/AAF, at 14-15 (stating that it is inexplicable and unfair to impose a different disclosure requirement on celebrities in a non-traditional context than in traditional advertising context).

[89]PMA, at 15; AAAA/AAF, at 15-16.

[90]The celebrity, however, could still be liable for any misleading statements she made, or for her failure to disclose her relationship with the advertiser.

[91]DMA, at 5; ANA, at 6-8; C of C, at 4-6; AAA/AAF, at 16 (stating that it is unfair to put the burden of potential liability on bloggers and other viral marketers); ERA/CRN, at 36-38.

[92]ANA, at 2; ERA/ERN, at 33-34.

[93]IAB, at 2 (stating that the FTC should not adopt them, in light of ''the evolving nature of the marketing industry and the need for further inquiry''; ''[e]stablishing new legal liabilities for marketers, publishers, and platform providers could restrict the supply of advertising revenue that is just beginning to flow into this nascent marketplace''); C of C, at 5 (stating that new Examples 7, 8, and 9 ''raise significant issues regarding the scope of advertiser liability for third party activity in the context of new media and word-of-mouth marketing.''); ERA/CRN, at 33 (stating that more discussion of these issues is needed first); *see also* ANA, at 5 (stating that the examples increase uncertainty by raising more questions than they answer); PMA, at 19 (stating that the Commission should not adopt them); BzzAgent, at 11-12 (suggesting revisions); DMA, at 5 (stating that new media channels should be considered in separate proceeding that takes into account their unique characteristics); ERA/CRN, at 33, 35.

[94]AAAA/AAF, at 18 (citing WOMMA guidelines); ERA/CRN, at 34 (same); *see also* ANA, at 1, 5 (stating that the new examples interfere with self-regulation in this area).

[95]Letter from Mary K. Engle, Associate Director for Advertising Practices, to Gary Ruskin, Commercial Alert, at 5 (Dec. 7, 2006)(noting that petitioners define ''buzz marketing'' as that in which marketers compensate consumers for disseminating messages to other consumers, without disclosing the marketer's relationship with the consumer). Indeed, the references to the Guides in the staff's letter suggested that the Guides' principles are applicable to these new marketing tools.

[96]The Commission's views as to the vibrancy of these new media and the importance of having law enforcement to support industry self-regulation are discussed in Part II.A.2 above.

should have procedures in place to attempt to monitor the blogger's statements about the system to ensure that the proper disclosures are being made and take appropriate steps if they are not (*e.g.,* cease providing free product to that individual).

One commenter asked whether, if the blogger in Example 7 should disclose that he received the video game system for free, must every critic disclose that a reviewed item was provided for free?[97] According to the commenter, reviewers in traditional media do not have to disclose this information, and reviewers in nontraditional media platforms such as blogs, online discussion boards, and street teams should not be treated any differently.[98] This commenter also noted that given marketers' lack of control over ''what employees say on online discussion boards, or what street team members say to their friends,'' it would be impracticable for them to ensure that material connections are disclosed in endorsements made using these media, and unclear what steps marketers would have to take to prevent endorsers from failing to disclose material connections with the marketer.[99]

The Commission acknowledges that bloggers may be subject to different disclosure requirements than reviewers in traditional media. In general, under usual circumstances, the Commission does not consider reviews published in traditional media (*i.e.,* where a newspaper, magazine, or television or radio station with independent editorial responsibility assigns an employee to review various products or services as part of his or her official duties, and then publishes those reviews) to be sponsored advertising messages. Accordingly, such reviews are not ''endorsements'' within the meaning of the Guides.[100] Under these circumstances, the Commission believes, knowing whether the media entity that published the review paid for the item in question would not affect the weight consumers give to the reviewer's statements.[101] Of course, this view could be different if the reviewer were receiving a benefit directly from the manufacturer (or its agent).

In contrast, if a blogger's statement on his personal blog or elsewhere (*e.g.,* the site of an online retailer of electronic products) qualifies as an ''endorsement'' –*i.e.,* as a sponsored message – due to the blogger's relationship with the advertiser or the value of the merchandise he has received and has been asked to review by that advertiser, knowing these facts might affect the weight consumers give to his review.

With respect to Example 8, one commenter asserted that if the employer has instituted policies and practices concerning ''social media participation'' by its employees, and the employee fails to comply with such policies and practices, the employer should not be subject to liability.[102] The Commission agrees that the establishment of appropriate procedures would warrant consideration in its decision as to whether law enforcement action would be an appropriate use of agency resources given the facts set forth in Example 8. Indeed, although the Commission has brought law enforcement actions against companies whose failure to establish or maintain appropriate internal procedures resulted in consumer injury, it is not aware of any instance in which an enforcement action was brought against a company for the actions of a single ''rogue'' employee who violated established company policy that adequately covered the conduct in question.[103]

The Commission does not believe, however, that it needs to spell out the procedures that companies should put in place to monitor compliance with the principles set forth in the Guides; these are appropriate subjects for advertisers to determine for themselves, because they have the best knowledge of their business practices, and thus of the processes that would best fulfill their responsibilities.

4. Example 1 (sponsorship of clinical trials)

In response to the Commission's January 2007 **FEDERAL REGISTER** notice seeking comment on the overall costs, benefits, and regulatory and economic impact of the Guides, 72 FR 2214 (Jan. 18, 2007), the Attorneys General of 33 States and Territories and Hawaii's Office of Consumer Protection (collectively, the ''Attorneys General'') suggested that a new provision be added stating that when an ad relies on a study that was sponsored by the advertiser itself, the ad should clearly disclose this information. 73 FR at 72390. The Attorneys General also pointed out that although the Guides require disclosure of material connections between endorsers and advertisers, Example 1 to Section 255.5 stated that an advertiser's payment of expenses to an outside entity that conducted a study subsequently touted by the advertiser as the findings of a research organization need not be disclosed, an outcome the Attorneys General thought was inconsistent with the general principles of Section 255.5.

Although the Commission did not propose substantive changes to Example 1 in November 2008, it now has reconsidered its previous conclusion that knowledge of the advertiser's sponsorship of the research would not materially affect the weight consumers would place on the reported results. Consumers reasonably can be more skeptical about research conducted by outside entities but funded by the advertiser than about studies that are both conducted and funded independently, because financial interest can create bias (intentional or unintentional) in the design of a study.[104] Accordingly, the Commission now is revising Example 1 to call for disclosure of the relationship between the advertiser and the research organization.

III. SECTION-BY-SECTION REVIEW OF ADDITIONAL CHANGES TO PROPOSED GUIDES PUBLISHED IN NOVEMBER 2008

A. Section 255.0

The Commission is adding the following new Example 8 to Section 255.0:

Example 8: A consumer who regularly purchases a particular brand of dog food decides one day to purchase a new, more expensive brand made by the same manufacturer. She writes in her personal blog that the change in diet has made her dog's fur noticeably softer and shinier, and that in her opinion, the new food definitely is worth the extra money. This posting would not be deemed an endorsement under the Guides.

[97] C of C, at 6.

[98] *Id.*

[99] *Id.*

[100] *See* Example 1 to Section 255.0 (movie review becomes an endorsement only when it is used by the motion picture studio in its own advertisement).

[101] The Commission's view would be the same if the employee worked for an Internet news website with independent editorial responsibility, rather than a traditional brick-and mortar periodical.

[102] WOMMA, at 9-10.

[103] *Cf. Eli Lilly*, 133 F.T.C. 763, 767 (2002) (consent order) (although the disclosure of consumers' personal information resulted from the actions of one employee, the Commission's complaint makes it clear that the underlying cause was ''[Lilly's] failure to maintain or implement internal measures appropriate under the circumstances to protect sensitive consumer information.'').

[104] *See* John Abramson & Barbara Starfield, ''The Effect of Conflict of Interest on Biomedical Research and Clinical Practice Guidelines: Can We Trust the Evidence in Evidence-Based Medicine?,'' J. Amer. Bd. Fam. Pract., Vol. 18 No. 5, 414-18 (Sept.-Oct. 2005); *see also* Cary P. Gross, Yale Univ. Sch. Med., ''Conflict of Interest and Clinical Re$earch: Ethical and Regulatory Aspects of Clinical Research'' (2009), (*http://www.bioethics.nih.gov/hsrc/slides/Gross%20NIH%20COI%202009%20draft%201.pdf*) (last visited Oct. 1, 2009).

Assume that rather than purchase the dog food with her own money, the consumer gets it for free because the store routinely tracks her purchases and its computer has generated a coupon for a free trial bag of this new brand. Again, her posting would not be deemed an endorsement under the Guides.

Assume now that the consumer joins a network marketing program under which she periodically receives various products about which she can write reviews if she wants to do so. If she receives a free bag of the new dog food through this program, her positive review would be considered an endorsement under the Guides.

B. Section 255.1

The Commission is deleting from Section 255.1(a) the proposed cross-reference to the proposed new Example 3 in Section 255.3. The Commission is also revising the proposed new Example 3 in Section 255.1 by adding the following cross-reference: ''[*See* Section 255.3 regarding the product evaluation that an expert endorser must conduct.]''

The Commission is revising the fifth and sixth sentences in proposed new Example 5 to clarify that the advertiser and the blogger both are subject to liability for misleading or unsubstantiated representations made in the course of the blogger's endorsement.

C. Section 255.2

The Commission is adding the phrase ''or service'' before the phrase ''in actual, albeit variable, conditions of use'' in the first sentence of Section 255.2(b).

The Commission also is replacing the proposed new Example 4 with the following:

Example 4: An advertisement for a weight-loss product features a formerly obese woman. She says in the ad, ''Every day, I drank 2 WeightAway shakes, ate only raw vegetables, and exercised vigorously for six hours at the gym. By the end of six months, I had gone from 250 pounds to 140 pounds.''The advertisement accurately describes the woman's experience, and such a result is within the range that would be generally experienced by an extremely overweight individual who consumed WeightAway shakes, only ate raw vegetables, and exercised as the endorser did. Because the endorser clearly describes the limited and truly exceptional circumstances under which she achieved her results, the ad is not likely to convey that consumers who weigh substantially less or use WeightAway under less extreme circumstances will lose 110 pounds in six months. (If the advertisement simply says that the endorser lost 110 pounds in six months using WeightAway together with diet and exercise, however, this description would not adequately alert consumers to the truly remarkable circumstances leading to her weight loss.) The advertiser must have substantiation, however, for any performance claims conveyed by the endorsement (*e.g.*, that WeightAway is an effective weight loss product).

If, in the alternative, the advertisement simply features ''before'' and ''after'' pictures of a woman who says ''I lost 50 pounds in 6 months with WeightAway,'' the ad is likely to convey that her experience is representative of what consumers will generally achieve. Therefore, if consumers cannot generally expect to achieve such results, the ad should clearly and conspicuously disclose what they can expect to lose in the depicted circumstances (*e.g.,* ''most women who use WeightAway for six months lose at least 15 pounds'').

If the ad features the same pictures but the testimonialist simply says, ''I lost 50 pounds with WeightAway,'' and WeightAway users generally do not lose 50 pounds, the ad should disclose what results they do generally achieve (*e.g.,* ''most women who use WeightAway lose 15 pounds'').

The Commission is also revising the third sentence of the first paragraph of the proposed new Example 7 in Section 255.2 to read as follows: ''The advertiser does not need to have substantiation that their views are representative of the opinions that most consumers will have about the movie. Because the consumers ' statements would be understood to be the subjective opinions of only three people, this advertisement is not likely to convey a typicality message.''

C. Section 255.3

In the second sentence of the proposed new Example 6, the Commission is revising the phrase ''the endorsement would be deceptive assuming those materials are not'' to ''the endorsement would likely be deceptive because those materials are not. . . .''

D. Section 255.4

The Commission is deleting the cross-reference to Section 255.3 that previously appeared at the end of the example to Section 255.4.

E. Section 255.5

The Commission is revising Section 255.5 to make it clear that the duty to disclose material connections between advertisers and endorsers may depend on the particular medium used to disseminate that endorsement.

The Commission is revising the proposed new Example 3 by replacing the phrase ''Consumers would not expect'' with ''Consumers might not realize,'' and by adding a new hypothetical, in which the tennis player endorses the clinic via a posting on a social networking service.

The Commission is also revising the proposed new Example 7, first to clarify that in the case of endorsements disseminated via consumer-generated media, the relationship between the advertiser and the endorser may not be apparent, thereby requiring disclosure by experts that might not otherwise be necessary, and second to make the advertiser's obligations more apparent.

Example 7: A college student who has earned a reputation as a video game expert maintains a personal weblog or ''blog'' where he posts entries about his gaming experiences. Readers of his blog frequently seek his opinions about video game hardware and software. As it has done in the past, the manufacturer of a newly released video game system sends the student a free copy of the system and asks him to write about it on his blog. He tests the new gaming system and writes a favorable review. Because his review is disseminated via a form of consumer-generated media in which his relationship to the advertiser is not inherently obvious, readers are unlikely to know that he has received the video game system free of charge in exchange for his review of the product, and given the value of the video game system, this fact likely would materially affect the credibility they attach to his endorsement. Accordingly, the blogger should clearly and conspicuously disclose that he received the gaming system free of charge. The manufacturer should advise him at the time it provides the gaming system that this connection should be disclosed, and it should have procedures in place to try to monitor his postings for compliance.

Finally, the Commission is revising the last two sentences of Example 1 to provide that an advertiser should disclose its payment of expenses to an outside entity that conducts a study subsequently touted by the advertiser: ''Although the design and conduct of the research project are controlled by the outside research organization, the weight consumers place on the reported results could be materially affected by knowing that the advertiser had funded the project. Therefore, the advertiser's payment of expenses to the research organization should be disclosed in this advertisement.''

IV. REVISED ENDORSEMENT AND TESTIMONIAL GUIDES

List of Subjects in 16 CFR Part 255

Advertising, Consumer protection, Trade practices.

■ Accordingly, for the reasons set forth in the preamble, the Federal Trade Commission revises 16 CFR part 255 of the Code of Federal Regulations to read as follows:

Part 255 – Guides Concerning Use of Endorsements and Testimonials in Advertising

Sec.
255.0 Purpose and definitions.
255.1 General considerations.
255.2 Consumer endorsements.
255.3 Expert endorsements.
255.4 Endorsements by organizations.
255.5 Disclosure of material connections.

Authority: 38 Stat. 717, as amended; 15 U.S.C. 41 - 58.

§ 255.0 Purpose and definitions.

(a) The Guides in this part represent administrative interpretations of laws enforced by the Federal Trade Commission for the guidance of the public in conducting its affairs in conformity with legal requirements. Specifically, the Guides address the application of Section 5 of the FTC Act (15 U.S.C. 45) to the use of endorsements and testimonials in advertising. The Guides provide the basis for voluntary compliance with the law by advertisers and endorsers. Practices inconsistent with these Guides may result in corrective action by the Commission under Section 5 if, after investigation, the Commission has reason to believe that the practices fall within the scope of conduct declared unlawful by the statute. The Guides set forth the general principles that the Commission will use in evaluating endorsements and testimonials, together with examples illustrating the application of those principles. The Guides do not purport to cover every possible use of endorsements in advertising. Whether a particular endorsement or testimonial is deceptive will depend on the specific factual circumstances of the advertisement at issue.

(b) For purposes of this part, an endorsement means any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser. The party whose opinions, beliefs, findings, or experience the message appears to reflect will be called the endorser and may be an individual, group, or institution.

(c) The Commission intends to treat endorsements and testimonials identically in the context of its enforcement of the Federal Trade Commission Act and for purposes of this part. The term endorsements is therefore generally used hereinafter to cover both terms and situations.

(d) For purposes of this part, the term product includes any product, service, company or industry.

(e) For purposes of this part, an expert is an individual, group, or institution possessing, as a result of experience, study, or training, knowledge of a particular subject, which knowledge is superior to what ordinary individuals generally acquire.

Example 1: A film critic's review of a movie is excerpted in an advertisement. When so used, the review meets the definition of an endorsement because it is viewed by readers as a statement of the critic's own opinions and not those of the film producer, distributor, or exhibitor. Any alteration in or quotation from the text of the review that does not fairly reflect its substance would be a violation of the standards set by this part because it would distort the endorser's opinion. [*See* § 255.1(b).]

Example 2: A TV commercial depicts two women in a supermarket buying a laundry detergent. The women are not identified outside the context of the advertisement. One comments to the other how clean her brand makes her family's clothes, and the other then comments that she will try it because she has not been fully satisfied with her own brand. This obvious fictional dramatization of a real life situation would not be an endorsement.

Example 3: In an advertisement for a pain remedy, an announcer who is not familiar to consumers except as a spokesman for the advertising drug company praises the drug's ability to deliver fast and lasting pain relief. He purports to speak, not on the basis of his own opinions, but rather in the place of and on behalf of the drug company. The announcer's statements would not be considered an endorsement.

Example 4: A manufacturer of automobile tires hires a well-known professional automobile racing driver to deliver its advertising message in television commercials. In these commercials, the driver speaks of the smooth ride, strength, and long life of the tires. Even though the message is not expressly declared to be the personal opinion of the driver, it may nevertheless constitute an endorsement of the tires. Many consumers will recognize this individual as being primarily a racing driver and not merely a spokesperson or announcer for the advertiser. Accordingly, they may well believe the driver would not speak for an automotive product unless he actually believed in what he was saying and had personal knowledge sufficient to form that belief. Hence, they would think that the advertising message reflects the driver's personal views. This attribution of the underlying views to the driver brings the advertisement within the definition of an endorsement for purposes of this part.

Example 5: A television advertisement for a particular brand of golf balls shows a prominent and well-recognized professional golfer practicing numerous drives off the tee. This would be an endorsement by the golfer even though she makes no verbal statement in the advertisement.

Example 6: An infomercial for a home fitness system is hosted by a well-known entertainer. During the infomercial, the entertainer demonstrates the machine and states that it is the most effective and easy-to-use home exercise machine that she has ever tried. Even if she is reading from a script, this statement would be an endorsement, because consumers are likely to believe it reflects the entertainer's views.

Example 7: A television advertisement for a housewares store features a well-known female comedian and a well-known male baseball player engaging in light-hearted banter about products each one intends to purchase for the other. The comedian says that she will buy him a Brand X, portable, high-definition television so he can finally see the strike zone. He says that he will get her a Brand Y juicer so she can make juice with all the fruit and vegetables thrown at her during her performances. The comedian and baseball player are not likely to be deemed endorsers because consumers will likely realize that the individuals are not expressing their own views.

Example 8: A consumer who regularly purchases a particular brand of dog food decides one day to purchase a new, more expensive brand made by the same manufacturer. She writes in her personal blog that the change in diet has made her dog's fur noticeably softer and shinier, and that in her opinion, the new food definitely is worth the extra money. This posting would not be deemed an endorsement under the Guides.

Assume that rather than purchase the dog food with her own money, the consumer gets it for free because the store routinely tracks her purchases and its computer has generated a coupon for a free trial bag of this new brand. Again, her posting would not be deemed an endorsement under the Guides.

Assume now that the consumer joins a network marketing program under which she periodically receives various products about which she can write reviews if she wants to do so. If she receives a free bag of the new dog food through this program, her positive review would be considered an endorsement under the Guides.

§ 255.1 General considerations.

(a) Endorsements must reflect the honest opinions, findings, beliefs, or experience of the endorser. Furthermore, an endorsement may not convey any express or implied representation that would be deceptive if made directly by the advertiser. [*See* §§ 255.2(a) and (b) regarding substantiation of representations conveyed by consumer endorsements.

(b) The endorsement message need not be phrased in the exact words of the endorser, unless the advertisement affirmatively so represents. However, the endorsement may not be presented out of context or reworded so as to distort in any way the endorser's opinion or experience with the product. An advertiser may use an endorsement of an expert or celebrity only so long as it has good reason to believe that the endorser continues to subscribe to the views presented. An advertiser may satisfy this obligation by securing the endorser's views at reasonable intervals where reasonableness will be determined by such factors as new information on the performance or effectiveness of the product, a material alteration in the product, changes in the performance of competitors' products, and the advertiser's contract commitments.

(c) When the advertisement represents that the endorser uses the endorsed product, the endorser must have been a bona fide user of it at the time the endorsement was given. Additionally, the advertiser may continue to run the advertisement only so long as it has good reason to believe that the endorser remains a bona fide user of the product. [*See* § 255.1(b) regarding the ''good reason to believe'' requirement.](d)Advertisers are subject to liability for false or unsubstantiated statements made through endorsements, or for failing to disclose material connections between themselves and their endorsers [*see* § 255.5]. Endorsers also may be liable for statements made in the course of their endorsements.

Example 1: A building contractor states in an advertisement that he uses the advertiser's exterior house paint because of its remarkable quick drying properties and durability. This endorsement must comply with the pertinent requirements of Section 255.3 (Expert Endorsements). Subsequently, the advertiser reformulates its paint to enable it to cover exterior surfaces with only one coat. Prior to continued use of the contractor's endorsement, the advertiser must contact the contractor in order to determine whether the contractor would continue to specify the paint and to subscribe to the views presented previously.

Example 2: A television advertisement portrays a woman seated at a desk on which rest five unmarked computer keyboards. An announcer says, ''We asked X, an administrative assistant for over ten years, to try these five unmarked keyboards and tell us which one she liked best.''The advertisement portrays X typing on each keyboard and then picking the advertiser's brand. The announcer asks her why, and X gives her reasons. This endorsement would probably not represent that X actually uses the advertiser's keyboard at work. In addition, the endorsement also may be required to meet the standards of Section 255.3 (expert endorsements).

Example 3: An ad for an acne treatment features a dermatologist who claims that the product is ''clinically proven'' to work. Before giving the endorsement, she received a write-up of the clinical study in question, which indicates flaws in the design and conduct of the study that are so serious that they preclude any conclusions about the efficacy of the product. The dermatologist is subject to liability for the false statements she made in the advertisement. The advertiser is also liable for misrepresentations made through the endorsement. [*See* Section 255.3 regarding the product evaluation that an expert endorser must conduct.]

Example 4: A well-known celebrity appears in an infomercial for an oven roasting bag that purportedly cooks every chicken perfectly in thirty minutes. During the shooting of the infomercial, the celebrity watches five attempts to cook chickens using the bag. In each attempt, the chicken is undercooked after thirty minutes and requires sixty minutes of cooking time. In the commercial, the celebrity places an uncooked chicken in the oven roasting bag and places the bag in one oven. He then takes a chicken roasting bag from a second oven, removes from the bag what appears to be a perfectly cooked chicken, tastes the chicken, and says that if you want perfect chicken every time, in just thirty minutes, this is the product you need. A significant percentage of consumers are likely to believe the celebrity's statements represent his own views even though he is reading from a script. The celebrity is subject to liability for his statement about the product. The advertiser is also liable for misrepresentations made through the endorsement.

Example 5: A skin care products advertiser participates in a blog advertising service. The service matches up advertisers with bloggers who will promote the advertiser's products on their personal blogs. The advertiser requests that a blogger try a new body lotion and write a review of the product on her blog. Although the advertiser does not make any specific claims about the lotion's ability to cure skin conditions and the blogger does not ask the advertiser whether there is substantiation for the claim, in her review the blogger writes that the lotion cures eczema and recommends the product to her blog readers who suffer from this condition. The advertiser is subject to liability for misleading or unsubstantiated representations made through the blogger's endorsement. The blogger also is subject to liability for misleading or unsubstantiated representations made in the course of her endorsement. The blogger is also liable if she fails to disclose clearly and conspicuously that she is being paid for her services. [*See* § 255.5.]

In order to limit its potential liability, the advertiser should ensure that the advertising service provides guidance and training to its bloggers concerning the need to ensure that statements they make are truthful and substantiated. The advertiser should also monitor bloggers who are being paid to promote its products and take steps necessary to halt the continued publication of deceptive representations when they are discovered.

§ 255.2 Consumer endorsements.

(a) An advertisement employing endorsements by one or more consumers about the performance of an advertised product or service will be interpreted as representing that the product or service is effective for the purpose depicted in the advertisement. Therefore, the advertiser must possess and rely upon adequate substantiation, including, when appropriate, competent and reliable scientific evidence, to support such claims made through endorsements in the same manner the advertiser would be required to do if it

had made the representation directly, *i.e.*, without using endorsements. Consumer endorsements themselves are not competent and reliable scientific evidence.

(b) An advertisement containing an endorsement relating the experience of one or more consumers on a central or key attribute of the product or service also will likely be interpreted as representing that the endorser's experience is representative of what consumers will generally achieve with the advertised product or service in actual, albeit variable, conditions of use. Therefore, an advertiser should possess and rely upon adequate substantiation for this representation. If the advertiser does not have substantiation that the endorser's experience is representative of what consumers will generally achieve, the advertisement should clearly and conspicuously disclose the generally expected performance in the depicted circumstances, and the advertiser must possess and rely on adequate substantiation for that representation.[105]

(c) Advertisements presenting endorsements by what are represented, directly or by implication, to be ''actual consumers'' should utilize actual consumers in both the audio and video, or clearly and conspicuously disclose that the persons in such advertisements are not actual consumers of the advertised product.

Example 1: A brochure for a baldness treatment consists entirely of testimonials from satisfied customers who say that after using the product, they had amazing hair growth and their hair is as thick and strong as it was when they were teenagers. The advertiser must have competent and reliable scientific evidence that its product is effective in producing new hair growth.

The ad will also likely communicate that the endorsers' experiences are representative of what new users of the product can generally expect. Therefore, even if the advertiser includes a disclaimer such as, ''Notice: These testimonials do not prove our product works. You should not expect to have similar results,'' the ad is likely to be deceptive unless the advertiser has adequate substantiation that new users typically will experience results similar to those experienced by the testimonialists.

Example 2: An advertisement disseminated by a company that sells heat pumps presents endorsements from three individuals who state that after installing the company's heat pump in their homes, their monthly utility bills went down by $100, $125, and $150, respectively. The ad will likely be interpreted as conveying that such savings are representative of what consumers who buy the company's heat pump can generally expect. The advertiser does not have substantiation for that representation because, in fact, less than 20% of purchasers will save $100 or more. A disclosure such as, ''Results not typical'' or, ''These testimonials are based on the experiences of a few people and you are not likely to have similar results'' is insufficient to prevent this ad from being deceptive because consumers will still interpret the ad as conveying that the specified savings are representative of what consumers can generally expect. The ad is less likely to be deceptive if it clearly and conspicuously discloses the generally expected savings and the advertiser has adequate substantiation that homeowners can achieve those results. There are multiple ways that such a disclosure could be phrased, *e.g.*, ''the average homeowner saves $35 per month,'' ''the typical family saves $50 per month during cold months and $20 per month in warm months,'' or ''most families save 10% on their utility bills.''

Example 3: An advertisement for a cholesterol-lowering product features an individual who claims that his serum cholesterol went down by 120 points and does not mention having made any lifestyle changes. A well-conducted clinical study shows that the product reduces the cholesterol levels of individuals with elevated cholesterol by an average of 15% and the advertisement clearly and conspicuously discloses this fact. Despite the presence of this disclosure, the advertisement would be deceptive if the advertiser does not have adequate substantiation that the product can produce the specific results claimed by the endorser (*i.e.*, a 120-point drop in serum cholesterol without any lifestyle changes).

Example 4: An advertisement for a weight-loss product features a formerly obese woman. She says in the ad, ''Every day, I drank 2 WeightAway shakes, ate only raw vegetables, and exercised vigorously for six hours at the gym. By the end of six months, I had gone from 250 pounds to 140 pounds.''The advertisement accurately describes the woman's experience, and such a result is within the range that would be generally experienced by an extremely overweight individual who consumed WeightAway shakes, only ate raw vegetables, and exercised as the endorser did. Because the endorser clearly describes the limited and truly exceptional circumstances under which she achieved her results, the ad is not likely to convey that consumers who weigh substantially less or use WeightAway under less extreme circumstances will lose 110 pounds in six months. (If the advertisement simply says that the endorser lost 110 pounds in six months using WeightAway together with diet and exercise, however, this description would not adequately alert consumers to the truly remarkable circumstances leading to her weight loss.)The advertiser must have substantiation, however, for any performance claims conveyed by the endorsement (*e.g.*, that WeightAway is an effective weight loss product).

If, in the alternative, the advertisement simply features ''before'' and ''after'' pictures of a woman who says ''I lost 50 pounds in 6 months with WeightAway,'' the ad is likely to convey that her experience is representative of what consumers will generally achieve. Therefore, if consumers cannot generally expect to achieve such results, the ad should clearly and conspicuously disclose what they can expect to lose in the depicted circumstances (*e.g.,* ''most women who use WeightAway for six months lose at least 15 pounds'').

If the ad features the same pictures but the testimonialist simply says, ''I lost 50 pounds with WeightAway,'' and WeightAway users generally do not lose 50 pounds, the ad should disclose what results they do generally achieve (*e.g.,* ''most women who use WeightAway lose 15 pounds'').

Example 5: An advertisement presents the results of a poll of consumers who have used the advertiser's cake mixes as well as their own recipes. The results purport to show that the majority believed that their families could not tell the difference between the advertised mix and their own cakes baked from scratch. Many of the consumers are actually

[105]The Commission tested the communication of advertisements containing testimonials that clearly and prominently disclosed either ''Results not typical'' or the stronger ''These testimonials are based on the experiences of a few people and you are not likely to have similar results.''Neither disclosure adequately reduced the communication that the experiences depicted are generally representative. Based upon this research, the Commission believes that similar disclaimers regarding the limited applicability of an endorser's experience to what consumers may generally expect to achieve are unlikely to be effective.

Nonetheless, the Commission cannot rule out the possibility that a strong disclaimer of typicality could be effective in the context of a particular advertisement. Although the Commission would have the burden of proof in a law enforcement action, the Commission notes that an advertiser possessing reliable empirical testing demonstrating that the net impression of its advertisement with such a disclaimer is non-deceptive will avoid the risk of the initiation of such an action in the first instance.

pictured in the advertisement along with relevant, quoted portions of their statements endorsing the product. This use of the results of a poll or survey of consumers represents that this is the typical result that ordinary consumers can expect from the advertiser's cake mix.

Example 6: An advertisement purports to portray a ''hidden camera'' situation in a crowded cafeteria at breakfast time. A spokesperson for the advertiser asks a series of actual patrons of the cafeteria for their spontaneous, honest opinions of the advertiser's recently introduced breakfast cereal. Even though the words ''hidden camera'' are not displayed on the screen, and even though none of the actual patrons is specifically identified during the advertisement, the net impression conveyed to consumers may well be that these are actual customers, and not actors. If actors have been employed, this fact should be clearly and conspicuously disclosed.

Example 7: An advertisement for a recently released motion picture shows three individuals coming out of a theater, each of whom gives a positive statement about the movie. These individuals are actual consumers expressing their personal views about the movie. The advertiser does not need to have substantiation that their views are representative of the opinions that most consumers will have about the movie. Because the consumers' statements would be understood to be the subjective opinions of only three people, this advertisement is not likely to convey a typicality message.

If the motion picture studio had approached these individuals outside the theater and offered them free tickets if they would talk about the movie on camera afterwards, that arrangement should be clearly and conspicuously disclosed. [*See* § 255.5.]

§ 255.3 Expert endorsements.

(a) Whenever an advertisement represents, directly or by implication, that the endorser is an expert with respect to the endorsement message, then the endorser's qualifications must in fact give the endorser the expertise that he or she is represented as possessing with respect to the endorsement.

(b) Although the expert may, in endorsing a product, take into account factors not within his or her expertise (*e.g.*, matters of taste or price), the endorsement must be supported by an actual exercise of that expertise in evaluating product features or characteristics with respect to which he or she is expert and which are relevant to an ordinary consumer's use of or experience with the product and are available to the ordinary consumer. This evaluation must have included an examination or testing of the product at least as extensive as someone with the same degree of expertise would normally need to conduct in order to support the conclusions presented in the endorsement. To the extent that the advertisement implies that the endorsement was based upon a comparison, such comparison must have been included in the expert's evaluation; and as a result of such comparison, the expert must have concluded that, with respect to those features on which he or she is expert and which are relevant and available to an ordinary consumer, the endorsed product is at least equal overall to the competitors' products. Moreover, where the net impression created by the endorsement is that the advertised product is superior to other products with respect to any such feature or features, then the expert must in fact have found such superiority. [*See* § 255.1(d) regarding the liability of endorsers.]

Example 1: An endorsement of a particular automobile by one described as an ''engineer'' implies that the endorser's professional training and experience are such that he is well acquainted with the design and performance of automobiles. If the endorser's field is, for example, chemical engineering, the endorsement would be deceptive.

Example 2: An endorser of a hearing aid is simply referred to as ''Doctor'' during the course of an advertisement. The ad likely implies that the endorser is a medical doctor with substantial experience in the area of hearing. If the endorser is not a medical doctor with substantial experience in audiology, the endorsement would likely be deceptive. A non-medical ''doctor'' (*e.g.*, an individual with a Ph.D. in exercise physiology) or a physician without substantial experience in the area of hearing can endorse the product, but if the endorser is referred to as ''doctor,'' the advertisement must make clear the nature and limits of the endorser's expertise.

Example 3: A manufacturer of automobile parts advertises that its products are approved by the ''American Institute of Science.''From its name, consumers would infer that the ''American Institute of Science'' is a bona fide independent testing organization with expertise in judging automobile parts and that, as such, it would not approve any automobile part without first testing its efficacy by means of valid scientific methods. If the American Institute of Science is not such a bona fide independent testing organization (*e.g.*, if it was established and operated by an automotive parts manufacturer), the endorsement would be deceptive. Even if the American Institute of Science is an independent bona fide expert testing organization, the endorsement may nevertheless be deceptive unless the Institute has conducted valid scientific tests of the advertised products and the test results support the endorsement message.

Example 4: A manufacturer of a non-prescription drug product represents that its product has been selected over competing products by a large metropolitan hospital. The hospital has selected the product because the manufacturer, unlike its competitors, has packaged each dose of the product separately. This package form is not generally available to the public. Under the circumstances, the endorsement would be deceptive because the basis for the hospital's choice – convenience of packaging –is neither relevant nor available to consumers, and the basis for the hospital's decision is not disclosed to consumers.

Example 5: A woman who is identified as the president of a commercial ''home cleaning service'' states in a television advertisement that the service uses a particular brand of cleanser, instead of leading competitors it has tried, because of this brand's performance. Because cleaning services extensively use cleansers in the course of their business, the ad likely conveys that the president has knowledge superior to that of ordinary consumers. Accordingly, the president's statement will be deemed to be an expert endorsement. The service must, of course, actually use the endorsed cleanser. In addition, because the advertisement implies that the cleaning service has experience with a reasonable number of leading competitors to the advertised cleanser, the service must, in fact, have such experience, and, on the basis of its expertise, it must have determined that the cleaning ability of the endorsed cleanser is at least equal (or superior, if such is the net impression conveyed by the advertisement) to that of leading competitors' products with which the service has had experience and which remain reasonably available to it. Because in this example the cleaning service's president makes no mention that the endorsed cleanser was ''chosen,'' ''selected,'' or otherwise evaluated in side-by-side comparisons against its competitors, it is sufficient if the service has relied solely upon its

accumulated experience in evaluating cleansers without having performed side-by-side or scientific comparisons.

Example 6: A medical doctor states in an advertisement for a drug that the product will safely allow consumers to lower their cholesterol by 50 points. If the materials the doctor reviewed were merely letters from satisfied consumers or the results of a rodent study, the endorsement would likely be deceptive because those materials are not what others with the same degree of expertise would consider adequate to support this conclusion about the product's safety and efficacy.

§ 255.4 Endorsements by organizations.

Endorsements by organizations, especially expert ones, are viewed as representing the judgment of a group whose collective experience exceeds that of any individual member, and whose judgments are generally free of the sort of subjective factors that vary from individual to individual. Therefore, an organization's endorsement must be reached by a process sufficient to ensure that the endorsement fairly reflects the collective judgment of the organization. Moreover, if an organization is represented as being expert, then, in conjunction with a proper exercise of its expertise in evaluating the product under § 255.3 (expert endorsements), it must utilize an expert or experts recognized as such by the organization or standards previously adopted by the organization and suitable for judging the relevant merits of such products. [*See* § 255.1(d) regarding the liability of endorsers.]

Example: A mattress seller advertises that its product is endorsed by a chiropractic association. Because the association would be regarded as expert with respect to judging mattresses, its endorsement must be supported by an evaluation by an expert or experts recognized as such by the organization, or by compliance with standards previously adopted by the organization and aimed at measuring the performance of mattresses in general and not designed with the unique features of the advertised mattress in mind.

§ 255.5 Disclosure of material connections.

When there exists a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement (*i.e.*, the connection is not reasonably expected by the audience), such connection must be fully disclosed. For example, when an endorser who appears in a television commercial is neither represented in the advertisement as an expert nor is known to a significant portion of the viewing public, then the advertiser should clearly and conspicuously disclose either the payment or promise of compensation prior to and in exchange for the endorsement or the fact that the endorser knew or had reason to know or to believe that if the endorsement favored the advertised product some benefit, such as an appearance on television, would be extended to the endorser. Additional guidance, including guidance concerning endorsements made through other media, is provided by the examples below.

Example 1: A drug company commissions research on its product by an outside organization. The drug company determines the overall subject of the research (*e.g.*, to test the efficacy of a newly developed product) and pays a substantial share of the expenses of the research project, but the research organization determines the protocol for the study and is responsible for conducting it. A subsequent advertisement by the drug company mentions the research results as the ''findings'' of that research organization. Although the design and conduct of the research project are controlled by the outside research organization, the weight consumers place on the reported results could be materially affected by knowing that the advertiser had funded the project. Therefore, the advertiser's payment of expenses to the research organization should be disclosed in this advertisement.

Example 2: A film star endorses a particular food product. The endorsement regards only points of taste and individual preference. This endorsement must, of course, comply with § 255.1; but regardless of whether the star's compensation for the commercial is a $1 million cash payment or a royalty for each product sold by the advertiser during the next year, no disclosure is required because such payments likely are ordinarily expected by viewers.

Example 3: During an appearance by a well-known professional tennis player on a television talk show, the host comments that the past few months have been the best of her career and during this time she has risen to her highest level ever in the rankings. She responds by attributing the improvement in her game to the fact that she is seeing the ball better than she used to, ever since having laser vision correction surgery at a clinic that she identifies by name. She continues talking about the ease of the procedure, the kindness of the clinic's doctors, her speedy recovery, and how she can now engage in a variety of activities without glasses, including driving at night. The athlete does not disclose that, even though she does not appear in commercials for the clinic, she has a contractual relationship with it, and her contract pays her for speaking publicly about her surgery when she can do so. Consumers might not realize that a celebrity discussing a medical procedure in a television interview has been paid for doing so, and knowledge of such payments would likely affect the weight or credibility consumers give to the celebrity's endorsement. Without a clear and conspicuous disclosure that the athlete has been engaged as a spokesperson for the clinic, this endorsement is likely to be deceptive. Furthermore, if consumers are likely to take away from her story that her experience was typical of those who undergo the same procedure at the clinic, the advertiser must have substantiation for that claim.

Assume that instead of speaking about the clinic in a television interview, the tennis player touts the results of her surgery – mentioning the clinic by name – on a social networking site that allows her fans to read in real time what is happening in her life. Given the nature of the medium in which her endorsement is disseminated, consumers might not realize that she is a paid endorser. Because that information might affect the weight consumers give to her endorsement, her relationship with the clinic should be disclosed.

Assume that during that same television interview, the tennis player is wearing clothes bearing the insignia of an athletic wear company with whom she also has an endorsement contract. Although this contract requires that she wear the company's clothes not only on the court but also in public appearances, when possible, she does not mention them or the company during her appearance on the show. No disclosure is required because no representation is being made about the clothes in this context.

Example 4: An ad for an anti-snoring product features a physician who says that he has seen dozens of products come on the market over the years and, in his opinion, this is the best ever. Consumers would expect the physician to be reasonably compensated for his appearance in the ad. Consumers are unlikely, however, to expect that the physician receives a percentage of gross product sales or that he owns part of the company, and either of these facts

would likely materially affect the credibility that consumers attach to the endorsement. Accordingly, the advertisement should clearly and conspicuously disclose such a connection between the company and the physician.

Example 5: An actual patron of a restaurant, who is neither known to the public nor presented as an expert, is shown seated at the counter. He is asked for his ''spontaneous'' opinion of a new food product served in the restaurant. Assume, first, that the advertiser had posted a sign on the door of the restaurant informing all who entered that day that patrons would be interviewed by the advertiser as part of its TV promotion of its new soy protein ''steak.'' This notification would materially affect the weight or credibility of the patron's endorsement, and, therefore, viewers of the advertisement should be clearly and conspicuously informed of the circumstances under which the endorsement was obtained.

Assume, in the alternative, that the advertiser had not posted a sign on the door of the restaurant, but had informed all interviewed customers of the ''hidden camera'' only after interviews were completed and the customers had no reason to know or believe that their response was being recorded for use in an advertisement. Even if patrons were also told that they would be paid for allowing the use of their opinions in advertising, these facts need not be disclosed.

Example 6: An infomercial producer wants to include consumer endorsements for an automotive additive product featured in her commercial, but because the product has not yet been sold, there are no consumer users. The producer's staff reviews the profiles of individuals interested in working as ''extras'' in commercials and identifies several who are interested in automobiles. The extras are asked to use the product for several weeks and then report back to the producer. They are told that if they are selected to endorse the product in the producer's infomercial, they will receive a small payment. Viewers would not expect that these ''consumer endorsers'' are actors who were asked to use the product so that they could appear in the commercial or that they were compensated. Because the advertisement fails to disclose these facts, it is deceptive.

Example 7: A college student who has earned a reputation as a video game expert maintains a personal weblog or ''blog'' where he posts entries about his gaming experiences. Readers of his blog frequently seek his opinions about video game hardware and software. As it has done in the past, the manufacturer of a newly released video game system sends the student a free copy of the system and asks him to write about it on his blog. He tests the new gaming system and writes a favorable review. Because his review is disseminated via a form of consumer-generated media in which his relationship to the advertiser is not inherently obvious, readers are unlikely to know that he has received the video game system free of charge in exchange for his review of the product, and given the value of the video game system, this fact likely would materially affect the credibility they attach to his endorsement. Accordingly, the blogger should clearly and conspicuously disclose that he received the gaming system free of charge. The manufacturer should advise him at the time it provides the gaming system that this connection should be disclosed, and it should have procedures in place to try to monitor his postings for compliance.

Example 8: An online message board designated for discussions of new music download technology is frequented by MP3 player enthusiasts. They exchange information about new products, utilities, and the functionality of numerous playback devices. Unbeknownst to the message board community, an employee of a leading playback device manufacturer has been posting messages on the discussion board promoting the manufacturer's product. Knowledge of this poster's employment likely would affect the weight or credibility of her endorsement. Therefore, the poster should clearly and conspicuously disclose her relationship to the manufacturer to members and readers of the message board.

Example 9: A young man signs up to be part of a ''street team'' program in which points are awarded each time a team member talks to his or her friends about a particular advertiser's products. Team members can then exchange their points for prizes, such as concert tickets or electronics. These incentives would materially affect the weight or credibility of the team member's endorsements. They should be clearly and conspicuously disclosed, and the advertiser should take steps to ensure that these disclosures are being provided.

By direction of the Commission.

Donald S. Clark

Secretary

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H.R. 3663/P.L. 111–72
To amend title XVIII of the Social Security Act to delay the date on which the accreditation requirement under the Medicare Program applies to suppliers of durable medical equipment that are pharmacies. (Oct. 13, 2009; 123 Stat. 2059)

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