Federal Register

6–29–10 Tuesday
Vol. 75 No. 124 June 29, 2010

Pages 37287–37706

The **FEDERAL REGISTER** (ISSN 0097–6326) is published daily, Monday through Friday, except official holidays, by the Office of the Federal Register, National Archives and Records Administration, Washington, DC 20408, under the Federal Register Act (44 U.S.C. Ch. 15) and the regulations of the Administrative Committee of the Federal Register (1 CFR Ch. I). The Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 is the exclusive distributor of the official edition. Periodicals postage is paid at Washington, DC.

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WHEN: Tuesday, July 13, 2010
9 a.m.–12:30 p.m.

WHERE: Office of the Federal Register
Conference Room, Suite 700
800 North Capitol Street, NW.
Washington, DC 20002

RESERVATIONS: (202) 741–6008

Printed on recycled paper.

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

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

RECOVERY ACCOUNTABILITY AND TRANSPARENCY BOARD

4 CFR Part 200

RIN 0430–AA03

Privacy Act Regulations

AGENCY: Recovery Accountability and Transparency Board

ACTION: Final rule.

SUMMARY: The Recovery Accountability and Transparency Board (Board) amends its regulations implementing the Privacy Act of 1974 (Privacy Act), Public Law 93–579, 5 U.S.C. 552a. This final rule adds 4 CFR 200.17 to exempt certain systems of records from certain sections of the Privacy Act (5 U.S.C. 552a) pursuant to 5 U.S.C. 552a(j) and (k). These exemptions will help ensure that the Board may efficiently and effectively compile investigatory material to prevent and detect fraud, waste, and abuse and perform its other authorized duties and activities relating to oversight of funds awarded pursuant to the American Recovery and Reinvestment Act of 2009, Public Law 111–5 (Feb. 17, 2009) (Recovery Act).

DATES: Effective June 29, 2010.

FOR FURTHER INFORMATION CONTACT: Jennifer Dure, General Counsel, (703) 487–5439.

SUPPLEMENTARY INFORMATION: The proposed rule was published in the **Federal Register** on April 19, 2010 (75 FR 20298) for a public comment period to end on June 18, 2010. This rule amends the Board's Privacy Act regulations, 4 CFR part 200, to exempt system of records "RATB–11–RATB Investigative Files" and "RATB–12–RATB Fraud Hotline Program Files" from certain provisions of the Privacy Act which require, among other things, that the Board provide notice when collecting information, account for certain disclosures, permit individuals access to their records, and allow them to request that the records be amended. These provisions would interfere with the Board's oversight functions if applied to the Board's maintenance of these systems of records.

Accordingly, these systems of records are exempt from specified provisions of the Privacy Act, pursuant to sections 552a(j)(2), (k)(2), and (k)(5):

Public Comments

The Board received one comment expressing an individual's opinion that the Board's amendment to its Privacy Act regulations "would allow investigators to really come through and fully investigate in many fraud cases."

List of Subjects in 4 CFR Part 200

Privacy Act of 1974.

■ For the reasons set forth in the preamble, the Board amends Chapter II of Title 4, Code of Federal Regulations, as follows:

CHAPTER II—RECOVERY ACCOUNTABILITY AND TRANSPARENCY BOARD

PART 200—PRIVACY ACT OF 1974

■ 1. The authority citation for Part 200 continues to read as follows:

Authority: 5 U.S.C. 552a(f)

■ 2. Part 200 is amended by adding § 200.17 as follows:

§ 200.17 Exemptions.

(a) *General policy.* The Privacy Act permits an agency to exempt certain types of systems of records from some of the Privacy Act's requirements. It is the policy of the Board to exercise authority to exempt systems of records only in compelling cases.

(b) *Specific systems of records exempted under (j)(2) and (k)(2).* The Board exempts the RATB Investigative Files (RATB–11) system of records from the following provisions of 5 U.S.C. 552a:

(1) From subsection (c)(3) because the release of accounting of disclosure would inform a subject that he or she is under investigation. This information would provide considerable advantage to the subject in providing him or her with knowledge concerning the nature of the investigation and the coordinated investigative efforts and techniques employed by the cooperating agencies. This would greatly impede the Board's criminal law enforcement duties.

(2) From subsection (c)(4) and (d) because notification would alert a subject to the fact that an open investigation on that individual is taking place, and might weaken the ongoing investigation, reveal investigatory techniques, and place confidential informants in jeopardy.

(3) From subsection (e)(1) because the nature of the criminal and/or civil investigative function creates unique problems in prescribing a specific parameter in a particular case with respect to what information is relevant or necessary. Also, due to the Board's close working relationship with other Federal, state and local law enforcement agencies, information may be received which may relate to a case under the investigative jurisdiction of another agency. The maintenance of this information may be necessary to provide leads for appropriate law enforcement purposes and to establish patterns of activity which may relate to the jurisdiction of other cooperating agencies.

(4) From subsection (e)(2) because collecting information to the fullest extent possible directly from the subject individual may or may not be practical in a criminal and/or civil investigation.

(5) From subsection (e)(3) because supplying an individual with a form containing a Privacy Act Statement would tend to inhibit cooperation by many individuals involved in a criminal and/or civil investigation. The effect would be somewhat adverse to established investigative methods and techniques.

(6) From subsection (e)(4)(G)–(I) because this system of records is exempt from the access provisions of subsection (d).

(7) From subsection (e)(5) because the requirement that records be maintained with attention to accuracy, relevance, timeliness, and completeness would unfairly hamper the investigative process. It is the nature of law enforcement for investigations to uncover the commission of illegal acts at diverse stages. It is frequently impossible to determine initially what information is accurate, relevant, timely, and least of all complete. With the passage of time, seemingly irrelevant or untimely information may acquire new significance as further investigation brings new details to light.

(8) From subsection (e)(8) because the notice requirements of this provision could present a serious impediment to law enforcement by revealing investigative techniques, procedures, and existence of confidential investigations.

(9) From subsection (f) because the agency's rules are inapplicable to those portions of the system that are exempt and would place the burden on the agency of either confirming or denying the existence of a record pertaining to a requesting individual, which might in itself provide an answer to that individual relating to an ongoing investigation. The conduct of a successful investigation leading to the indictment of a criminal offender precludes the applicability of established agency rules relating to verification of record, disclosure of the record to that individual, and record amendment procedures for this record system.

(10) For comparability with the exemption claimed from subsection (f), the civil remedies provisions of subsection (g) must be suspended for this record system. Because of the nature of criminal investigations, standards of accuracy, relevance, timeliness, and completeness cannot apply to this record system. Information gathered in an investigation is often fragmentary, and leads relating to an individual in the context of one investigation may instead pertain to a second investigation.

(c) *Specific systems of records exempted under (k)(2) and (k)(5).* The Board exempts the RATB Fraud Hotline Program Files (RATB–12) system of records from the following provisions of 5 U.S.C. 552a:

(1) From subsection (c)(3) because disclosures from this system could interfere with the just, thorough and timely resolution of the complaint or inquiry, and possibly enable individuals to conceal their wrongdoing or mislead the course of the investigation by concealing, destroying or fabricating evidence or documents.

(2) From subsection (d) because disclosures from this system could interfere with the just, thorough and timely resolution of the complaint or inquiry, and possibly enable individuals to conceal their wrongdoing or mislead the course of the investigation by concealing, destroying or fabricating evidence or documents. Disclosures could also subject sources and witnesses to harassment or intimidation which jeopardize the safety and well-being of themselves and their families.

(3) From subsection (e)(1) because the nature of the investigatory function creates unique problems in prescribing specific parameters in a particular case as to what information is relevant or necessary. Due to close working relationships with other Federal, state and local law enforcement agencies, information may be received which may relate to a case under the investigative jurisdiction of another government agency. It is necessary to maintain this information in order to provide leads for appropriate law enforcement purposes and to establish patterns of activity which may relate to the jurisdiction of other cooperating agencies.

(4) From subsection (e)(4)(G)–(H) because this system of records is exempt from the access provisions of subsection (d).

(5) From subsection (f) because the agency's rules are inapplicable to those portions of the system that are exempt and would place the burden on the agency of either confirming or denying the existence of a record pertaining to a requesting individual might in itself provide an answer to that individual relating to an on-going investigation. The conduct of a successful investigation leading to the indictment of a criminal offender precludes the applicability of established agency rules relating to verification of record, disclosure of the record to that individual, and record amendment procedures for this record system.

Ivan J. Flores,

Paralegal Specialist, Recovery Accountability and Transparency Board.

[FR Doc. 2010–15691 Filed 6–28–10; 8:45 am]

BILLING CODE 6820–GA–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 920

[Doc. No. AO–FV–08–0174; AMS–FV–08–0085; FV08–920–3]

Kiwifruit Grown in California; Order Amending Marketing Order No. 920

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This rule amends Marketing Order No. 920 (order), which regulates the handling of kiwifruit grown in California. The amendments are based on proposals by the Kiwifruit Administrative Committee (committee), which is responsible for local administration of the order. The amendments will redefine the grower districts into which the production area is divided and reallocate committee membership among the districts, revise the deadline for committee nominations, and revise committee meeting and voting procedures. The amendments were approved by kiwifruit growers in a referendum conducted from March 12 through March 26, 2010. The amendments are intended to improve the operation and administration of the California kiwifruit marketing order program. Proposed amendments that failed in referendum and are not effectuated in this final order include revising committee member terms of office, authorizing the Secretary to fill committee vacancies based upon committee recommendations, authorizing research and promotion programs and accepting voluntary contributions for such programs, and allowing substitute alternates to represent absent members at committee meetings.

DATES: This rule is effective July 29, 2010, except for §§ 920.12 and 920.20, which are effective August 1, 2010.

FOR FURTHER INFORMATION CONTACT: Laurel May or Kathleen M. Finn, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., Stop 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491, Fax: (202) 720–8938, E-mail: *Laurel.May@ams.usda.gov* or *Kathy.Finn@ams.usda.gov.*

Small businesses may request information on this proceeding by contacting Antoinette Carter, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., Stop 0237, Washington, DC 20250–0237; telephone: (202) 720–2491, Fax: (202) 720–8938, E-mail: *Anotoinette.Carter@ams.usda.gov.*

SUPPLEMENTARY INFORMATION: Prior documents in this proceeding include a Notice of Hearing issued on November 13, 2008, and published in the November 19, 2008, issue of the **Federal Register** (73 FR 69588); a Recommended Decision issued on November 5, 2009, and published in the November 12, 2009, issue of the **Federal Register** (74 FR 58216); and a Secretary's Decision and Referendum Order issued on February 17, 2010, and published in the February 23, 2010, issue of the **Federal Register** (75 FR 7981).

This action is governed by the provisions of sections 556 and 557 of title 5 of the United States Code and is therefore excluded from the requirements of Executive Order 12866.

Preliminary Statement

This final rule was formulated on the record of a public hearing held on December 9, 2008, in Modesto, California. Notice of this hearing was issued on November 13, 2008, and published in the **Federal Register** on November 19, 2008 (73 FR 69588). The hearing was held to consider the proposed amendment of Marketing Order No. 920, regulating the handling of kiwifruit grown in California. The hearing was held pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the "Act," and the applicable rules of practice and procedure governing the formulation of marketing agreements and orders (7 CFR part 900).

The Notice of Hearing described several amendment proposals submitted by the committee. Upon the basis of evidence introduced at the hearing and the record thereof, the Administrator of the Agricultural Marketing Service (AMS) on November 5, 2009, filed with the Hearing Clerk, U.S. Department of Agriculture, a Recommended Decision and Opportunity to File Written Exceptions thereto by December 14, 2009. No exceptions were filed.

A Secretary's Decision and Referendum Order was issued on February 17, 2010, directing that a referendum be conducted during the period March 12 through March 26, 2010, among California kiwifruit growers to determine whether they favored the proposed amendments to the order. To become effective, the amendments had to be approved by at least two-thirds of those growers voting or by voters representing at least two-thirds of the volume of kiwifruit represented by voters voting in the referendum. Voters voting in the referendum favored three of the seven proposed amendments.

The amendments favored by voters and included in this order will:

1. Redefine the grower districts into which the production area is divided and reallocate committee membership among the districts;

2. Require that committee member nomination meetings be held by June 1 of each year in which nominations are to be made; and

3. Authorize the committee to conduct business meetings by telephone or other means of communication, specify that votes cast during telephone meetings shall be taken by roll call, and specify that videoconferences shall be considered assembled meetings.

Four amendments pertaining to: Revision of the beginning and ending dates of all committee member terms of office, the filling of mid-term committee vacancies, authority for research and marketing programs, and allowing substitute alternates to represent absent members at committee meetings failed to obtain the requisite level of support needed to pass in referendum.

The Agricultural Marketing Service (AMS) also proposed to make such changes as may be necessary to the order so that all of the orders' provisions conform to the effectuated amendments. AMS is making a clarifying conforming change to the order language in § 920.20 that cross references § 920.31(l).

A marketing agreement reflecting amendments to the order was subsequently mailed to all kiwifruit handlers in the production area for their approval. The marketing agreement was not approved by handlers representing at least 50 percent of the volume of kiwifruit handled by all handlers during the representative period of August 1, 2008, through July 31, 2009.

Small Business Considerations

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

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions so that small businesses will not be unduly or disproportionately burdened. Small agricultural service firms, which include handlers regulated under the order, have been defined by the Small Business Administration (SBA) (13 CFR 121.201) as those having annual receipts of less than $7,000,000. Small agricultural growers have been defined as those with annual receipts of less than $750,000.

There are approximately 30 handlers of kiwifruit subject to regulation under the order and approximately 220 growers of kiwifruit in the regulated area. Information provided at the hearing indicates that the majority of the handlers would be considered small agricultural service firms. Hearing testimony also suggests that the majority of growers would be considered small entities according to the SBA's definition.

The order regulates the handling of kiwifruit grown in the State of California. Total bearing kiwifruit acreage has declined from a peak of approximately 7,300 acres in 1992–93 to about 4,000 acres in 2007–08. Approximately 24,500 tons of kiwifruit were produced in California during the 2007–08 season—a decline of approximately 27,800 tons compared to the 1992–93 season. According to evidence provided at the hearing, approximately 30 percent of the 2007–08 California kiwifruit crop was shipped to export markets, including Canada, Mexico, Central American, and Asian destinations.

Under the order, outgoing grade, size, pack, and container regulations are established for kiwifruit shipments; and shipping and inventory information is collected. Program activities administered by the committee are designed to support large and small kiwifruit growers and handlers. The 12-member committee is comprised of eleven grower representatives from the production area, as well as a public member. Committee meetings in which regulatory recommendations and other decisions are made are open to the public. All members are able to participate in committee deliberations, and each committee member has an equal vote. Others in attendance at meetings are also allowed to express their views.

The committee appointed an amendment subcommittee to consider possible order revisions. The subcommittee developed a list of proposed amendments to the order, which was then presented to the committee. The committee met to review and discuss the subcommittee's proposals at its meetings on January 30, 2008, April 22, 2008, and July 9, 2008. At those meetings, the committee voted unanimously to support the proposed amendments that were forwarded to AMS and subsequently considered at the hearing. The hearing to receive evidence on the proposed changes was open to the public and all interested parties were invited and encouraged to participate and provide their views.

The amendments are intended to provide the committee and the industry with additional flexibility in administering the order and producing and marketing California kiwifruit. Record evidence indicates that the proposals are intended to benefit all growers and handlers under the order, regardless of size.

Amendment 1—Districts and Representation

The amendment to redefine the districts into which the production area is divided and provide for the allocation of committee membership positions between the districts will not have a differential impact upon small and large entities. Such allocation will be based upon five-year production averages, or

upon another basis approved by the Secretary.

At the time the order was promulgated, kiwifruit acreage was more widespread throughout California and there were many more growers involved in kiwifruit production. The order originally provided for eight grower districts within the production area, with one membership seat apportioned to each district, and an additional seat reallocated annually to each of the three districts with the highest production in the preceding year. The structure was designed to afford equitable representation for all districts on the committee.

Planted acreage has been gradually concentrated into two main regions in recent years. That, and the decline in the number of growers over time, prompted consolidation of the districts and reallocation of grower seats to better reflect the current composition of the industry. Under the amended order, the production area will be divided into three grower districts, and committee membership will be allocated proportionately among the districts based upon the previous five years' average production for each district. The committee may recommend membership allocation on an alternative basis with the Secretary's approval. The revisions will ensure that the interests of all large and small entities are represented appropriately during committee deliberations.

Amendment 2—Nominations

The amendment specifying that grower nomination meetings be held by June 1 of each nomination year will have no economic impact upon growers or handlers of any size. Historically, the order required that nomination meetings be held by July 15 of each year, but that deadline did not allow for timely processing of the nominations and selections of new members prior to the August 1 beginning of the terms of office. In recent years, the committee has been conducting nomination meetings earlier than prescribed by the order. This amendment codifies what has become normal practice.

Amendment 3—Meeting and Voting Procedures

The amendment authorizing the committee to meet by telephone or other means of communication is expected to benefit growers and handlers of all sizes by improving committee efficiencies and encouraging greater participation in industry deliberations. The amendment is not expected to result in any significant increased costs to producers or handlers.

Under this amendment, video conference meetings will be considered assembled meetings and votes taken at such meetings will be considered in-person. Votes by telephone or other types of non-assembled meetings will be by roll call.

This amendment will provide the committee with greater flexibility in scheduling meetings and will be consistent with current practices in other kiwi industry settings. The use of telephone and other means of communication will allow greater access to committee meetings for members as well as other interested persons. Additionally, administration of the order will be improved as urgent committee business can be addressed in a timely manner.

Interested persons were invited to present evidence at the hearing on the probable regulatory and informational impact of the proposed amendments to the order on small entities. The record evidence indicates that the proposed amendments are intended to benefit all producers and handlers under the order, regardless of size. Furthermore, the record shows that any costs associated with implementing regulations will be outweighed by the benefits expected to accrue to the California kiwifruit industry.

Paperwork Reduction Act

Current information collection requirements for Part 920 are currently approved by the Office of Management and Budget (OMB) under OMB number 0581–0189, "Generic OMB Fruit Crops." No changes in those requirements as a result of this proceeding are needed. Should any changes become necessary, they will be submitted to OMB for approval.

As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

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

Civil Justice Reform

The amendments to Marketing Order 920 stated herein have been reviewed under Executive Order 12988, Civil Justice Reform. They are not intended to have retroactive effect.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United Sates in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed no later than 20 days after the date of the entry of the ruling.

Order Amending the Order Regulating Kiwifruit Grown in California

Findings and Determinations

The findings and determinations set forth hereinafter are supplementary and in addition to the findings and determinations previously made in connection with the issuance of the order; and all of said previous findings and determinations are hereby ratified and affirmed, except as such findings and determinations may be in conflict with the findings and determinations set forth herein.

(a) Findings and Determinations Upon the Basis of the Hearing Record

Pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674) and the applicable rules of practice and procedure effective thereunder (7 CFR part 900), a public hearing was held upon the proposed amendments to Marketing Order No. 920 (7 CFR part 920), regulating the handling of kiwifruit grown in California.

Upon the basis of the evidence introduced at such hearing and the record thereof it is found that:

(1) The marketing order, as amended, and as hereby further amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(2) The marketing order, as amended, and as hereby further amended, regulates the handling of kiwifruit grown in the production area in the same manner as, and is applicable only to persons in the respective classes of, commercial and industrial activity specified in the marketing order upon which hearings have been held;

(3) The marketing order, as amended, and as hereby further amended, is limited in application to the smallest regional production area which is

practicable, consistent with carrying out the declared policy of the Act, and the issuance of several orders applicable to subdivision of the production area would not effectively carry out the declared policy of the Act;

(4) The marketing order, as amended, and as hereby further amended, prescribes, insofar as practicable, such different terms applicable to different parts of the production area as are necessary to give due recognition to the differences in the production and marketing of kiwifruit grown in the production area; and

(5) All handling of kiwifruit grown in the production area is in the current of interstate or foreign commerce or directly burdens, obstructs, or affects such commerce.

(b) Determinations

It is hereby determined that:

(1) Handlers (excluding cooperative associations of growers who are not engaged in processing, distributing, or shipping kiwifruit covered by the order as hereby amended) who, during the period August 1, 2008, through July 31, 2009, handled 50 percent or more of the volume of such kiwifruit covered by the order, as hereby amended, have not signed an amended marketing agreement; and

(2) The issuance of this amendatory order, further amending the aforesaid order, is favored or approved by at least two-thirds of the growers who participated in a referendum and who, during the period August 1, 2008, through July 31, 2009 (which has been determined to be a representative period), have been engaged within the production area in the production of kiwifruit for market, such producers having also produced for market at least two-thirds of the volume of such commodity represented in the referendum.

(3) In the absence of a signed marketing agreement, the issuance of this amendatory order is the only practical means pursuant to the declared policy of the Act of advancing the interests of kiwifruit growers in the production area.

Order Relative to Handling of Kiwifruit Grown in California

It is therefore ordered, That on and after the effective date hereof, all handling of kiwifruit grown in California shall be in conformity to, and in compliance with, the terms and conditions of the said order as hereby amended as follows:

Certain provisions of proposals contained in Material Issue numbers 1, 2, and 4 of the proposed order amending the order contained in the Recommended Decision issued by the Administrator on November 5, 2009, and published in the **Federal Register** on November 12, 2009, shall be and are the terms and provisions of this order amending the order and set forth in full herein.

List of Subjects in 7 CFR Part 920

Kiwifruit, Marketing agreements, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, 7 CFR Part 920 is amended as follows:

PART 920—KIWIFRUIT GROWN IN CALIFORNIA

■ 1. The authority citation for 7 CFR part 920 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 2. Revise § 920.12 to read as follows:

§ 920.12 District

District means the applicable one of the following described subdivisions of the production area or such other subdivision as may be prescribed pursuant to § 920.31:

(a) *District 1* shall include Butte, Sutter, and Yuba Counties.

(b) *District 2* shall include Tulare County.

(c) *District 3* shall include all counties within the production area not included in Districts 1 and 2.

■ 3. Revise § 920.20 to read as follows:

§ 920.20 Establishment and membership.

There is hereby established a Kiwifruit Administrative Committee consisting of 12 members, each of whom shall have an alternate who shall have the same qualifications as the member for whom he or she is an alternate. The 12-member committee shall be made up of the following: One public member (and alternate), and eleven members (and alternates). With the exception of the public member and alternate, all members and their respective alternates shall be growers or employees of growers. In accordance with § 920.31(l), district representation on the committee shall be based upon the previous five-year average production in the district and shall be established so as to provide an equitable relationship between membership and districts. The committee may, with the approval of the Secretary, provide such other allocation of membership as may be necessary to assure equitable representation.

■ 4. In § 920.22, revise the first sentence of paragraph (a) to read as follows:

§ 920.22 Nomination.

(a) Except as provided in paragraph (b) of this section, the committee shall hold, or cause to be held, not later than June 1 of each year in which nominations are made, or such other date as may be specified by the Secretary, a meeting or meetings of growers in each district for the purpose of designating nominees to serve as grower members and alternates on the committee. * * *

* * * * *

■ 5. Revise paragraph (b) of § 920.32 to read as follows:

§ 920.32 Procedure.

* * * * *

(b) Committee meetings may be assembled or held by telephone, video conference, or other means of communication. The committee may vote by telephone, facsimile, or other means of communication. Votes by members or alternates present at assembled meetings shall be cast in person. Votes by members or alternates participating by telephone or other means of communication shall be by roll call; *Provided,* That a video conference shall be considered an assembled meeting, and votes by those participating through video conference shall be considered as cast in person.

Dated: June 24, 2010.

Rayne Pegg,

Administrator, Agricultural Marketing Service.

[FR Doc. 2010–15744 Filed 6–28–10; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2009–1183; Airspace Docket No. 09–ASW–38]

Amendment of Class E Airspace; Osceola, AR

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends Class E airspace for Osceola, AR. Decommissioning of the Osceola non-directional beacon (NDB) at Osceola Municipal Airport has made this action necessary to enhance the safety and management of Instrument Flight Rule (IFR) operations at the airport.

DATES: Effective date 0901 UTC, September 23, 2010. The Director of the Federal Register approves this

incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

FOR FURTHER INFORMATION CONTACT: Scott Enander, Central Service Center, Operations Support Group, Federal Aviation Administration, Southwest Region, 2601 Meacham Blvd., Fort Worth, TX 76137; telephone (817) 321–7716.

SUPPLEMENTARY INFORMATION:

History

On February 10, 2010, the FAA published in the **Federal Register** a notice of proposed rulemaking to amend Class E airspace for Osceola, AR, reconfiguring controlled airspace at Osceola Municipal Airport (75 FR 6594) Docket No. FAA–2009–1183. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received. Class E airspace designations are published in paragraph 6005 of FAA Order 7400.9T signed August 27, 2009, and effective September 15, 2009, which is incorporated by reference in 14 CFR Part 71.1. The Class E airspace designations listed in this document will be published subsequently in the Order.

The Rule

This action amends Title 14 Code of Federal Regulations (14 CFR) part 71 by amending Class E airspace for the Osceola, AR area. Decommissioning of the Osceola NDB and cancellation of the NDB approach at Osceola Municipal Airport has made this action necessary for the safety and management of IFR operations at the airport.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this regulation: (1) Is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in subtitle VII, part A, subpart I, section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it amends controlled airspace at Osceola Municipal Airport, Osceola, AR.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

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

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

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR Part 71.1 of the Federal Aviation Administration Order 7400.9T, Airspace Designations and Reporting Points, signed August 27, 2009, and effective September 15, 2009 is amended as follows:

* * * * *

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

* * * * *

ASW AR E5 Osceola, AR [Amended]

Osceola Municipal Airport, AR

(Lat. 35°41′28″ N., long. 90°00′36″ W.)

That airspace extending upward from 700 feet above the surface within a 6.4-mile radius of Osceola Municipal Airport.

Issued in Fort Worth, Texas, on June 16, 2010.

Anthony D. Roetzel,

Manager, Operations Support Group, ATO Central Service Center.

[FR Doc. 2010–15671 Filed 6–28–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2010–0085; Airspace Docket No. 10–ACE–1]

Amendment of Class E Airspace; Cherokee, IA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends Class E airspace for Cherokee, IA. Decommissioning of the Pilot Rock non-directional beacon (NDB) at Cherokee County Regional Airport, Cherokee, IA has made this action necessary to enhance the safety and management of Instrument Flight Rule (IFR) operations at the airport.

DATES: Effective date 0901 UTC, September 23, 2010. The Director of the Federal Register approves this incorporation by reference action under 1 CFR Part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

FOR FURTHER INFORMATION CONTACT: Scott Enander, Central Service Center, Operations Support Group, Federal Aviation Administration, Southwest Region, 2601 Meacham Blvd., Fort Worth, TX 76137; telephone (817) 321–7716.

SUPPLEMENTARY INFORMATION:

History

On April 7, 2010, the FAA published in the **Federal Register** a notice of proposed rulemaking to amend Class E airspace for Cherokee, IA, reconfiguring controlled airspace at Cherokee County Regional Airport (75 FR 17637) Docket No. FAA–2010–0085. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received. Class E airspace designations are published in paragraph 6005 of FAA Order 7400.9T signed August 27, 2009, and effective September 15, 2009, which is incorporated by reference in 14 CFR Part 71.1. The Class E airspace designations listed in this document will be published subsequently in the Order.

The Rule

This action amends Title 14 Code of Federal Regulations (14 CFR) Part 71 by amending Class E airspace for the Cherokee, IA area. Decommissioning of the Pilot Rock NDB and cancellation of the NDB approach at Cherokee County

Regional Airport has made this action is necessary for the safety and management of IFR operations at the airport. Adjustment to the geographic coordinates also will be made in accordance with the FAA's National Aeronautical Charting Office.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this regulation: (1) Is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, Section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it amends controlled airspace at Cherokee County Regional Airport, Cherokee, IA.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (Air).

Adoption of the Amendment

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

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

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR Part 71.1 of the Federal Aviation Administration Order 7400.9T, Airspace Designations and Reporting Points, signed August 27, 2009, and effective September 15, 2009 is amended as follows:

* * * * *

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

* * * * *

ACE IA E5 Cherokee, IA [Amended]

Cherokee County Regional Airport, IA
(Lat. 42°43′52″ N., long. 95°33′22″ W.)
That airspace extending upward from 700 feet above the surface within a 6.4-mile radius of Cherokee County Regional Airport.

Issued in Fort Worth, Texas, on June 16, 2010.

Anthony D. Roetzel,

Manager, Operations Support Group, ATO Central Service Center.

[FR Doc. 2010–15674 Filed 6–28–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2009–0190; Airspace Docket No. 09–ASW–5]

Establishment of Class E Airspace; Hamilton, TX

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends Class E airspace for Hamilton, TX to accommodate Area Navigation (RNAV) Standard Instrument Approach Procedures (SIAPs) at Hamilton Municipal Airport, Hamilton, TX. The FAA is taking this action to enhance the safety and management of Instrument Flight Rule (IFR) operations at the airport.

DATES: Effective date: 0901 UTC, September 23, 2010. The Director of the Federal Register approves this incorporation by reference action under 1 CFR Part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

FOR FURTHER INFORMATION CONTACT: Scott Enander, Central Service Center, Operations Support Group, Federal Aviation Administration, Southwest Region, 2601 Meacham Blvd., Fort Worth, TX 76137; telephone (817) 321–7716.

SUPPLEMENTARY INFORMATION:

History

On April 21, 2010, the FAA published in the **Federal Register** a notice of proposed rulemaking to amend Class E airspace for Hamilton, TX, creating additional controlled airspace at Hamilton Municipal Airport (75 FR 20794) Docket No. FAA–2009–0190. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received. Class E airspace designations are published in paragraph 6005 of FAA Order 7400.9T signed August 27, 2009, and effective September 15, 2009, which is incorporated by reference in 14 CFR Part 71.1. The Class E airspace designations listed in this document will be published subsequently in the Order.

The Rule

This action amends Title 14 Code of Federal Regulations (14 CFR) Part 71 by adding additional Class E airspace extending upward from 700 feet above the surface to accommodate SIAPs at Hamilton Municipal Airport, Hamilton, TX. This action is necessary for the safety and management of IFR operations at the airport.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this regulation: (1) Is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, Section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use

of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it amends controlled airspace at Hamilton Municipal Airport, Hamilton, TX.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

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

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

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR Part 71.1 of the Federal Aviation Administration Order 7400.9T, Airspace Designations and Reporting Points, signed August 27, 2009, and effective September 15, 2009 is amended as follows:

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

* * * * *

ASW TX E5 Hamilton, TX [Amended]

Hamilton Municipal Airport, TX
(Lat. 31°39′57″ N., long. 98°08′55″ W.)
Hamilton NDB
(Lat. 31°37′13″ N., long. 98°08′51″ W.)

That airspace extending upward from 700 feet above the surface within a 6.4-mile radius of Hamilton Municipal Airport, and within 3.7 miles each side of the 009° bearing from the airport extending from the 6.4-mile radius to 8.6 miles north of the airport, and within 4 miles each side of the 189° bearing from the airport extending from the 6.4-mile radius to 9.6 miles south of the airport, and within 8 miles east and 4 miles west of the 170° bearing from the Hamilton NDB extending from the NDB to 16 miles south of the NDB.

Issued in Fort Worth, Texas on June 16, 2010.

Anthony D. Roetzel,

Manager, Operations Support Group, ATO Central Service Center.

[FR Doc. 2010–15672 Filed 6–28–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2009–1135; Airspace Docket No. 09–ANM–20]

Modification of Class E Airspace; Kelso, WA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action will amend existing Class E airspace at Kelso, WA, to accommodate aircraft using a new Area Navigation (RNAV) Global Positioning System (GPS) Standard Instrument Approach Procedure (SIAP) at Southwest Washington Regional Airport. This will improve the safety and management of Instrument Flight Rules (IFR) operations at the airport.

DATES: Effective date, 0901 UTC, September 23, 2010. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

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

SUPPLEMENTARY INFORMATION:

History

On April 19, 2010, the FAA published in the **Federal Register** a notice of proposed rulemaking to amend controlled airspace at Kelso, WA (75 FR 20322). Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

Class E airspace designations are published in paragraph 6005 of FAA Order 7400.9T signed August 27, 2009, and effective September 15, 2009, which is incorporated by reference in 14 CFR part 71.1. The Class E airspace designations listed in this document will be published subsequently in that Order.

The Rule

This action amends Title 14 Code of Federal Regulations (14 CFR) part 71 by modifying Class E airspace extending upward from 700 feet above the surface, at Southwest Washington Regional Airport, providing adequate controlled airspace to accommodate IFR aircraft executing new RNAV GPS SIAP's at the airport. This action is necessary for the safety and management of IFR operations.

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

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

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

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

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

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

§ 71.1 [Amended]

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

signed August 27, 2009, and effective September 15, 2009 is amended as follows:

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

* * * * *

ANM WA, ES Kelso, WA [Modified]

Southwest Washington Regional Airport, WA (Lat. 46°07′05″ N., long. 122°53′54″ W.)

* * * * *

That airspace extending upward from 700 feet above the surface within a 6.4-mile radius of the Southwest Washington Regional Airport, and 2.4 miles each side of the 290° bearing of the airport extending 9.1 miles west, and 4.3 miles each side of the 337° bearing of the airport extending 22.2 miles northwest, and 5.8 miles west and 3 miles east of the 012° bearing of the airport extending 18.2 miles north of the airport.

Issued in Seattle, Washington, on June 14, 2010.

Kevin Nolan,

Acting Manager, Operations Support Group, Western Service Center.

[FR Doc. 2010–15436 Filed 6–28–10; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 312 and 314

[Docket No. FDA–2010–N–0010]

Change of Address; Abbreviated New Drug Applications; Technical Amendment

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule; technical amendment.

SUMMARY: The Food and Drug Administration (FDA) is amending its regulations to update the address for applicants to submit abbreviated new drug applications (ANDAs) and ANDA amendments, supplements, and resubmissions. FDA is also updating the address for ANDA applicants to submit investigational new drug applications (INDs) for in vivo bioavailability and bioequivalence studies in humans that are intended to support ANDAs. This action is being taken to ensure accuracy and clarity in the agency's regulations.

DATES: This rule is effective August 1, 2010.

FOR FURTHER INFORMATION CONTACT: Martin Shimer, Center for Drug Evaluation and Research, Food and Drug Administration, 7500 Standish Pl., MPN II, Rockville, MD 20855, 240–276–8675.

SUPPLEMENTARY INFORMATION: FDA is amending 21 CFR 314.440(a)(2) to update the address for applicants to submit ANDAs and ANDA amendments, supplements, and resubmissions. FDA is also amending 21 CFR 312.140(a)(1) to update the address for ANDA applicants to submit INDs for in vivo bioavailability and bioequivalence studies that are intended to support ANDAs. The new address for all these submissions is Office of Generic Drugs (HFD–600), Center for Drug Evaluation and Research, Food and Drug Administration, Metro Park North VII, 7620 Standish Pl., Rockville, MD 20855. This action is being taken to ensure accuracy and clarity in the agency's regulations.

Publication of this document constitutes final action on these changes under the Administrative Procedure Act (5 U.S.C. 553). FDA has determined that notice and public comment are unnecessary because this amendment to the regulations provides only technical changes to update an address for the submission of ANDAs; ANDA amendments, supplements, and resubmissions; and INDs related to ANDAs.

List of Subjects

21 CFR Part 312

Drugs, Exports, Imports, Investigations, Labeling, Medical research, Reporting and recordkeeping requirements, Safety.

21 CFR Part 314

Administrative practice and procedure, Confidential business information, Drugs, Reporting and recordkeeping requirements.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR parts 312 and 314 are amended as follows:

PART 312—INVESTIGATIONAL NEW DRUG APPLICATION

■ 1. The authority citation for 21 CFR part 312 continues to read as follows:

Authority: 21 U.S.C. 321, 331, 351, 352, 353, 355, 360bbb, 371; 42 U.S.C. 262.

§ 312.140 [Amended]

■ 2. Section 312.140 is amended in paragraph (a)(1) by removing "II, 7500" and adding in its place "VII, 7620".

PART 314—APPLICATIONS FOR FDA APPROVAL TO MARKET A NEW DRUG

■ 3. The authority citation for 21 CFR part 314 continues to read as follows:

Authority: 21 U.S.C. 321, 331, 351, 352, 353, 355, 356, 356a, 356b, 356c, 371, 374, 379e.

§ 314.440 [Amended]

■ 4. Section 314.440 is amended in the first sentence of paragraph (a)(2) by removing "II, 7500 Standish Place., rm. 150" and adding in its place "VII, 7620 Standish Pl.".

Dated: June 23, 2010.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2010–15711 Filed 6–28–10; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR Part 1308

[Docket No. DEA–305F]

RIN 1117–AB16

Control of Immediate Precursor Used in the Illicit Manufacture of Fentanyl as a Schedule II Controlled Substance

AGENCY: Drug Enforcement Administration (DEA), Department of Justice.

ACTION: Final Rule.

SUMMARY: The Drug Enforcement Administration (DEA) is designating the precursor chemical, 4-anilino-N-phenethyl-4-piperidine (ANPP) as an immediate precursor for the schedule II controlled substance fentanyl under the definition set forth in 21 U.S.C. 802(23). Furthermore, DEA is finalizing the control of ANPP as a schedule II substance under the Controlled Substances Act (CSA), pursuant to the authority in 21 U.S.C. 811(e), which states that an immediate precursor may be placed in the same schedule as the controlled substance it produces, without regard to the procedures required by 21 U.S.C. 811(a) and (b) and without regard to the findings required by 21 U.S.C. 811(a) and 812(b).

ANPP is the immediate chemical intermediary in the synthesis process currently used by clandestine laboratory operators for the illicit manufacture of the schedule II controlled substance fentanyl. In 2005 and 2006, the distribution of illicitly manufactured fentanyl caused an unprecedented outbreak of hundreds of fentanyl-related

overdoses in the United States. DEA believes that the control of ANPP as a schedule II controlled substance is necessary to prevent its diversion as an immediate chemical intermediary for the illicit production of fentanyl.

DATES: This rulemaking becomes effective August 30, 2010.

FOR FURTHER INFORMATION CONTACT: Christine A. Sannerud, Ph.D., Chief, Drug and Chemical Evaluation Section, Office of Diversion Control, Drug Enforcement Administration, 8701 Morrissette Drive, Springfield, VA 22152 at (202) 307–7183.

SUPPLEMENTARY INFORMATION: The DEA is extremely concerned with the recent increase in the illicit manufacture and distribution of fentanyl, which has resulted in hundreds of fentanyl-related overdoses and fentanyl-related deaths in several areas of the country. Therefore, on April 9, 2008, DEA published a Notice of Proposed Rulemaking (NPRM) [73 FR 19175] to designate the precursor chemical, 4-anilino-N-phenethyl-4-piperidine (ANPP) as an immediate precursor for the schedule II controlled substance fentanyl under the definition set forth in 21 U.S.C. 802(23). This rulemaking finalizes that NPRM.

Under the immediate precursor provision in 21 U.S.C. 811(e), DEA may schedule an immediate precursor "without regard to the findings required by" section 811(a) or section 812(b) and "without regard to the procedures" prescribed by section 811(a) and (b). Because of the authority in section 811(e), DEA need not address the "factors determinative of control" in section 811 or the findings required for placement in schedule II in section 812(b)(2).

This rulemaking finalizes two actions. It (1) designates the precursor chemical ANPP as an immediate precursor for the schedule II controlled substance fentanyl under the definition set forth in 21 U.S.C. 802(23); and (2) controls ANPP as a schedule II substance pursuant to the authority in 21 U.S.C. 811(e).

Background

Fentanyl is a schedule II controlled substance. Fentanyl and analogues of fentanyl are the most potent opioids available for human and veterinary use. Fentanyl produces opioid effects that are indistinguishable from morphine or heroin, but fentanyl has a greater potency and a shorter duration of action. Fentanyl is approximately 50 to 100 times more potent than morphine and 30 to 50 times more potent than heroin, depending on the physiological or behavioral measure, the route of administration, and other factors.

The legitimate medical use of fentanyl is for anesthesia and analgesia, but fentanyl's euphoric effects are highly sought after by narcotic addicts. Fentanyl can serve as a direct pharmacological substitute for heroin in opioid-dependent individuals. Fentanyl is a very dangerous substitute for heroin, however, because the amount that produces a euphoric effect also induces respiratory depression. Furthermore, due to fentanyl's greater potency, illicit drug dealers have trouble adjusting ("cutting") pure fentanyl into non-lethal dosage concentrations. Heroin users similarly have difficulty determining how much to take to get their "high" and sometimes mistakenly take a lethal quantity of the fentanyl. Unfortunately, only a slight excess of fentanyl can be, and is often, lethal because the resulting level of respiratory depression is sufficient to cause the user to stop breathing.

Illicit Fentanyl-Related Deaths

In 2005 and 2006, DEA saw a sharp increase in the seizures of illicit fentanyl. The distribution of illicit fentanyl or illicit fentanyl combined with heroin or with cocaine (i.e., a "speedball") resulted in an outbreak of hundreds of confirmed and suspected fentanyl-related overdose deaths in the United States since April 2005, according to the Centers for Disease Control and Prevention and medical examiners representing numerous cities and counties across the United States. DEA terms fentanyl-related deaths "suspected" until confirmed through the completion of an autopsy, a positive toxicological testing result for fentanyl in the blood and the reporting of the death to the DEA.

To address this emergency health situation, DEA published an Interim Final Rule, "Control of a Chemical Precursor Used in the Illicit Manufacture of Fentanyl as a List I Chemical" (72 FR 20039, April 23, 2007), followed by a Final Rule (73 FR 43355, July 25, 2008), to control N-phenethyl-4-piperidone (NPP), the chemical precursor to ANPP, as a List I chemical. As DEA discussed extensively in that Interim Final Rule, at least 972 confirmed fentanyl-related deaths, and 162 suspected fentanyl-related deaths, mostly in Delaware, Illinois, Maryland, Michigan, Missouri, New Jersey, and Pennsylvania were initially reported to the DEA. The number of fentanyl-related deaths significantly decreased after October 2006 and continued at lower levels following control of the precursor NPP in 2007.

From the information and data collected, there is a strong indication that the fentanyl in these confirmed and suspected fentanyl-related deaths is the result of illicitly manufactured fentanyl, rather than from fentanyl diverted from legal pharmaceutical manufacturers. Forensic testing of seized fentanyl drug exhibits can identify manufacture procedure markers such as benzylfentanyl and ANPP. The forensic data suggests that most of these fentanyl-related deaths are from fentanyl illicitly manufactured by the procedure called the Siegfried method, discussed in DEA's Interim Final Rule, which uses NPP/ANPP.

Synthesis of Fentanyl

DEA has determined from the forensic testing of seized illicit fentanyl that two primary synthesis routes (i.e., the Janssen synthesis route and the Siegfried method) are being used to produce fentanyl clandestinely. In 1965, Janssen Pharmaceutical patented the original synthesis procedure for fentanyl. The Janssen synthesis route is difficult to perform and is beyond the rudimentary skills of most clandestine laboratory operators. Only individuals who have acquired advanced chemistry knowledge and skills have successfully used this synthesis route. Forensic laboratories can determine whether fentanyl was manufactured illicitly by the Janssen route by detecting the impurity benzylfentanyl in the tested fentanyl drug exhibit.

In the early 1980s, an alternate route for fentanyl synthesis was published in the scientific literature; it uses N-phenethyl-4-piperidone (NPP) as the starting material. The NPP synthesis route is described on the Internet and is referred to as the Siegfried method. The chemical intermediary ANPP is produced during the synthesis and is the immediate precursor used in the illicit manufacture of fentanyl in the last stage of the Siegfried method. The Chemical Abstracts Service Registry Number [1] (CASRN) for ANPP is 21409–26–7. The detection of the impurity 4-anilino-N-phenethyl-4-piperidine (ANPP) without the presence of benzylfentanyl in the fentanyl drug exhibit suggests that the fentanyl was manufactured by the Siegfried method (or a modified version) that produces

[1] The Chemical Abstracts Service Registry Number (CASRN) is created by the Chemical Abstracts Service (CAS) Division of the American Chemical Society and is part of an automated information system housing data and information on specific, definable chemical substances. The CASRN provides consistent and unambiguous identification of chemicals and facilitates sharing of chemical information.

the precursor ANPP and then converts ANPP directly to fentanyl. (A small amount of ANPP is not consumed in the last reaction in the synthesis, and thus a trace amount of ANPP remains in the fentanyl.)

The increase in street-level fentanyl may be the result of the relative ease with which fentanyl can be produced via the Siegfried method and the widespread distribution of the Siegfried method on the Internet. Preliminary data indicate that the majority of the deaths in the 2005–2006 fentanyl outbreak have resulted from the distribution of illicit fentanyl made by the Siegfried method and marked by traces of ANPP rather than benzylfentanyl.

Role of ANPP in Synthesis of Fentanyl

Since 2000, four of the five domestic fentanyl clandestine laboratories seized by law enforcement agents have used the Siegfried method or a modified version of the Siegfried method in manufacturing fentanyl. The amount of illicit fentanyl and precursor chemicals found at these four laboratories could have generated a total of 5,800 grams of illicit fentanyl. Since fentanyl is potent in sub-milligram quantities, the subsequent "cutting" of 5,800 grams of illicit fentanyl would be sufficient to make about 46 million fentanyl doses.

The precursor chemical NPP is the starting material utilized in the Siegfried method of synthesizing fentanyl, both in industry and in illicit drug laboratories. Under a separate rulemaking first published as an interim rule on April 23, 2007 (72 FR 20039), followed by a final rule on July 25, 2008 (73 FR 43355), DEA has controlled the precursor NPP as a List I chemical under the regulatory control provisions of the CSA (21 CFR part 1300).

During the production process, the starting material, NPP, is subjected to a series of chemical reactions in order to produce the intermediary chemical ANPP. The ANPP is then subjected to a simple chemical reaction resulting in the synthesis of fentanyl. DEA has not identified any industrial uses for ANPP and believes that ANPP is only produced as a chemical intermediary in the production of fentanyl, either in the legitimate production of pharmaceutical fentanyl or the illicit production of fentanyl in clandestine laboratories. ANPP is, therefore, an immediate chemical intermediary in the synthesis of fentanyl and is produced primarily for this purpose.

DEA is controlling ANPP as a schedule II controlled substance in an effort to prevent its use in production of illicit fentanyl. DEA believes control is necessary to prevent unscrupulous chemists from synthesizing and distributing ANPP (as an unregulated material), and selling it through the Internet and other channels to individuals who may wish to acquire an unregulated precursor for fentanyl synthesis. DEA believes this action is also advisable in order to deter the theft of ANPP from legitimate pharmaceutical firms where it is generated in the course of fentanyl production. It has been determined by DEA's Office of Forensic Sciences that ANPP can also be produced through synthetic pathways that do not require NPP as the starting material. Therefore, DEA believes that controlling ANPP directly is necessary to prevent the illicit production of fentanyl.

Designation as an Immediate Precursor

Under 21 U.S.C. 811(e), the Attorney General may place an immediate precursor into the same schedule as the controlled substance that the immediate precursor is used to make. The substance must meet the requirements of an immediate precursor under 21 U.S.C. 802(23). The term "immediate precursor" as defined in 21 U.S.C. 802(23) means a substance:

(A) Which the Attorney General has found to be and by regulation designated as being the principal compound used, or produced primarily for use, in the manufacture of a controlled substance;

(B) which is an immediate chemical intermediary used or likely to be used in the manufacture of such controlled substance; and

(C) the control of which is necessary to prevent, curtail, or limit the manufacture of such controlled substance.

DEA finds that ANPP meets the three criteria for the definition of an immediate precursor under 21 U.S.C 802(23). First, DEA finds that ANPP is produced primarily for use in the manufacture of the schedule II controlled substance fentanyl. As stated in the preceding section, under the Siegfried method, ANPP is typically produced from the starting material NPP and is then subjected to a simple one-step chemical reaction to obtain the schedule II controlled substance fentanyl. DEA has not identified any industrial or other uses for ANPP and believes that it is produced primarily during the synthesis of fentanyl.

Second, DEA finds that ANPP is an immediate chemical intermediary used in the manufacture of the controlled substance fentanyl. As stated earlier, ANPP is produced as an intermediary in the fentanyl synthetic pathway. After it is synthesized, the ANPP is subjected to a simple chemical reaction that converts it directly to fentanyl.

Third, DEA finds that controlling ANPP is necessary to prevent, curtail, and limit the unlawful manufacture of the controlled substance fentanyl. As noted above, DEA believes this action is necessary to assist in preventing the possible theft of ANPP from legitimate pharmaceutical firms where it is a chemical intermediary generated for fentanyl production. As a schedule II substance, ANPP will be safeguarded to the same degree that pharmaceutical firms now safeguard the fentanyl that they produce. DEA believes this increased level of security is necessary to prevent diversion of ANPP.

As noted previously, ANPP can also be produced through synthetic pathways that do not require NPP as the precursor material. Accordingly, DEA believes control is necessary to prevent unscrupulous chemists from synthesizing ANPP and selling it (as an unregulated material) through the Internet and other channels to individuals who may wish to acquire an unregulated precursor for fentanyl synthesis, in order to circumvent the regulation of NPP as a List I chemical.

DEA believes that the control of ANPP is necessary to prevent its production and use in the illicit production of fentanyl. Therefore, DEA is designating ANPP as an immediate precursor of fentanyl pursuant to 21 U.S.C. 802(23) and 21 U.S.C. 811(e).

Placement in Schedule II—Findings Required Under CSA Immediate Precursor Provisions

Under the authority in 21 U.S.C. 811(e), once ANPP is designated as an immediate precursor under 21 U.S.C. 802(23), it may be placed directly into schedule II (or a schedule with a higher numerical designation). The immediate precursor provision in 21 U.S.C. 811(e) permits DEA to schedule an immediate precursor "without regard to the findings required by" section 811(a) or section 812(b) and "without regard to the procedures" prescribed by section 811(a) and (b). Accordingly, DEA need not address the "factors determinative of control" in section 811(c) [2] or the

[2] Under administrative scheduling of a substance pursuant to 21 U.S.C. 811(c), DEA must consider the "factors determinative of control." The DEA must consider the following factors with respect to each drug or other substance proposed to be controlled in a schedule:

(1) Its actual or relative potential for abuse;

(2) Scientific evidence of its pharmacological effect, if known;

(3) The state of current scientific knowledge regarding the drug or other substance;

(4) Its history and current pattern of abuse;

Continued

findings required for placement in schedule II in section 812(b)(2).[3]

Based on the finding that ANPP is an "immediate precursor" for fentanyl, DEA is hereby placing ANPP directly into schedule II.

NPRM Comments

As part of this NPRM, DEA solicited comments and requested information on any possible legitimate uses of ANPP unrelated to fentanyl (including industrial uses) to assess the potential commercial impact of scheduling ANPP. DEA solicited input from all potentially affected parties regarding: (1) The types of legitimate industries using ANPP; (2) the legitimate uses of ANPP; (3) the size of the domestic market for ANPP; (4) the number of manufacturers of ANPP; (5) the number of distributors of ANPP; (6) the level of import and export of ANPP; (7) the potential burden these proposed regulatory controls of ANPP may have on legitimate commercial activities; (8) the potential number of individuals/firms that may be adversely affected by these proposed regulatory controls (particularly with respect to the impact on small businesses); and (9) any other information on the manner of manufacturing, distribution, consumption, storage, disposal, and uses of ANPP by industry and others. DEA invited all interested parties to provide any information on any legitimate uses of ANPP in industry, commerce, academia, research and development, or other applications.

In response to the NPRM, DEA received only one comment. The commenter expressed concerns that the Aggregate Production Quotas for ANPP would need to take into account production losses that are inherent in the manufacture of fentanyl. Additionally, the commenter expressed concerns that the effective date of the rulemaking may adversely impact the timetable for production of fentanyl, since manufacturers would be required to obtain ANPP registrations and manufacturing quotas prior to being able to produce fentanyl.

In response to this comment, DEA recognizes that the ANPP Aggregate Production Quota must be established at a level that allows adequate production losses. Additionally, DEA is aware of the concerns of fentanyl manufacturers and will use its best efforts to minimize the impact of the new ANPP regulations on the legitimate production of fentanyl for medical use. Any person who manufactures, distributes, imports, exports, engages in research or conducts instructional activities with ANPP, or who desires to manufacture, distribute, import, export, engage in instructional activities or conduct research with ANPP, must be registered to conduct such activities in accordance with part 1301 of Title 21 of the Code of Federal Regulations. Current bulk manufacturers, importers, and exporters of ANPP must submit an application for registration or an application to amend an existing registration to include ANPP on or before August 30, 2010 and may continue their activities until DEA has approved or denied that application.

Requirements for Handling Schedule II Substances

This rulemaking finalizes two actions. It (1) designates the precursor chemical ANPP as an immediate precursor for the schedule II controlled substance fentanyl under the definition set forth in 21 U.S.C. 802(23); and (2) controls ANPP as a schedule II substance pursuant to the authority in 21 U.S.C. 811(e).

The scheduling of ANPP as an immediate precursor will subject ANPP to all of the regulatory controls and administrative, civil, and criminal sanctions applicable to the manufacture, distribution, dispensing, importing, and exporting of a schedule II controlled substance.

DEA has not identified any legitimate industrial use for ANPP, other than its role as an intermediary chemical in the production of fentanyl by the pharmaceutical industry. If ANPP is used only to manufacture fentanyl, the regulation of ANPP as an immediate precursor will not represent a new, major regulatory burden because fentanyl manufacturers have already implemented the CSA requirements for schedule II substances. For example, since fentanyl is a schedule II controlled substance, these firms will already be schedule II registrants and will already have adequate schedule II security. As a result of this rulemaking, these firms will need to begin storing ANPP under the same security controls already used for the final product fentanyl. The impact upon legitimate industry of controlling ANPP as a schedule II substance should be minimal. The regulatory requirements will include the following:

Registration. Any person who manufactures, distributes, imports, exports, engages in research or conducts instructional activities with ANPP, or who desires to manufacture, distribute, import, export, engage in instructional activities or conduct research with ANPP, must be registered to conduct such activities in accordance with 21 CFR part 1301. Current bulk manufacturers, importers and exporters of ANPP must submit an application for registration or an application to amend an existing registration to include ANPP on or before August 30, 2010 and may continue their activities until DEA has approved or denied that application.

Security. ANPP will be subject to schedule II security requirements. To prevent diversion, ANPP will have to be manufactured, distributed, and stored in accordance with the standards for physical security and the operating procedures set forth in 21 CFR 1301.71, 1301.72(a), (c), and (d), 1301.73, 1301.74, 1301.75(b) and (c), 1301.76, and 1301.77.

This rule does not establish any new security requirements for schedule II controlled substances. The following existing security requirements are provided for informational purposes only.

Existing DEA physical security regulations require that, for schedule I and II controlled substances, raw material, bulk materials awaiting further processing, and finished products be stored in either a safe or steel cabinet (if the quantity is small) or in a vault (21 CFR 1301.72). DEA regulations set forth specific requirements regarding these structures. Controlled substances must be stored in these facilities during the manufacturing process except where a continuous manufacturing process should not be interrupted (21 CFR 1301.73). Secure storage areas are required to have an alarm system which, upon attempted unauthorized entry, shall transmit a signal directly to a central protection company or to a local or state police agency which has a legal duty to respond, or a 24-hour control station operated by the registrant, or other protection as approved by DEA (21 CFR 1301.72(a)(1)(iii), 1301.72(a)(3)(iv)). The controlled substances storage areas are required to be accessible only to an absolute minimum number of specifically authorized employees (21 CFR 1301.72(d)). When it is necessary for other personnel or guests to be present

(5) The scope, duration, and significance of abuse;

(6) What, if any, risk there is to the public health;

(7) Its psychic or physiological dependence liability; and

(8) Whether the substance is an immediate precursor of a substance already controlled.

21 U.S.C. 811(e) specifies that none of these factors must be considered, however, in the control of an "immediate precursor."

[3] The findings for schedule II include (A) the drug or other substance has a high potential for abuse; (B) the drug or other substance has a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions; and (C) abuse of the drug or other substance may lead to severe psychological or physical dependence.

in, or pass through, such secure areas, the registrant shall provide for adequate observation of the area by an employee (21 CFR 1301.72(d), 1301.73(c)).

Labeling and Packaging. All labels and labeling for commercial containers of ANPP that are distributed will be required to comply with the requirements of 21 CFR 1302.03–1302.07.

Quotas. Quotas for ANPP will be established pursuant to 21 CFR part 1303.

Inventory. Every registrant who possesses any quantity of ANPP will be required to keep an inventory of all stocks of the substance on hand pursuant to 21 CFR 1304.03, 1304.04 and 1304.11.

Records. All registrants will be required to keep records pursuant to 21 CFR 1304.03, 1304.04, and 1304.21–1304.23.

Reports. All registrants will be required to submit reports in accordance with 21 CFR 1304.33.

Orders. All registrants involved in the distribution of ANPP will be required to comply with the order requirements of 21 CFR part 1305.

Importation and Exportation. All registrants involved in the importation and exportation of ANPP will be required to comply with 21 CFR part 1312.

Prescriptions. All prescriptions for ANPP or prescriptions for products containing ANPP will be required to be issued pursuant to 21 CFR 1306.03–1306.06 and 21 CFR §§ 1306.11–1306.15.

Criminal Liability. Any activity with ANPP in violation of or not authorized under the Controlled Substances Act or the Controlled Substances Import and Export Act will be unlawful and potentially subject to criminal penalties (21 U.S.C. 841–863 and 959–964).

Regulatory Certifications

Regulatory Flexibility and Small Business Concerns

The Regulatory Flexibility Act (5 U.S.C. 601–612) requires agencies to determine whether a rule will have a significant economic impact on a substantial number of small entities. If an agency finds that there is a significant economic impact on a substantial number of small entities, the agency must consider whether alternative approaches could mitigate the impact on small entities. The size criteria for small entities are defined by the Small Business Administration in 13 CFR 121.201.

DEA has not identified any legitimate industrial use for ANPP, other than its role as an intermediary chemical in the production of fentanyl by the pharmaceutical industry. DEA has not identified any firms that import, export, or distribute ANPP. If ANPP is used only to manufacture fentanyl, the potential regulation of ANPP as an immediate precursor will not represent a new, major regulatory burden, because fentanyl manufacturers have already implemented the CSA requirements for the handling of schedule II substances. Consequently, DEA believes this rule will not have a significant economic impact on a substantial number of small entities. DEA did not receive any comments suggesting that this rule will result in a significant economic impact on any small entities.

Executive Order 12866

The Deputy Administrator certifies that this rulemaking has been drafted in accordance with the principles in Executive Order 12866 § 1(b). It has been determined that this is "a significant regulatory action." Therefore, this action has been reviewed by the Office of Management and Budget.

DEA is regulating ANPP as a schedule II substance. Any person manufacturing, distributing, dispensing, conducting research with, importing, or exporting ANPP will have to register each location where ANPP is handled, maintain records of transactions involving ANPP, and take steps to ensure that inventories are secure (e.g., stored in sealed containers in areas where access can be controlled or monitored). DEA has not identified any domestic chemical companies that distribute ANPP, other than the production as an intermediate during the manufacture of fentanyl. Such manufacturers are already registered with DEA for the schedule II drug fentanyl.

Executive Order 12988

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

Executive Order 13132

This rulemaking does not preempt or modify any provision of state law; nor does it impose enforcement responsibilities on any state; nor does it diminish the power of any state to enforce its own laws. Accordingly, this rulemaking does not have federalism implications warranting the application of Executive Order 13132.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $120,000,000 or more (adjusted for inflation) in any one year, and will not significantly or uniquely affect small governments. Therefore, no actions are deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Congressional Review Act

This rule is not a major rule as defined by Section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996 (Congressional Review Act). This rule will not result in an annual effect on the economy of $100,000,000 or more; a major increase in cost or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

List of Subjects in 21 CFR Part 1308

Administrative practice and procedure, Drug traffic control, Reporting and recordkeeping requirements.

■ For the reasons set out above, 21 CFR part 1308 is amended as follows:

PART 1308—SCHEDULES OF CONTROLLED SUBSTANCES

■ 1. The authority citation for part 1308 continues to read as follows:

Authority: 21 U.S.C. 811, 812, 871(b) unless otherwise noted.

■ 2. Section 1308.12 is amended by adding a new paragraph (g)(3) to read as follows:

§ 1308.12 Schedule II.

* * * * *

(g) * * *

(3) Immediate precursor to fentanyl:

(i) 4-anilino-N-phenethyl-4-piperidine (ANPP) 8333

(ii) [Reserved]

Dated: June 19, 2010.

Michele M. Leonhart,

Deputy Administrator.

[FR Doc. 2010–15520 Filed 6–28–10; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR Part 1308

[Docket No. DEA–313F]

RIN 1117–AB26

Correction of Code of Federal Regulations: Removal of Temporary Listing of Benzylfentanyl and Thenylfentanyl as Controlled Substances

AGENCY: Drug Enforcement Administration (DEA), Department of Justice

ACTION: Final rule.

SUMMARY: This rulemaking corrects Title 21 Code of Federal Regulations (CFR) by deleting regulations which list the substances benzylfentanyl and thenylfentanyl as being temporarily subject to schedule I controls under the emergency scheduling provisions of the Controlled Substances Act (CSA). The temporary scheduling of benzylfentanyl and thenylfentanyl expired on November 29, 1986. DEA determined that these compounds were both essentially inactive, with no evidence of abuse potential. As such, these compounds are no longer schedule I controlled substances and all references to these compounds are being deleted from DEA regulations.

DATES: This rulemaking becomes effective June 29, 2010.

FOR FURTHER INFORMATION CONTACT: Christine A. Sannerud, PhD, Chief, Drug and Chemical Evaluation Section, Office of Diversion Control, Drug Enforcement Administration, 8701 Morrissette Drive, Springfield, VA 22152 at (202) 307–7183.

SUPPLEMENTARY INFORMATION: The CSA was amended by the Comprehensive Crime Control Act of 1984 (Pub. L.98–473) which became effective on October 12, 1984. This Act included a provision (21 U.S.C. 811(h)) which allows the DEA Administrator to place a substance, on a temporary basis, into schedule I when necessary to avoid an imminent hazard to the public safety. This emergency scheduling authority permits scheduling a substance that is not currently controlled, is being abused, and is a risk to the public health while the formal rulemaking procedures (21 U.S.C. 811) described in the CSA are being conducted. A temporary scheduling order may be issued for one year with a possible extension of up to six months if formal scheduling procedures have been initiated. The proposal and order are published in the **Federal Register** as are the proposals and orders for formal scheduling. The emergency scheduling authority was given to DEA in an effort to streamline the scheduling process in response to the growing problem of controlled substance analogues ("designer drugs").

On October 29, 1985, DEA published a Final Rule (50 FR 43698) which temporarily placed Acetyl-alpha-methylfentanyl, Alpha-methylthiofentanyl, Beta-hydroxyfentanyl, Beta-hydroxy-3-methylfentanyl, 3-Methylthiofentanyl, Thiofentanyl, Benzylfentanyl and Thenylfentanyl into schedule I of the CSA. This control action became effective on November 29, 1985.

These substances were emergency scheduled based on their appearance in the illicit market, their similarity in chemical structure to that of controlled substances, and the likelihood that they would produce pharmacological effects similar to those of prototypic schedule I or II substances. Often there is no biological data available prior to the emergency control of illicitly produced and abused substances. Therefore, information derived from structure-activity relationship considerations plays an important role in emergency scheduling. To keep an emergency scheduled substance in schedule I, DEA must initiate traditional scheduling procedures (21 U.S.C. 811) for that substance during the one year period in which it is emergency controlled and complete the action before the expiration of 18 months. The time limitations of emergency scheduling underscore the need for timely abuse liability data and the need to determine the most efficient tests to provide the data necessary to make permanent scheduling decisions. During the one-year temporary scheduling period, DEA must acquire sufficient data to make a determination as to whether the emergency scheduled substance should remain under the CSA. Often the substances have never been studied nor are they available for study. DEA, as soon as possible after identifying a newly abused substance, provides for the synthesis of this substance for analytical reference standards and biological testing. Only then can the appropriate pharmacological and abuse liability tests be conducted.

In an effort to assess the addiction liability of these compounds, DEA contracted studies of each of the temporarily scheduled fentanyl compounds at the University of Michigan Medical School in Ann Arbor and at the Medical College of Virginia in Richmond. The studies indicated that while most of the fentanyl compounds had abuse liability profiles that warranted control, two of these temporarily scheduled compounds (benzylfentanyl and thenylfentanyl) did not have an addiction-forming or addiction-sustaining liability similar to morphine.

Based on the results of these studies, on November 28, 1986, the DEA extended the temporary scheduling of six of these substances in schedule I. However, benzylfentanyl and thenylfentanyl were specifically omitted from this extension (and any future permanent control) because the pharmacological and biological testing of the substances, which included assessment of morphine-like activity, addiction liability, and analgesic effect, indicated that the compounds were both essentially inactive, with no evidence of abuse potential.

Both of these substances were temporarily controlled because they were initially found in street samples with other fentanyl analogues and were most likely unreacted intermediates in the synthesis of the target fentanyl analogues. The DEA, having concluded that these two drugs lacked morphine-like addictive properties, allowed the temporary regulation of benzylfentanyl and thenylfentanyl to expire on November 29, 1986. Therefore, these two substances were no longer regulated as controlled substances upon that date. In contrast, however, DEA chose to extend temporary control of the other four fentanyl compounds in a Final Rule published November 26, 1986 (51 FR 42834) and permanently controlled them in a Final Rule published May 29, 1987 (52 FR 20070).

Action of This Rulemaking

After the temporary listing of benzylfentanyl and thenylfentanyl expired in November of 1986, these compounds were no longer controlled under the CSA. However, DEA never deleted 21 CFR 1308.11(g)(1) and (g)(2) that reference the listing of these compounds temporarily in schedule I. This rulemaking hereby corrects the CFR to delete 21 CFR 1308.11(g)(1) and (g)(2) which previously stated:

(1) N-[1-benzyl-4-piperidyl]-N-phenylpropanamide (benzylfentanyl), its optical isomers, salts and salts of isomers 9818
(2) N-[1-(2-thienyl)methyl-4-piperidyl]-N-phenylpropanamide (thenylfentanyl), its optical isomers, salts and salts of isomers 9834

This action therefore corrects part 1308 to remove any reference to control of benzylfentanyl and thenylfentanyl in schedule I.

Regulatory Certifications

Administrative Procedure Act (5 U.S.C. 553)

An agency may find good cause to exempt a rule from certain provisions of the Administrative Procedure Act (5 U.S.C. 553), including notice of proposed rulemaking and the opportunity for public comment, if it is determined to be unnecessary, impracticable, or contrary to the public interest. The temporary placement of benzylfentanyl and thenylfentanyl in Schedule I expired on November 29, 1986. The substances were never scheduled and should have been removed from Title 21 of the Code of Federal Regulations, part 1308. This Final Rule corrects this by removing benzylfentanyl and thenylfentanyl from the listing of controlled substances in schedule I. As this Final Rule makes a technical correction by removing benzylfentanyl and thenylfentanyl from the Code of Federal Regulations, DEA finds it unnecessary and impracticable to permit public notice and comment. Therefore, DEA is publishing this document as a final rule. Further, as the removal of these substances prevents confusion about the scheduling of these substances, DEA finds there is good cause to make this final rule effective immediately upon publication.

Regulatory Flexibility Act

The Deputy Administrator hereby certifies that this rulemaking has been drafted in accordance with the Regulatory Flexibility Act (5 U.S.C. 601–612), and by approving it certifies that this regulation will not have a significant economic impact upon a substantial number of small entities. This action removes the substances benzylfentanyl and thenylfentanyl from the schedules of controlled substances. These substances were temporarily scheduled in 1985 under the emergency scheduling provisions (21 U.S.C. 811, 21 CFR 1308.11(g)) and that temporary scheduling expired on November 29, 1986; however, the substances were never removed from the listing.

Executive Order 12866

The Deputy Administrator certifies that this rulemaking has been drafted in accordance with the principles in Executive Order 12866 § 1(b). It has been determined that this is not "a significant regulatory action." Therefore, this action has not been reviewed by the Office of Management and Budget.

Executive Order 12988

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

Executive Order 13132

This rulemaking does not preempt or modify any provision of state law; nor does it impose enforcement responsibilities on any state; nor does it diminish the power of any state to enforce its own laws. Accordingly, this rulemaking does not have federalism implications warranting the application of Executive Order 13132.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $120,000,000 or more (adjusted for inflation) in any one year, and will not significantly or uniquely affect small governments. Therefore, no actions are deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Congressional Review Act

This rule is not a major rule as defined by Section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996 (Congressional Review Act). This rule will not result in an annual effect on the economy of $100,000,000 or more; a major increase in cost or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

List of Subjects in 21 CFR Part 1308

Administrative practice and procedure, Drug traffic control, Reporting and recordkeeping requirements.

■ For the reasons set out above, 21 CFR part 1308 is amended as follows:

PART 1308—SCHEDULES OF CONTROLLED SUBSTANCES

■ 1. The authority citation for part 1308 continues to read as follows:

Authority: 21 U.S.C. 811, 812, 871(b) unless otherwise noted.

■ 2. Section 1308.11 is amended by revising paragraph (g) to read as follows:

§ 1308.11 Schedule I.

* * * * *

(g) *Temporary listing of substances subject to emergency scheduling.* Any material, compound, mixture or preparation which contains any quantity of the following substances:

(1) [Reserved.]

(2) [Reserved.]

Dated: June 19, 2010.

Michele M. Leonhart,

Deputy Administrator.

[FR Doc. 2010–15529 Filed 6–28–10; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR Part 1310

[Docket No. DEA–222F]

RIN 1117–AA64

Exempt Chemical Mixtures Containing Gamma-Butyrolactone

AGENCY: Drug Enforcement Administration (DEA), Justice.

ACTION: Final rule.

SUMMARY: This rulemaking finalizes a November 12, 2008, Notice of Proposed Rulemaking in which DEA proposed that chemical mixtures that are 70 percent or less gamma-butyrolactone (GBL), by weight or volume, be automatically exempt from regulatory controls under the Controlled Substances Act (CSA). DEA is seeking through this rulemaking to exempt only those chemical mixtures that do not represent a significant risk of diversion. This regulation makes GBL chemical mixtures, in concentrations greater than 70 percent, subject to List I chemical regulatory requirements of the CSA, except if exempted through an existing categorical exemption. DEA is taking this action because there is a serious threat to the public safety associated with the ease by which GBL is chemically converted to the schedule I controlled substance gamma-hydroxybutyric acid (GHB).

DEA recognizes that concentration criteria alone cannot identify all mixtures that warrant exemption. As a result, DEA regulations provide for an application process by which manufacturers may obtain exemptions from CSA regulatory controls for those GBL chemical mixtures that are not automatically exempt under the concentration criteria.

DATES: This rulemaking becomes effective July 29, 2010. Persons seeking registration must apply on or before July 29, 2010 to continue their business pending final action by DEA on their application.

FOR FURTHER INFORMATION CONTACT: Christine A. Sannerud, PhD, Chief, Drug and Chemical Evaluation Section, Office of Diversion Control, Drug Enforcement Administration, 8701 Morrissette Drive, Springfield, VA 22152; Telephone: (202) 307–7183.

SUPPLEMENTARY INFORMATION:

DEA's Legal Authority

DEA implements the Comprehensive Drug Abuse Prevention and Control Act of 1970, often referred to as the Controlled Substances Act (CSA) and Controlled Substances Import and Export Act (21 U.S.C. 801 *et seq.*), as amended. DEA publishes the implementing regulations for these statutes in Title 21 of the Code of Federal Regulations (CFR), parts 1300 to end. These regulations are designed to ensure that there is a sufficient supply of controlled substances for legitimate medical purposes and to deter the diversion of controlled substances to illegal purposes. The CSA mandates that DEA establish a closed system of control for manufacturing, distributing, and dispensing controlled substances. Any person who manufactures, distributes, dispenses, imports, exports, or conducts research or chemical analysis with controlled substances must register with DEA (unless exempt) and comply with the applicable requirements for the activity. The CSA as amended also requires DEA to regulate the manufacture and distribution of chemicals that may be used to manufacture controlled substances. Listed chemicals that are classified as List I chemicals are important to the manufacture of controlled substances. Those classified as List II chemicals may be used to manufacture controlled substances.

Illicit Uses of Gamma-Butyrolactone

Gamma-Butyrolactone, or GBL, is a chemical that is used as a precursor in the illicit manufacture of the schedule I controlled substance gamma-hydroxybutyric acid, or GHB. GBL is a necessary and important chemical precursor in the clandestine synthesis of GHB because, to date, no other chemical has been identified as a substitute for GBL in the clandestine process. Congress recognized this and regulated GBL as a List I chemical upon enactment of Pub. L. 106–172, the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000, on February 18, 2000.

GBL and GHB induce a sense of euphoria and intoxication and are abused for their central nervous system (CNS) depressant effect. An overdose from GBL or GHB may result in respiratory depression, coma, and even death. Both substances have been associated with drug-facilitated sexual assaults. The Drug Abuse Warning Network (DAWN) is a national surveillance system operated by the Substance Abuse and Mental Health Services Administration (SAMHSA) to monitor trends in drug emergency department visits. SAMHSA collects information on GHB and GBL separately but reports GHB and GBL together in its publications. This reflects the similar threat to public safety and abuse liability of GBL to GHB.

The conversion of GBL to GHB in a clandestine laboratory is a simple one-step process. Availability of GBL is the determining factor in producing GHB, not the execution of complicated chemical procedures or having sophisticated scientific equipment. GBL is a unique chemical precursor. It can be either converted into GHB by a simple chemical reaction or efficiently converted into GHB by the body upon ingestion, thus producing the same pharmacological effects as ingesting GHB. For this reason, abusers or predators seeking to use GBL on their victims routinely substitute GBL for GHB to obtain the same type of intoxication.

Other Laws That Apply to GBL: Controlled Substance Analogue Provisions

Section 802(32)(B) of Title 21 provides that the designation of GBL, or any other chemical, as a listed chemical does not preclude a finding that the chemical is a controlled substance analogue under subparagraph (A) of the definition 21 U.S.C. 802(32)(A).[1] A controlled substance analogue is treated, for purposes of Federal law, as a schedule I controlled substance to the extent intended for human consumption (21 U.S.C. 813). The analogue provision of the CSA has been applied to prosecute individuals who have diverted GBL for human consumption. Although a chemical commodity when used by legitimate industry, diversion of GBL is tantamount to diversion of a schedule I controlled substance if intended for human consumption.

Concern Over GBL-Containing Chemical Mixtures

Prior to control as a List I chemical, GBL had been sold under false pretenses to disguise its intended use. Suppliers pretended that GBL was being sold for use as ink jet printer cleaners, room deodorizers, and as educational kits (which purport to demonstrate the scientific principle of an exothermic chemical reaction).

Since the designation of GBL as a List I chemical in 2000, persons who manufacture, distribute, import, or export GBL must be registered with DEA and maintain records of transactions in GBL. These regulatory requirements prevent unscrupulous persons from freely distributing GBL. Persons without a legitimate business need to manufacture or distribute GBL do not receive the required registration from DEA. DEA believes that those wishing to traffic GBL are less willing to purchase GBL from DEA-approved registrants who are required to maintain records that are accessible to DEA.

DEA has observed the retail marketing and promotion of chemical mixtures containing GBL. Exempt chemical mixtures containing GBL were sold as cosmetic products and contained greater than 99 percent GBL (along with dye(s), fragrance(s), skin conditioners, and other ingredients). DEA became aware that persons were purchasing such products for conversion to GHB or directly ingesting these products for their GBL content. Retailers reported that they quickly sold out of these products. DEA notified retailers of the potential for abuse, which resulted in the voluntary withdrawal of these products from store shelves. Manufacturers of said products stated their intent to reformulate these products.

DEA is concerned that legitimate businesses may be unintentionally contributing to the diversion of GBL. Without regulatory controls, DEA is unable to monitor distributions of such chemical mixtures containing GBL, since registration and recordkeeping requirements do not apply. Regulation of GBL chemical mixtures pursuant to 21 U.S.C. 802(39)(A)(vi) is necessary to

[1] 21 U.S.C. 802(32)(A) Except as provided in subparagraph (C), the term "controlled substance analogue" means a substance— (i) The chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule I or II;

(ii) Which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II; or

(iii) With respect to a particular person, which such person represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II.

(B) The designation of gamma butyrolactone or any other chemical as a Listed chemical pursuant to paragraph (34) or (35) does not preclude a finding pursuant to paragraph (A) of this paragraph that the chemical is a controlled substance analogue.

reduce the threat to the public health and safety.

Defining a Chemical Mixture

Title 21 U.S.C. 802(40) defines the term "chemical mixture" as "a combination of two or more chemical substances, at least one of which is not a List I chemical or a List II chemical, except that such term does not include any combination of a List I chemical or a List II chemical with another chemical that is present solely as an impurity." Therefore, a chemical mixture contains any number of listed chemicals in combination with any number of non-listed chemicals.

DEA does not consider a chemical mixture to mean the combination of a listed chemical and an inert carrier. An inert carrier is any chemical that does not modify the function of the listed chemical but is present to aid in the delivery of the listed chemical. Examples include, but are not limited to, dilutions in water and the presence of a carrier gas. For purposes of control under the CSA, these examples would be controlled as List I or List II chemicals, not as a chemical mixture containing a List I or List II chemical.

Past Regulations Regarding Chemical Mixtures

The Chemical Diversion and Trafficking Act of 1988 (Pub. L. 100–690) (CDTA) created the legal definition of a "chemical mixture" (21 U.S.C. 802(40)), and exempted chemical mixtures from regulatory coverage. The CDTA established 21 U.S.C. 802(39)(A)(v) to exclude "any transaction in a chemical mixture" from the definition of a "regulated transaction." The result of such exemption was that it provided traffickers with an unregulated source for obtaining listed chemicals for use in the illicit manufacture of controlled substances.

The Domestic Chemical Diversion Control Act of 1993 (Pub. L. 103–200) (DCDCA), enacted in April 1994, subjected all chemical mixtures containing List I and List II chemicals to CSA regulatory requirements, unless such chemical mixtures were specifically exempted by regulation. The regulatory requirements include recordkeeping, reporting, and security for all regulated chemical mixtures with the additional requirement of registration for handlers of List I chemical mixtures. The DCDCA also provided the Attorney General with the authority to establish regulations exempting chemical mixtures from the definition of a "regulated transaction," "based on a finding that the mixture is formulated in such a way that it cannot be easily used in the illicit production of a controlled substance and that the listed chemical or chemicals contained in the mixture cannot be readily recovered" (21 U.S.C. 802(39)(A)(vi)).

DEA treats all chemical mixtures containing List I and List II chemicals as non-regulated (upon the withdrawal of its proposed rule "Implementation of the Domestic Chemical Diversion Control Act of 1993 (DCDCA)" (59 FR 51887, October 13, 1994; withdrawn at 59 FR 63738, December 9, 1994)) until it promulgates a final rule that identifies chemical mixtures that are exempt for each List I and List II chemical. The withdrawal sought to prevent the immediate regulation of qualified chemical mixtures, which was not necessary and would impose an undue burden on industry. It also provided DEA the opportunity to gather information to implement regulations pursuant to 21 U.S.C. 802(39)(A)(vi).

In 2003, DEA published a Final Rule (68 FR 23195, May 1, 2003) that identified exempt mixtures containing the chemicals ephedrine, N-methylephedrine, N-methylpseudoephedrine, norpseudoephedrine, phenylpropanolamine, and pseudoephedrine, with an effective date of June 2, 2003. In a second Final Rule (69 FR 74957, December 15, 2004; corrected at 70 FR 294, January 4, 2005,) DEA promulgated regulations that defined exempt chemical mixtures for 27 of the remaining 38 listed chemicals. The effective date was January 14, 2005. As gamma-butyrolactone (GBL) was not a listed chemical when DEA initiated this regulatory action in 1998, regulation of chemical mixtures containing gamma-butyrolactone was not addressed but was the subject of a separate regulatory action.

Regulations Regarding Chemical Mixtures Containing GBL

On July 19, 2002, DEA published in the **Federal Register** an Advance Notice of Proposed Rulemaking (ANPRM) (67 FR 47403; corrected at 67 FR 53842, August 19, 2002; corrected at 67 FR 56776, September 5, 2002) in anticipation of identifying GBL-containing chemical mixtures to exempt by regulation. The ANPRM invited interested persons to submit information related to legitimate formulations containing GBL, including the concentration of GBL in their mixtures. Comments received to that ANPRM provided information DEA used in its Notice of Proposed Rulemaking.

On November 12, 2008, DEA published a Notice of Proposed Rulemaking (73 FR 66815) which proposed the control of certain GBL chemical mixtures.

Defining Exempt Chemical Mixtures Containing GBL

In defining exempt chemical mixtures containing GBL for purposes of the proposed rule, the clandestine use of GBL and the requirements of 21 U.S.C. 802(39)(A)(vi) were heavily considered. The requirements described by statute do not allow for exemptions based on such factors as: (1) Manufacturers selling only to known customers, (2) the cost of the mixture, (3) the customer's knowledge of the product's chemical content, packaging, and/or such related topics. 21 U.S.C. 802(39)(A)(vi) requires DEA to establish an exemption based on the finding (1)that the mixture is formulated in such a way that it cannot be easily used in the illicit production of a controlled substance and (2) that the listed chemical or chemicals contained in the mixture cannot be readily recovered.

After examination of the comments on the ANPRM and after weighing the risk of diversion, on November 12, 2008 (73 FR 66815), DEA proposed a 70 percent concentration limit (by weight or volume) to identify GBL chemical mixtures that do not pose a significant risk of diversion. In that NPRM, DEA stated that it anticipated that chemical mixtures over 70 percent, as identified for use as protective coatings and films, will be automatically exempt pursuant to 21 CFR 1310.12(d)(2) ("Completely formulated paints and coatings"), which is being revised to clarify that film-forming agents are exempted. Additionally, the NPRM clarified that other chemical mixtures having concentrations of GBL over 70 percent may qualify for exemption via the application process (21 CFR 1310.13). DEA proposed a 70 percent concentration limit in an effort to prevent the automatic exemption of chemical mixtures with higher concentration limits such as solvent-based mixtures (*e.g.,* cleaners or thinners) which DEA had concluded could be useful to traffickers.

Comments

In response to the November 12, 2008, Notice of Proposed Rulemaking (73 FR 66815), DEA received three comments. One comment was from the American Chemistry Council's GBL/1,4-Butanediol (BDO) Panel comprised of companies that domestically produce and/or distribute GBL. The Panel member companies manufacture a large

percentage of the total GBL produced in the United States. The Panel stated that DEA's GBL proposal offers a reasonable approach to help protect the public from risks of potential diversion "without unnecessary administrative and financial burden" and further stated that the Panel "believes that exempting chemical mixtures containing 70 percent or less of GBL from List I requirements of the CSA "provides a balanced criteria for regulatory exemption."

A second comment was received directly from one of the Panel's member companies, which is a major manufacturer and supplier of GBL. The comment stated that this firm is in agreement with the Panel's comments in support of DEA's proposed regulation. The commenter further stated that it believed DEA "thoroughly evaluated the information gathered in response to the Advanced Notice of Proposed Rulemaking for the exemption of GBL chemical mixtures published July 19, 2002 [67 FR 47403] and that DEA has "proposed a reasonable approach for exempting such mixtures."

A third comment was received from the Healthcare Distribution Management Association (HDMA) which represents the nation's primary, full service healthcare product distributors. The comment stated that HDMA reached out to groups in the chemical industry, and to its own members, in an attempt to identify specific products containing GBL (in concentrations greater than 70 percent) which would be subject to the proposed regulatory controls. To date, HDMA stated that it has not identified any such products which are distributed by healthcare product distributors. This conclusion is consistent with information developed by DEA. DEA does not believe that any products distributed by healthcare distributors will fall under the proposed regulatory controls. Therefore, DEA does not believe that this final rule will have any impact upon HDMA members.

After careful consideration of the comments received, DEA is hereby finalizing these regulatory controls exactly as proposed in the November 12, 2008, Notice of Proposed Rulemaking (73 FR 66815). Therefore, chemical mixtures that are 70 percent or less gamma-butyrolactone (GBL), by weight or volume, are automatically exempt from regulatory controls under the CSA. This regulation makes GBL chemical mixtures, in concentrations greater than 70 percent, subject to List I chemical regulatory requirements of the CSA, except if exempted through an existing categorical exemption as provided in 21 CFR 1310.12(d). Most notably, 21 CFR 1310.12(d)(2) provides a category exemption for completely formulated paints and coatings. As such, completely formulated paints and coatings consisting of greater that 70 percent GBL shall not become regulated as a result of this final rule and remain exempt from CSA chemical regulatory controls such as recordkeeping, reporting, registration, and import/export requirements.

DEA recognizes that concentration and category criteria alone cannot identify all mixtures that warrant exemption. As a result, 21 CFR 1310.13 provides for an application process by which manufacturers may obtain exemptions from CSA regulatory controls for those GBL chemical mixtures that are not automatically exempt under the concentration or categorical criteria.

Thresholds and Excluded Transactions for Regulated GBL Chemical Mixtures

The List I chemical GBL, as described in 21 CFR 1310.04(g)(1), does not have a threshold. Therefore, all transactions in regulated GBL chemical mixtures are regulated transactions. Certain transactions described in 21 CFR 1310.08 are excluded from the definition of a regulated transaction. These excluded transactions, as specified in 21 CFR 1310.08(d), are domestic, import, and export distributions of GBL weighing 4,000 kilograms (net weight) or more in a single container. This exclusion also applies to chemical mixtures.

Requirements That Apply to Regulated List I Chemical Mixtures

Persons interested in handling chemical mixtures containing List I chemicals (here referred to as regulated chemical mixtures) must comply with the following:

Registration. Any person who manufactures, distributes, imports or exports a regulated chemical mixture, or proposes to engage in the manufacture, distribution, importation or exportation of a regulated chemical mixture, shall obtain a registration pursuant to the CSA (21 U.S.C. 822 and 957). Regulations describing registration for List I chemical handlers are set forth in 21 CFR part 1309.

A separate registration is required for manufacturing, distribution, importing, and exporting. Different locations operated by a single entity require separate registration if any location is involved with the manufacture, distribution, import, or export of regulated chemical mixtures. DEA recognizes, however, that it is not possible for persons who manufacture, distribute, import, or export GBL-containing regulated chemical mixtures to immediately complete and submit an application for registration and for DEA to issue registrations immediately for those activities. To allow continued legitimate commerce in GBL-containing regulated chemical mixtures, DEA is establishing in 21 CFR 1310.09(k) a temporary exemption from the registration requirement for persons desiring to manufacture, distribute, import, or export GBL-containing regulated chemical mixtures, provided that DEA receives a properly completed application for registration on or before July 29, 2010. The temporary exemption for such persons will remain in effect until DEA takes final action on their application for registration. The temporary exemption applies solely to the registration requirement; all other chemical control requirements, including recordkeeping and reporting, remain in effect. Additionally, the temporary exemption does not suspend applicable federal criminal laws relating to GBL-containing regulated chemical mixtures, nor does it supersede state or local laws or regulations. All handlers of regulated chemical mixtures must comply with their state and local requirements in addition to the CSA and other federal regulatory controls.

DEA notes that warehouses are exempt from the requirement of registration and may lawfully possess List I chemicals, if the possession of those chemicals is in the usual course of business (21 U.S.C. 822(c)(2), 21 U.S.C. 957(b)(1)(B)). For purposes of this exemption, the warehouse must receive the List I chemical from a DEA registrant and shall only distribute the List I chemical back to the DEA registrant and registered location from which it was received. All other activities conducted by a warehouse do not fall under this exemption; a warehouse that distributes List I chemicals to persons other than the registrant and registered location from which they were obtained is conducting distribution activities and is required to register accordingly (21 U.S.C. 802(39)(A)(ii)).

Records and Reports. The CSA (21 U.S.C. 830) requires that certain records be kept and reports be made that involve listed chemicals. Regulations describing recordkeeping and reporting requirements are set forth in 21 CFR part 1310. A record must be made and maintained for two years after the date of a transaction involving a List I chemical, provided the transaction is a regulated transaction. Because GBL is a listed chemical for which no minimum threshold has been established (21 CFR

1310.04(g)(1)(v)), a distribution, receipt, sale, importation, or exportation of a GBL-containing regulated chemical mixture in any amount, except those very large distributions described in 21 CFR 1310.08(k), is a regulated transaction (21 CFR 1300.02(b)(28)). Title 21 CFR 1310.08(k) exempts domestic, import, and export distributions of GBL weighing 4,000 kilograms (net weight) or more in a single container from the definition of regulated transaction. This exemption also applies to its chemical mixtures. The net weight of the mixture is determined by measuring the mass of the mixture, not the mass of the GBL contained in the mixture.

Further, 21 U.S.C. 830(b) and 21 CFR 1310.05(a) requires that each regulated person shall report to DEA: (1) Any regulated transaction involving an extraordinary quantity of a listed chemical, an uncommon method of payment or delivery, or any other circumstance that the regulated person believes may indicate that the listed chemical will be used in violation of the CSA; (2) any proposed regulated transaction with a person whose description or other identifying characteristics the Administration has previously furnished to the regulated person; (3) any unusual or excessive loss or disappearance of a listed chemical under the control of the regulated person, and any in-transit loss in which the regulated person is the supplier; and (4) any domestic regulated transaction in a tableting or encapsulating machine.

Import/Export. All imports/exports of a regulated chemical mixture shall comply with the CSA (21 U.S.C. 957 and 971). Regulations for importation and exportation of List I chemicals are found in 21 CFR part 1313. Separate registration is necessary for each activity (21 CFR 1309.22).

Administrative Inspection. Places, including factories, warehouses, or other establishments and conveyances, where regulated persons may lawfully hold, manufacture, or distribute, dispense, administer, or otherwise dispose of regulated chemical mixtures or where records relating to those activities are maintained, are controlled premises as defined in 21 CFR 1316.02(c). The CSA (21 U.S.C. 880) allows for administrative inspections of these controlled premises as provided in 21 CFR part 1316 Subpart A.

Regulatory Certifications

Regulatory Flexibility and Small Business Concerns

The Regulatory Flexibility Act (5 U.S.C. 601–612) requires agencies to determine whether a rule will have a significant economic impact upon a substantial number of small entities. The final rule would impose no new requirements on manufacturers, distributors, importers, and exporters that are already registered to handle GBL. DEA has not been able to identify any United States firm that handles high purity GBL mixtures that would be subject to the rule. Therefore, the rule will not affect a substantial number of small entities.

In addition, the requirements of the rule other than the registration fee can be met with standard business records, that is, with orders, invoices, shipping papers, etc. that the business creates and maintains in the normal course of business. The registration fee is $2,293 for manufacturers, and $1,147 for distributors, importers, and exporters. DEA registration and reregistration application fees are established by rulemaking in accordance with DEA statutory mandates (21 U.S.C. 886a). The sectors that could be affected by this rule are organic chemical manufacturers (NAICS 325199) and chemical wholesalers (NAICS 42469); importers and exporters could be either manufacturers or wholesalers. The smallest firms (those with fewer than five employees) in the organic chemical manufacturing and chemical wholesale sector have annual shipments and sales of about $1.27 million and $1.05 million, respectively, based on the 2002 Economic Census, updated to 2007 dollars. The registration fee would represent 0.2 percent of a small chemical manufacturer's shipments and 0.1 percent of a wholesaler's sales. Consequently, even if a United States-based small entity exists that markets high purity GBL mixtures, the rule would not impose a significant economic burden.

Further, as discussed above, commenters supported this regulatory action and were, themselves, unable to identify any entities that would be directly impacted by this rule.

In accordance with the Regulatory Flexibility Act, the Deputy Administrator has reviewed this regulation and by approving it certifies that this regulation will not have a significant economic impact upon a substantial number of small entities.

Executive Order 12866

This regulation has been drafted and reviewed in accordance with Executive Order 12866, Section 1(b), Principles of Regulation. It has been determined that this rule is a "significant regulatory action" under Executive Order 12866, Section 3(f), Regulatory Planning and Review, and accordingly this rule has been reviewed by the Office of Management and Budget.

As noted in the previous section, DEA is unaware of any United States firm that will have to register as a manufacturer, distributor, importer, or exporter of a GBL mixture. Most commercial mixtures that may exceed the 70 percent concentration are coatings and films, which are already exempt. The only mixtures that DEA has been able to identify that will be covered are essentially pure GBL (99.6–99.9 percent) being sold as paint strippers and cleaners in Europe. Anyone wanting to import these products would be required to register, but DEA considers it unlikely that anyone with a legitimate need for a paint stripper or cleaner would pay the high prices ($120 to $160 per liter) when substitute products are readily available in the U.S. for a fraction of the cost. DEA also notes that any mixture that is more than 70 percent GBL by weight or volume may qualify for an exemption if GBL cannot be readily recovered from the mixture and the mixture cannot be easily used to produce controlled substances.

Executive Order 12988

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

Executive Order 13132

This rulemaking does not preempt or modify any provision of state law; nor does it impose enforcement responsibilities on any state; nor does it diminish the power of any state to enforce its own laws. Accordingly, this rulemaking does not have federalism implications warranting the application of Executive Order 13132.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $120,000,000 or more (adjusted for inflation) in any one year, and will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Congressional Review Act

This rule is not a major rule as defined by Section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996 (Congressional Review Act). This rule will not result in an annual effect on the economy of $100,000,000 or more; a major increase in cost or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Paperwork Reduction Act

Persons manufacturing, distributing, importing and exporting chemical mixtures containing a List I chemical are required to register with DEA. This rule regulates chemical mixtures due to the presence of GBL; however, such mixtures are automatically exempt if the concentration of GBL is 70 percent or less by weight or volume. Under this method of automatic exemption, persons who handle chemical mixtures with concentration levels of GBL of 70 percent or less will not be subject to CSA regulatory controls, including the requirement to register with DEA. Further, many GBL chemical mixtures are already categorically exempt from regulatory control as fully formulated paints and coatings (21 CFR 1310.12(d)(2)). As discussed previously, commenters supported this regulatory action and were, themselves, unable to identify handlers of GBL that would be subject to this rule. For persons handling chemical mixtures containing GBL in concentration levels of greater than 70 percent who are not otherwise exempt from regulatory controls, DEA anticipates granting some of these mixtures exempt status by the application process (21 CFR 1310.13). Therefore, although DEA believes the impact of this rulemaking under the Paperwork Reduction Act will be minimal, at this time it is not feasible for DEA to determine the extent of the impact of this rulemaking on the regulated industry. Once DEA has determined the impact, it will make the necessary filing with the Office of Management and Budget to adjust the burden for its information collection "application for Registration under Domestic Chemical Diversion Control Act of 1993 and Renewal Application for Registration under Domestic Chemical Diversion Control Act of 1993" [OMB control number 1117–0031] for the affected industry.

List of Subjects in 21 CFR Part 1310

Drug traffic control, List I and List II chemicals, Reporting requirements.

■ For the reasons set out above, 21 CFR part 1310 is amended as follows:

PART 1310—RECORDS AND REPORTS OF LISTED CHEMICALS AND CERTAIN MACHINES

■ 1. The authority citation for part 1310 continues to read as follows:

Authority: 21 U.S.C. 802, 827(h), 830, 871(b), 890.

■ 2. Section 1310.09 is amended by adding new paragraph (k) to read as follows:

§ 1310.09 Temporary exemption from registration.

* * * * *

(k)(1) Each person required by sections 302 or 1007 of the Act (21 U.S.C. 822, 957) to obtain a registration to manufacture, distribute, import, or export regulated GBL-containing chemical mixtures, pursuant to sections 1310.12 and 1310.13, is temporarily exempted from the registration requirement, provided that DEA receives a properly completed application for registration or application for exemption on or before July 29, 2010. The exemption will remain in effect for each person who has made such application until the Administration has approved or denied that application. This exemption applies only to registration; all other chemical control requirements set forth in parts 1309, 1310, and 1313 of this chapter remain in full force and effect.

(2) Any person who manufactures, distributes, imports or exports a GBL-containing chemical mixture whose application for exemption is subsequently denied by DEA must obtain a registration with DEA. A temporary exemption from the registration requirement will also be provided for those persons whose applications for exemption are denied, provided that DEA receives a properly completed application for registration on or before 30 days following the date of official DEA notification that the application for exemption has been denied. The temporary exemption for such persons will remain in effect until DEA takes final action on their registration application.

■ 3. Section 1310.12 is amended in the Table of Concentration Limits in paragraph (c) by adding gamma-butyrolactone in alphabetical order between "Ethylamine and its salts" and "Hydriodic acid" under List I chemicals and by revising paragraph (d)(2) to read as follows:

§ 1310.12 Exempt chemical mixtures.

* * * * *

(c) * * *

TABLE OF CONCENTRATION LIMITS

	DEA chemical code No.	Concentration (percent)	Special conditions
List I Chemicals			
* * * *	*	*	*
Gamma-Butyrolactone	2011	70% by weight or volume.	
* * * *	*	*	*

* * * * *

(d) * * *

(2) Completely formulated paints and coatings: Completely formulated paints and coatings are only those formulations that contain all of the components of the paint or coating for use in the final application without the need to add any additional substances except a thinner if needed in certain cases. A completely formulated paint or coating is defined as any clear or pigmented liquid, liquefiable or mastic composition designed for application to a substrate in a thin layer that is converted to a clear or opaque solid protective, decorative, or functional adherent film after application. Included in this category are clear coats, top-coats, primers, varnishes, sealers, adhesives, lacquers, stains, shellacs, inks,

temporary protective coatings and film-forming agents.

* * * * *

Dated: June 18, 2010.

Michele M. Leonhart,

Deputy Administrator.

[FR Doc. 2010–15518 Filed 6–28–10; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2010–0430]

Drawbridge Operation Regulation; Black River, Port Huron, MI

AGENCY: Coast Guard, DHS.

ACTION: Notice of temporary deviation from regulations.

SUMMARY: Commander, Ninth Coast Guard District, issued a temporary deviation from the regulation governing the operation of the Military Street Bridge at Mile 0.33, 7th Street Bridge at Mile 0.50, and the 10th Street Bridge at Mile 0.94 over the Black River, at Port Huron, MI. This deviation temporarily changes the bridge operating schedules to accommodate the City's special events for 2010. This temporary deviation allows the bridges to remain secured to masted navigation on the dates and times listed.

DATES: This deviation is effective on June 26, 2010 from 10:45 p.m. to 11:30 p.m., on July 9, 2010 from 6 p.m. to 8 p.m., and on July 14, 2010 from 6:15 p.m. to 9 p.m.

ADDRESSES: Documents mentioned in this preamble as being available in the docket are part of docket USCG–2010–0430 and are available online by going to *http://www.regulations.gov,* inserting USCG–2010–0430 in the "Keyword" box and then clicking "Search". They are 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 Mr. Lee D. Soule, Bridge Management Specialist, Ninth Coast Guard District; telephone 216–902–6085, e-mail; *lee.d.soule@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION: The City of Port Huron, Michigan, who owns and operates these drawbridges, requested a temporary deviation from the current operating regulations set forth in 33 CFR 117.625. The purpose of this request is to facilitate efficient management of all transportation needs and provide timely public safety services during these special events. The most updated and detailed current marine information for this event, and all bridge operations, is found in the Local Notice to Mariners and Broadcast Notice to Mariners issued by the Ninth District Commander. 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 periods. These deviations from the operating regulations are authorized under 33 CFR 117.35.

Dated: June 11, 2010.

M. N. Parks,

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

[FR Doc. 2010–15703 Filed 6–28–10; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2010–0522]

Drawbridge Operation Regulations; Milwaukee, Menomonee, and Kinnickinnic Rivers and South Menomonee and Burnham Canals, Milwaukee, WI

AGENCY: Coast Guard, DHS.

ACTION: Notice of temporary deviation from regulations.

SUMMARY: Commander, Ninth Coast Guard District, issued a temporary deviation from the regulation governing the operation of the Broadway Street Bridge at Mile 0.79, Water Street Bridge at Mile 0.94, Saint Paul Avenue Bridge at Mile 1.21, the Clybourn Street Bridge at Mile 1.28, Michigan Street Bridge at Mile 1.37, and the Wisconsin Avenue Bridge at Mile 1.46 over the Milwaukee River at Milwaukee, WI, during the scheduled Festa Italiana, and the Summerfest public events for the 2010 season.

DATES: This deviation is effective from 9:30 p.m. to 1 a.m. on June 24, 2010 and July 3, 2010. A rain date of June 25 and July 4, 2010 are authorized. June 25, 2010 through July 2, 2010 from 11 p.m. to 1 a.m. daily, and July 15, 2010 to July 18 from 10 p.m. to midnight daily.

ADDRESSES: Documents mentioned in this preamble as being available in the docket are part of docket USCG–2010–0522 and are available online by going to *http://www.regulations.gov*, inserting USCG–2010–0522 in the "Keyword" box and then clicking "Search". They are 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 Mr. Lee D. Soule, Bridge Management Specialist, Ninth Coast Guard District; telephone 216–902–6085, e-mail *lee.d.soule@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION: The City of Milwaukee, WI, which owns and operates these drawbridges, has requested a temporary deviation from the current operating regulations set forth in 33 CFR 117.1093. The purpose of this request is to facilitate efficient management of all transportation needs and provide timely public safety services during these special events. The most updated and detailed current marine information for this event, and all bridge operations, is found in the Local Notice to Mariners and Broadcast Notice to Mariners issued by the Ninth District Commander. On June 24, 2010 and including the rain date of June 25, 2010 the bridges need not open for any vessel from 9:30 p.m. to 1 a.m. except at the discretion of the Milwaukee Police Department. From June 25 through July 2, 2010 the bridges need not open for recreational vessels from 11 p.m. to 1 a.m. except at the discretion of the Milwaukee Police Department. From July 15, 2010 through July 18, 2010 the bridges need not open for recreational vessels between the hours of 10 p.m. and midnight for recreational vessels. 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 periods. These deviations from the operating regulations are authorized under 33 CFR 117.35.

Dated: June 11, 2010.

M.N. Parks,

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

[FR Doc. 2010–15704 Filed 6–28–10; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2010–0521]

Drawbridge Operation Regulations; Grand River, Grand Haven, MI

AGENCY: Coast Guard, DHS.

ACTION: Notice of temporary deviation from regulations.

SUMMARY: Commander, Ninth Coast Guard District, issued a temporary deviation from the regulation governing the operation of the U.S. 31 Bridge at Mile 2.89 over the Grand River, at Grand Haven, MI. This deviation temporarily changes the bridges operating schedule to accommodate the City's Fourth of July and Coast Guard Festival events for 2010. This temporary deviation allows the bridges to remain secured to masted navigation on the dates and times listed.

DATES: This deviation is effective from 10 p.m. on July 4, 2010 to 2 a.m. on July 5, 2010 and again from 10 p.m. on August 7, 2010 to 2 a.m. on August 8, 2010.

ADDRESSES: Documents mentioned in this preamble as being available in the docket are part of docket USCG–2010–0521 and are available online by going to *http://www.regulations.gov,* inserting USCG–2010–0521 in the "Keyword" box and then clicking "Search". They are 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 Mr. Lee D. Soule, Bridge Management Specialist, Ninth Coast Guard District; telephone 216–902–6085, e-mail; *lee.d.soule@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION: The City of Grand Haven, MI, requested a temporary deviation from the current operating regulations set forth in 33 CFR 117.633. The purpose of this request is to facilitate efficient management of all transportation needs and provide timely public safety services during these special events. The most updated and detailed current marine information for this event, and all bridge operations, is found in the Local Notice to Mariners and Broadcast Notice to Mariners issued by the Ninth District Commander. 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 periods. These deviations from the operating regulations are authorized under 33 CFR 117.35.

Dated: June 11, 2010.

M.N. Parks,

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

F.M. Midgette,

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

[FR Doc. 2010–15705 Filed 6–28–10; 8:45 am]

BILLING CODE 9110–04–P

POSTAL SERVICE

39 CFR Part 20

Cigarettes and Smokeless Tobacco—Prohibited in All Outbound and Inbound International Mail; Correction

AGENCY: Postal Service™.

ACTION: Final rule; correction.

SUMMARY: The Postal Service published in the **Federal Register** of June 22, 2010, a final rule pertaining to the international mailing of inbound and outbound tobacco cigarettes and smokeless tobacco with an incorrect effective date. This document corrects that effective date.

DATES: *Effective Date:* The correct effective date is June 29, 2010.

FOR FURTHER INFORMATION CONTACT: Rick Klutts at 813–877–0372.

SUPPLEMENTARY INFORMATION: The Postal Service published a final rule in the **Federal Register** on June 22, 2010 (75 FR 35302), adding a new section 136.4 to the *International Mail Manual* (IMM®), which is incorporated by reference in 39 CFR part 20, that provides that cigarettes (including roll-your-own tobacco) and smokeless tobacco products are nonmailable when sent in outbound or inbound international mail. That final rule contained an erroneous effective date of August 2, 2010. This document corrects the effective date to June 29, 2010.

Dated: June 23, 2010.

Neva R. Watson,

Attorney, Legislative.

[FR Doc. 2010–15811 Filed 6–28–10; 8:45 am]

BILLING CODE 7710–12–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2010–0237; FRL–9167–6]

Revisions to the California State Implementation Plan, Yolo-Solano Air Quality Management District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is finalizing approval of revisions to the Yolo-Solano Air Quality Management District (YSAQMD) portion of the California State Implementation Plan (SIP). These revisions were proposed in the **Federal Register** on April 16, 2010 and concern volatile organic compound (VOC), oxides of nitrogen (NO_x), oxides of sulfur (SO_x), particulate matter (PM), and carbon monoxide (CO) emissions from the permanent curtailment of burning rice straw. We are approving a local rule that regulates these emission sources under the Clean Air Act as amended in 1990 (CAA or the Act).

DATES: *Effective Date:* This rule is effective on July 29, 2010.

ADDRESSES: EPA has established docket number EPA–R09–OAR–2010–0237 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: Lily Wong, EPA Region IX, (415) 947–4114, *wong.lily@epa.gov.*

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

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I. Proposed Action
II. Public Comments and EPA Responses
III. EPA Action
IV. Statutory and Executive Order Reviews

I. Proposed Action

On April 16, 2010 (75 FR 19923), EPA proposed to approve the following rule into the California SIP.

Local agency	Rule No.	Rule title	Adopted	Submitted
YSAQMD	3.21	Rice Straw Emission Reduction Credits	12/10/08	03/17/09

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

II. Public Comments and EPA Responses

EPA's proposed action provided a 30-day public comment period. During this period, we did not receive any comments.

III. EPA Action

No comments were submitted that change our assessment that the submitted rule complies with the relevant CAA requirements. Therefore, as authorized in section 110(k)(3) of the Act, EPA is fully approving this rule 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 August 30, 2010. 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, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: June 14, 2010.

Jared Blumenfeld,

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 paragraph (c)(363)(i)(C) to read as follows:

§ 52.220 Identification of plan.

* * * * *

(c) * * *

(363) * * *

(i) * * *

(C) Yolo Solano Air Quality Management District

(*1*) Rule 3.21, "Rice Straw Emission Reduction Credits," adopted on December 10, 2008.

* * * * *

[FR Doc. 2010–15641 Filed 6–28–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 716

Health and Safety Data Reporting

CFR Correction

In Title 40 of the Code of Federal Regulations, Parts 700 to 789, revised as of July 1, 2009, make the following corrections:

1. At the bottom of page 86, in § 716.20, paragraph (a) introductory text, in the third table, the entry for "Lead, and lead compounds" is moved to appear above "Oxirane, (bromomethyl)–".

2. On page 86, in § 716.20, paragraph (a) introductory text, the table beginning with "Alkyl epoxides", the illustration, and the table beginning with "R_1=R_2=R_3=R_4 =H or alkyl" are moved to § 716.120, paragraph (c) immediately before the first illustration in (c) on page 102.

3. On pages 86 through 88, in § 716.20, paragraph (a) introductory text, the table beginning with "R_1=X or $C_nH_{2n=1-y}X_y$(y=1 to 1n=1)" is moved to § 716.120, paragraph (c), after the last illustration in paragraph (c) and before paragraph (d) on page 107.

[FR Doc. 2010–15867 Filed 6–28–10; 8:45 am]

BILLING CODE 1505–01–D

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 1039

Control of Emissions From New and In-Use Nonroad Compression-Ignition Engines

CFR Correction

In Title 40 of the Code of Federal Regulations, Part 1000 to End, revised as of July 1, 2009, on pages 94 and 95, in § 1039.102, correct the headings of Tables 2 through 6 to read as follows:

§ 1039.102 What exhaust emission standards and phase-in allowances apply for my engines in model year 2014 and earlier?

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TABLE 2 OF § 1039.102—INTERIM TIER 4 EXHAUST EMISSION STANDARDS (G/KW-HR): 19 ≤ KW < 37

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TABLE 3 OF § 1039.102—INTERIM TIER 4 EXHAUST EMISSION STANDARDS (G/KW-HR): 37 ≤ KW < 56

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TABLE 4 OF § 1039.102—INTERIM TIER 4 EXHAUST EMISSION STANDARDS (G/KW-HR): 56 ≤ KW < 75

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TABLE 5 OF § 1039.102—INTERIM TIER 4 EXHAUST EMISSION STANDARDS (G/KW-HR): 75 ≤ KW < 130

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TABLE 6 OF § 1039.102—INTERIM TIER 4 EXHAUST EMISSION STANDARDS (G/KW-HR): 130 ≤ KW < 560

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[FR Doc. 2010–15828 Filed 6–28–10; 8:45 am]

BILLING CODE 1505–01–D

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 1065

Engine-Testing Procedures

CFR Correction

In Title 40 of the Code of Federal Regulations, Part 1000 to End, revised as of July 1, 2009, on page 675, in § 1065.710, in Table 1, correct the entries for "Hydrocarbon composition" to read as follows:

§ 1065.710 Gasoline.

* * * * *

TABLE 1 OF § 1065.710—TEST FUEL SPECIFICATIONS FOR GASOLINE

Item	Units	General testing	Low-temperature testing	Reference procedure [1]
	*	* *	* *	
Hydrocarbon composition:				
Olefins	m^3/m^3	Maximum, 0.10	Maximum, 0.175	ASTM D1319–03.
Aromatics		Maximum, 0.35	Maximum, 0.304.	
Saturates		Remainder	Remainder.	
	*	* *	* *	

[1] ASTM procedures are incorporated by reference in § 1065.1010. See § 1065.701(d) for other allowed procedures.

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[FR Doc. 2010–15829 Filed 6–28–10; 8:45 am]

BILLING CODE 1505–01–D

Proposed Rules

Federal Register

Vol. 75, No. 124

Tuesday, June 29, 2010

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

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 25 and 33

[Docket No. FAA–2010–0636; Notice No. 10–10]

RIN 2120–AJ34

Airplane and Engine Certification Requirements in Supercooled Large Drop, Mixed Phase, and Ice Crystal Icing Conditions

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of Proposed Rulemaking (NPRM).

SUMMARY: The Federal Aviation Administration proposes to amend the airworthiness standards applicable to certain transport category airplanes certified for flight in icing conditions and the icing airworthiness standards applicable to certain aircraft engines. The proposed regulations would improve safety by addressing supercooled large drop icing conditions for transport category airplanes most affected by these icing conditions, mixed phase and ice crystal conditions for all transport category airplanes, and supercooled large drop, mixed phase, and ice crystal icing conditions for all turbine engines. These proposed regulations are the result of information gathered from a review of icing accidents and incidents.

DATES: Send your comments on or before August 30, 2010.

ADDRESSES: You may send comments identified by Docket Number FAA–2010–0636 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the online instructions for sending your comments electronically.
- *Mail:* Send comments to Docket Operations, M–30; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* Bring comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* Fax comments to Docket Operations at 202–493–2251.

For more information on the rulemaking process, *see* the **SUPPLEMENTARY INFORMATION** section of this document.

Privacy: The FAA will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. Using the search function of our docket Web site, anyone can find and read the electronic form of all comments received into any of our dockets, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78) or you may visit *http://DocketsInfo.dot.gov.*

Docket: To read background documents or comments received, go to *http://www.regulations.gov* at any time and follow the online instructions for accessing the docket. Or, go to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: For part 25 technical questions contact Robert Hettman, FAA, Propulsion/Mechanical Systems Branch, ANM–112, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue, SW., Renton, WA 98057–3356; telephone (425) 227–2683; facsimile (425) 227–1320, e-mail *robert.hettman@faa.gov.*

For part 33 technical questions contact John Fisher, FAA, Rulemaking and Policy Branch, ANE–111, Engine and Propeller Directorate Standards Staff, Aircraft Certification Service, 12 New England Executive Park, Burlington, MA 01803; telephone (781) 238–7149, facsimile (781) 238–7199, e-mail *john.fisher@faa.gov.*

For part 25 legal questions contact Douglas Anderson, FAA, Office of the Regional Counsel, ANM–7, Northwest Mountain Region, 1601 Lind Avenue, SW., Renton, WA 98057–3356; telephone (425) 227–2166; facsimile (425) 227–1007, e-mail *douglas.anderson@faa.gov.*

For part 33 legal questions contact Vince Bennett, FAA, Office of the Regional Counsel, ANE–007, New England Region, 12 New England Executive Park, Burlington, MA 01803; telephone (781) 238–7044; facsimile (781) 238–7055, e-mail *vincent.bennett@faa.gov.*

SUPPLEMENTARY INFORMATION: Later in this preamble under the Additional Information section, the FAA discusses how you can comment on this proposal and how the agency will handle your comments. Included in this discussion is related information about the docket, privacy, and the handling of proprietary or confidential business information. The FAA also discusses how you can get a copy of this proposal and related rulemaking documents.

Authority for This Rulemaking

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

This rulemaking is proposed under the authority described in subtitle VII, part A, subpart III, section 44701, "General requirements." Under that section, the FAA is charged with promoting safe flight of civil aircraft in air commerce by prescribing minimum standards required in the interest of safety for the design and performance of aircraft; regulations and minimum standards in the interest of safety for inspecting, servicing, and overhauling aircraft; and regulations for other practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it would prescribe—

- New safety standards for the design and performance of certain transport category airplanes and aircraft engines; and
- New safety requirements that are necessary for the design, production, and operation of those airplanes, and for other practices, methods, and

procedures relating to those airplanes and engines.

Summary of the Proposal

The FAA proposes to revise certain regulations in Title 14, Code of Federal Regulations (14 CFR) part 25 (Airworthiness Standards: Transport Category Airplanes) and part 33 (Airworthiness Standards: Aircraft Engines) related to the certification of transport category airplanes and turbine aircraft engines in icing conditions. We also propose to create new regulations: § 25.1324—Angle of attack systems; § 25.1420 SLD icing conditions; part 25, appendix O (SLD icing conditions); part 33, appendix C (this will be intentionally left blank as a placeholder); and part 33, appendix D (Mixed phase and ice crystal icing conditions). To improve the safety of transport category airplanes operating in SLD, mixed phase, and ice crystal icing conditions, the proposed regulations would:

- Expand the certification icing environment to include freezing rain and freezing drizzle.
- Require airplanes most affected by SLD icing conditions to meet certain safety standards in the expanded certification icing environment, including additional airplane performance and handling qualities requirements.
- Expand the engine and engine installation certification, and some airplane component certification regulations (for example, angle of attack and airspeed indicating systems), to include freezing rain, freezing drizzle, ice crystal, and mixed phase icing conditions. For certain cases, a subset of these icing conditions is proposed.

The benefits and costs are summarized below. The estimated benefits are $405.6 million ($99.5 million present value). The total estimated costs are $71.0 million ($54.0 million present value). On an annualized basis, for the time period 2012–2064, the benefits are $7.0 million, and the costs are $3.8 million.

	Nominal benefits	PV benefits
Benefits		
Smaller & Medium Airplanes	$249,580,915	$69,994,259
Larger Airplanes	156,004,884	29,498,469
Total Benefits	405,585,799	99,492,728
		(7.0 million annually)
Costs		
	Nominal cost	PV cost
Engine Cert Cost	7,936,000	6,931,610
Engine Capital Cost	*6,000,000*	*5,240,632*
Total Engine	13,936,000	12,172,242
Smaller Airplane Certification Cost	24,999,039	21,835,129
New Larger Airplane Certification Cost	3,154,600	2,755,350
Derivative Larger Airplane Certification Cost	10,438,800	9,117,652
Hardware Costs	10,390,000	5,842,024
Fuel Burn All	8,046,676	2,261,941
Total Costs	70,965,115	53,984,338
		($3.8 million annually)

Background

In the 1990s, the FAA became aware that the types of icing conditions considered during the certification of transport category airplanes and turbine aircraft engines needed to be expanded to increase the level of safety during flight in icing. The FAA determined that the revised icing certification standards should include supercooled large drops (SLD), mixed phase, and ice crystals.[1]

Safety concerns about the adequacy of the icing certification standards were brought to the forefront of public and governmental attention by a 1994 accident in Roselawn, Indiana, involving an Avions de Transport Regional ATR 72 series airplane. The FAA, Aerospatiale, the French Direction Général de l'Aviation Civile, Bureau Enquete Accident, the National Aeronautics and Space Administration, the National Transportation Safety Board (NTSB), and others conducted an extensive investigation of this accident. These investigations led to the conclusion that freezing drizzle conditions created a ridge of ice on the wing's upper surface aft of the deicing boots and forward of the ailerons. It was further concluded that this ridge of ice contributed to an uncommanded roll of the airplane. Based on its investigation, the NTSB recommended changes to the icing certification requirements.

The certification requirements for icing conditions are specified in part 25, appendix C. The atmospheric condition (freezing drizzle) that contributed to the Roselawn accident is currently outside the icing envelope for certifying transport category airplanes. The term "icing envelope" is used within part 25, appendix C, and this NPRM to refer to the environmental icing conditions within which the airplane must be shown to be able to safely operate. The term "transport category airplanes" is used throughout this rulemaking document to include all airplanes type certificated to part 25 regulations.

Another atmospheric icing condition that is currently outside the icing envelope is freezing rain. The FAA has not required airplane manufacturers to show that airplanes can operate safely in freezing drizzle or freezing rain conditions. These conditions constitute an icing environment known as supercooled large drops (SLDs).

As a result of this accident and consistent with related NTSB

[1] Appendix 1 of this preamble contains definitions of certain terms used in this notice of proposed rulemaking (NPRM).

recommendations[2] the FAA tasked the Aviation Rulemaking Advisory Committee (ARAC),[3] through its Ice Protection Harmonization Working Group (IPHWG), to do the following:

- Define an icing environment that includes SLDs.
- Consider the need to define a mixed phase icing environment (supercooled liquid and ice crystals).
- Devise requirements to assess the ability of an airplane to either safely operate without restrictions in SLD and mixed phase conditions or safely operate until it can exit these conditions.
- Study the effects icing requirement changes could have on §§ 25.773, Pilot compartment view; 25.1323, Airspeed indicating system; and 25.1325, Static pressure systems.
- Consider the need for a regulation on ice protection for angle of attack probes.

This proposed rule is based on the ARAC's recommendations to the FAA. Terms used in this notice of proposed rulemaking (NPRM) are defined in Appendix 1 of this preamble.

A. Existing Regulations for Flight in Icing Conditions

Currently, the certification regulations applicable to transport category airplanes for flight in icing conditions require that: "The airplane must be able to operate safely in the continuous maximum and intermittent maximum icing conditions of appendix C."[4] The certification regulations also require minimum performance and handling qualities in these icing conditions and methods to detect airframe icing and to activate and operate ice protection systems.[5] Icing regulations applicable to engines are in §§ 33.68 and 33.77. Operating regulations in parts 91 (General Operating and Flight Rules) and 135 (Operating Requirements: Commuter and On Demand Operations) address limitations in icing conditions for airplanes operated under these parts.[6] Part 121 (Operating Requirements: Domestic, Flag and Supplemental Operations) addresses operations in icing conditions that might adversely affect safety and requires installing certain types of ice protection equipment and wing illumination equipment.[7]

Some of the part 25 and 33 regulations specify that the affected equipment must be able to operate in some or all of the icing conditions defined in part 25, appendix C. Other regulations within these parts do not specify the icing conditions that must be considered for airplane certification, but, historically, airplane certification programs have only considered icing conditions that are defined in appendix C.

Appendix C addresses continuous maximum and intermittent maximum icing conditions within stratiform and cumuliform clouds ranging from sea level up to 30,000 feet. Appendix C defines icing cloud characteristics in terms of mean effective drop diameters, liquid water content, temperature, horizontal and vertical extent, and altitude. Icing conditions that contain drops with mean effective diameters that are larger than the cloud mean effective drop diameters defined in appendix C are typically referred to as freezing drizzle or freezing rain. Icing conditions containing freezing drizzle and freezing rain are not currently considered when certifying an airplane's ice protection systems. Because the larger diameter drops typically impinge farther aft on the airfoil, exposure to these conditions can result in ice accretions aft of the ice protection area, which can negatively affect airplane performance and handling qualities.

Likewise, mixed phase (supercooled liquid and ice crystals) and 100% ice crystal icing conditions are not currently considered when certifying an airplane's ice protection systems. Exposing engines and externally mounted probes to these conditions could result in hazardous ice accumulations within the engine that may result in engine damage, power loss, and loss of or misleading airspeed indications. The certification regulations for transport category airplanes and engines do not address the safe operation of airplanes in SLD, mixed phase, or ice crystal icing conditions and the operating rules do not specifically prohibit operations in these conditions.

B. National Transportation Safety Board Safety Recommendations

The NTSB issued NTSB Safety Recommendation Numbers A–96–54[8] and A–96–56[9] as a result of the Roselawn accident previously discussed. This rulemaking activity partially addresses the NTSB recommendations because there are separate rulemaking activities associated with revisions to 14 CFR part 23 regulations for small airplanes and 14 CFR part 121 operational regulations. The NTSB recommendations are as follows:

1. A–96–54

Revise the icing criteria published in 14 Code of Federal Regulations (CFR), parts 23 and 25, in light of both recent research into aircraft ice accretion under varying conditions of liquid water content, drop size distribution, and temperature, and recent developments in both the design and use of aircraft. Also, expand the appendix C icing certification envelope to include freezing drizzle/freezing rain and mixed water/ice crystal conditions, as necessary. (Class II, Priority Action) (A–96–54) (Supersedes A–81–116 and—118)

2. A–96–56

Revise the icing certification testing regulation to ensure that airplanes are properly tested for all conditions in which they are authorized to operate, or are otherwise shown to be capable of safe flight into such conditions. If safe operations can not be demonstrated by the manufacturer, operational limitations should be imposed to prohibit flight in such conditions and flightcrews should be provided with the means to positively determine when they are in icing conditions that exceed the limits for aircraft certification. (Class II, Priority Action) (A–96–56)

C. Related Rulemaking Activity

The ARAC's Ice Protection Harmonization Working Group (IPHWG) submitted additional part 121 icing rulemaking recommendations to the FAA that may lead to future rulemaking, but do not directly impact this NPRM. Those recommendations would improve airplane safety when operating in icing conditions. The recommendations would:

- Address when ice protection systems must be activated.

[2] NTSB recommendations A–96–54 and A–96–56; available in the Docket and on the Internet at: *http://www.ntsb.gov/Recs/letters/1996/A96_48_69.pdf.*

[3] Published in the **Federal Register**, December 8, 1997 (62 FR 64621).

[4] 14 CFR 25.1419, Ice Protection.

[5] For a complete discussion of the regulations see Amendment 25–121 (72 FR 44665, August 8, 2007), and Amendment 25–129 (74 FR 38328, August 3, 2009).

[6] 14 CFR 91.527, Operating in icing conditions; and § 135.227, Icing conditions: Operating limitations.

[7] 14 CFR 121.629(a), Operation in icing conditions and § 121.341, Equipment for operations in icing conditions.

[8] NTSB recommendation A–96–54; available in the Docket and on the Internet at: *http://www.ntsb.gov/Recs/letters/1996/A96_48_69.pdf.*

[9] NTSB recommendation A–96–56; available in the Docket and on the Internet at: *http://www.ntsb.gov/Recs/letters/1996/A96_48_69.pdf.*

• Require some airplanes to exit all icing conditions after encountering large drop icing conditions conducive to ice accretions aft of the airframe's protected area.

D. Advisory Material

The proposed new AC and revisions to existing ACs would provide guidance material for one acceptable means, but not the only means, of demonstrating compliance with the proposed regulations contained in this NPRM. The guidance provided in these documents is directed at airplane manufacturers, modifiers, foreign regulatory authorities, and FAA transport airplane type certification engineers, flight test pilots, and their designees. The proposed ACs will be posted on the "Aircraft Certification Draft Documents Open for Comment" Web site, *http://www.faa.gov/aircraft/draft_docs,* after this NPRM is published in the **Federal Register**

For advisory material related to this NPRM, the FAA is:

• Developing a new AC 25–xx, Compliance of Transport Category Airplanes with Certification Requirements for Flight in Icing Conditions.

• Revising AC 20–147, Turbojet, Turboprop, and Turbofan Engine Induction System Icing and Ice Ingestion.

• Revising AC 25–25, Performance and Handling Characteristics in the Icing Conditions Specified in Part 25, Appendix C.

• Revising AC 25.629–1A, Aeroelastic Stability Substantiation of Transport Category Airplanes.

• Revising AC 25.1329–1B, Approval of Flight Guidance Systems.

General Discussion of the Proposal

The FAA proposes to revise certain regulations in parts 25 and 33 related to the certification of transport category airplanes and turbine aircraft engines in icing conditions.

We also propose to create a new: § 25.1324—Angle of attack systems; § 25.1420—Supercooled large drop icing conditions; part 25, appendix O (supercooled large drop icing conditions; part 33, appendix C (intentionally left blank); and part 33, appendix D (Mixed phase and ice crystal icing conditions). Part 33, appendix C, is intentionally left blank and retained as a placeholder for non-icing related regulations so that part 33, appendix C, would not be confused with the icing conditions defined in part 25, appendix C.

To improve the safety of transport category airplanes operating in SLD, mixed phase, and ice crystal icing conditions, the proposed regulations would:

• Expand the certification icing environment to include freezing rain and freezing drizzle.

• Require airplanes most affected by SLD icing conditions (transport category airplanes with a maximum takeoff weight less than 60,000 pounds or with reversible flight controls) to meet certain safety standards in the expanded certification icing environment, including additional airplane performance and handling qualities requirements.

• Expand the engine and engine installation certification, and some airplane component certification regulations (for example, angle of attack and airspeed indicating systems) to include freezing rain, freezing drizzle, ice crystal, and mixed phase icing conditions. For certain cases, a subset of these icing conditions is proposed.

A. Safety Concern

The ARAC's IPHWG reviewed icing events involving transport category airplanes and found accidents and incidents that are believed to have occurred in icing conditions that are not addressed by the current regulations. The icing conditions resulted in flightcrews losing control of their aircraft and, in some cases, engine power loss. The review found hull losses and fatalities associated with SLD conditions, but not for ice crystal and mixed phase conditions. However, there have been 14 documented cases of ice crystal and mixed phase engine power loss events between 1988 through 2009. Of those events, there were 13 occurrences of multi-engine power loss events. Fifty percent of those events were defined as "aircraft level events," since they occurred on multiple engines installed on the same airplane. Two of these aircraft level events resulted in diversions.

The incident history also indicates that flightcrews have experienced temporary loss of or misleading airspeed indications in icing. Airspeed indications on transport category airplanes are derived from the difference between two air pressures—the total pressure, as measured by a pitot tube mounted somewhere on the fuselage, and the ambient or static pressure, as measured by a static port. The static port may be flush mounted on the airplane fuselage or co-located on the pitot tube. When the static and pitot systems are co-located, the configuration is referred to as a pitot-static tube. Static ports are not prone to collecting ice crystals, either because of their flush mounted locations or their overall shape.

Due to the way pitot or pitot-static tubes are usually mounted, they are prone to collecting ice crystals. Encountering high concentrations of ice crystals may lead to blocked pitot or pitot-static tubes because the energy necessary to melt the ice crystals can exceed the tubes' design requirements. Pitot or pitot-static tube blockage can lead to errors in measuring airspeed. The regulatory changes which add ice crystal conditions for airspeed indicating systems are intended to apply to either a pitot tube or pitot-static tube configuration.

The IPHWG did not identify any events due to ice accumulations on probes that are used to measure angle of attack, or other angle of attack sensors. However, the IPHWG determined there are angle of attack probe designs that are susceptible to mixed phase conditions.

The IPHWG concluded that the current regulations do not adequately address SLD, mixed phase, and ice crystal conditions. The concerns regarding mixed phase and ice crystal conditions were limited to engines, propulsion installations, airspeed indications, and angle of attack systems. The FAA concurs with the IPHWG's conclusions.

B. Prior FAA Actions To Address the Safety Concern

The FAA has issued airworthiness directives (ADs) to address the unsafe conditions associated with operating certain airplanes in severe icing conditions, which can include SLD icing conditions. These ADs are applicable to airplanes equipped with both reversible flight controls in the roll axis and pneumatic deicing boots. The ADs require the flightcrews to exit icing when visual cues are observed that indicate the conditions exceed the capabilities of the ice protection equipment. In addition, for new certifications of airplanes equipped with unpowered roll axis controls and pneumatic deicing boots, the airplanes are evaluated to ensure the roll control forces are acceptable if the airplane operates in certain SLD conditions. However, the scope of these actions is limited because they do not address all transport category airplanes and do not address the underlying safety concern of the unknown performance and handling qualities safety margins for airplanes and engines operating in freezing drizzle, freezing rain, mixed phase, and ice crystal conditions. The IPHWG concluded there is a need to improve the regulations to ensure safe operation

of airplanes and engines in these conditions.

C. Alternatives to Rulemaking

Before proposing new rulemaking, the FAA considers alternative ways to solve the safety issue under consideration. Following is a brief discussion of two of the alternatives we considered during deliberations on this proposed rule.

1. Alternative 1: Terminal Area Radar and Sensors

The IPHWG considered the use of terminal area radar and ground-based sensors to identify areas of SLDs so they can be avoided, rather than require certification for operations in SLD. Equipment for detecting and characterizing icing conditions in holding areas is being developed. However, the equipment would have limited coverage area. For areas not covered by terminal area radar and ground-based sensors, airborne radars and sensors are being developed that would identify SLD conditions in sufficient time for avoidance. These ground-based and airborne systems are not mature enough to provide sufficient protection for all flight operations affected by SLD. Even if the equipment was mature, rulemaking would still be necessary to establish safety margins for inadvertent flight into such conditions and to provide an option for applicants to substantiate that the airplane is capable of safe operation in SLD conditions.

2. Alternative 2: Icing Diagnostic and Predictive Weather Tools

The IPHWG considered the use of icing diagnostic and predictive weather tools to avoid SLD rather than certify an airplane to operate in SLD conditions. Tools have been developed that can provide information on icing and SLD potential, but may not report all occurrences of SLD. These experimental tools are available on the Internet and can be used to provide flight planning information guidance for avoidance of SLD conditions. However, rulemaking would still be necessary to establish safety margins for inadvertent flight into such conditions and to provide an option for applicants to substantiate that the airplane is capable of safe operation in SLD conditions.

Discussion of the Proposed Regulatory Requirements

Appendix O to Part 25

The proposed appendix O is structured like part 25, appendix C, one part defining icing conditions and one defining ice accretions. Appendix O, part I, would define SLD icing conditions and part II would define the ice accretions that a manufacturer must consider when designing an airplane.

Supercooled Large Drop Icing Conditions

Proposed § 25.1420 would add safety requirements that must be met in SLD icing conditions for certain transport category airplanes to be certified for flight in icing conditions. This change would require evaluating the operation of these airplanes in the SLD icing environment; developing a means to differentiate between different SLD icing conditions, if necessary; and developing procedures to exit all icing conditions.

The proposed regulation would require consideration of the SLD icing conditions (freezing drizzle and freezing rain) defined in a proposed new part 25, appendix O, part I, in addition to the existing part 25, appendix C, icing conditions. Proposed appendix O would include drop sizes larger than those considered by current icing regulations. These larger drops impinge and freeze farther aft on airplane surfaces than the drops defined in appendix C and may affect the airplane's performance, handling qualities, flutter characteristics, and engine and systems operations. The appendix O icing conditions, if adopted, may affect the design of airplane ice protection systems.

The SLD icing conditions described in the proposed appendix O would be those in which the airplane must be able to either safely exit following the detection of any or specifically identified appendix O icing conditions, or safely operate without restrictions. Specifically, the proposed § 25.1420 would allow three options:

- Detect appendix O conditions and then operate safely while exiting all icing conditions (§ 25.1420(a)(1)).
- Safely operate in a selected portion of appendix O conditions, detect when the airplane is operating in conditions that exceed the selected portion, and then operate safely while exiting all icing conditions (§ 25.1420(a)(2)).
- Operate safely in all of the appendix O conditions (§ 25.1420(a)(3)).

As discussed below in the section titled "Differences from the ARAC Recommendations," the proposed § 25.1420 would apply to airplanes with either: (1) a takeoff maximum gross weight of less than 60,000 pounds, or (2) reversible flight controls.

To establish that an airplane could operate safely in the proposed appendix O conditions described above, proposed § 25.1420(b) would require both analysis and one test, or more as found necessary, to establish that the ice protection for the various components of the airplane is adequate. The words "as found necessary" would be applied in the same way as they are applied in § 25.1419(b). During the certification process, the applicant would demonstrate compliance with the rule using a combination of analyses and test(s). The applicant's means of compliance would consist of analyses and the amount and types of testing it finds necessary to demonstrate compliance with the regulation. The applicant would choose to use one or more of the tests identified in paragraphs § 25.1420(b)(1) through (b)(5). Although the applicant may choose the means of compliance, it is ultimately the FAA that determines whether the applicant has performed sufficient test(s) and analyses to substantiate compliance with the regulation. Similarly, the words "as necessary," which appear in § 25.1420(b)(3) and (b)(5), would result in the applicant choosing the means of compliance that is needed to support the analysis, but the FAA would make a finding whether the means of compliance is acceptable. If an applicant has adequate data a similarity analysis may be used in lieu of the testing required by § 25.1420(b). For an airplane certified to operate in at least a portion of proposed appendix O icing conditions, proposed § 25.1420(c) would extend the requirements of § 25.1419(e), (f), (g), and (h) [10] to include activation and operation of airframe ice protection systems in the appendix O icing conditions for which the airplane is certified. Proposed § 25.1420(c) would not apply to airplanes certified to proposed § 25.1420(a)(1) because proposed § 25.1420(a)(1) would require a method to identify and safely exit all appendix O conditions.

The proposed appendix O defines SLD conditions. It was developed by the ARAC IPHWG, which included meteorologists and icing research specialists from industry, FAA/FAA Tech Center, Meteorological Services of Canada, National Aeronautics and Space Administration (NASA), and Transport Canada/Transport Development Center. The IPHWG collected and analyzed airborne measurements of pertinent SLD variables, developed an engineering standard to be used in aircraft certification, and recommended that

[10] These requirements were recently adopted in Amendment 25–129 (74 FR 38328, August 3, 2009). Generally, that amendment requires methods to detect airframe icing and to activate and operate ice protection systems.

standard to the FAA. The FAA concurs with the recommendation.

The SLD conditions defined in appendix O, part I, include freezing drizzle and freezing rain conditions. The freezing drizzle and freezing rain environments are further divided into conditions in which the drop median volume diameters are either less than or greater than the 40 microns. Appendix O consists of measured data that was divided into drop distributions within these four icing conditions. These distributions were averaged to produce the representative distributions for each condition.

The distributions of drop sizes are defined as part of appendix O. The need to include the distributions comes from the larger amount of mass in the larger drop diameters of appendix O. The water mass of the larger drops affects the amount of water that impinges on airplane components, the drop impingement, icing limits, and the ice buildup shape.

Appendix O provides a liquid water content scale factor that would be used to adjust the liquid water content for freezing drizzle and freezing rain. The scale factor is based on the liquid water contents of continuous freezing drizzle and freezing rain conditions decreasing with increasing horizontal extents.

Performance and Handling Qualities

The ice accretion definitions in proposed appendix O, part II, and the proposed revisions to the performance and handling qualities requirements for flight in icing conditions are similar to those required for flight in appendix C icing conditions. The proposals address the three options allowed by proposed § 25.1420(a). Proposed appendix O, part II, would contain definitions of the ice accretions appropriate to each phase of flight. The proposed appendix O, part II(b), would define the ice accretions used to show compliance with the performance and handling qualities requirements for any portion of appendix O in which the airplane is not certified to operate. The proposed appendix O, part II(c), would define the ice accretions for any portion of appendix O in which the airplane is certified to operate.

Proposed appendix O, part II(d), would define the ice accretion in appendix O conditions before the airframe ice protection system is activated and is performing its intended function to reduce or eliminate ice accretions on protected surfaces. This ice accretion would be used in showing compliance with the controllability and stall warning margin requirements of §§ 25.143(j) and 25.207(h), respectively, that apply before the airframe ice protection system has been activated and is performing its intended function. Even if the airplane is certified to operate only in a portion of the appendix O icing conditions, the ice accretion used to show compliance with §§ 25.143(j) and 25.207(h) must consider all appendix O icing conditions since the initial entry into icing conditions may be into appendix O icing conditions in which the airplane is not certified to operate.

To reduce the number of ice accretions needed to show compliance with § 25.21(g), the proposed appendix O, part II(e), would allow the option of using an ice accretion defined for one flight phase for any other flight phase if it is shown to be more critical than the ice accretion defined for that other flight phase.

Existing § 25.21(g)(1) [11] requires that the performance and handling qualities requirements of part 25, subpart B, with certain exceptions,[12] be met in appendix C icing conditions.[13] Proposed § 25.21(g)(3) would identify the performance and handling qualities requirements that must be met to ensure that an airplane certified to either the proposed § 25.1420(a)(1) or (a)(2) could safely exit icing if the icing conditions of proposed appendix O, for which certification is not sought, are encountered. Such an airplane would not be approved to take off in proposed appendix O icing conditions and would only need to be able to detect and safely exit those icing conditions encountered en route. Therefore, it is proposed that, in addition to the exceptions identified in the existing § 25.21(g)(1), such an airplane would not need to meet certain requirements [14] for appendix O icing conditions.

With one exception, for an airplane certified under proposed § 25.1420(a)(1) or (a)(2), the same handling qualities requirements that must currently be met for flight in appendix C icing conditions are proposed for flight in appendix O icing conditions for which certification is not sought. That exception is § 25.143(c)(1), which addresses controllability following engine failure during takeoff at V_2. Compliance with that rule would not be necessary since the airplane would not be approved for takeoff in appendix O icing conditions. No justification for a relaxation of other handling qualities requirements could be identified.

The requirements for safe operation in all or any portion of proposed appendix O icing conditions under proposed § 25.21(g)(4) are similar to those currently required for appendix C icing conditions. With one exception, the list of part 25, subpart B requirements that currently do not have to be met for flight in appendix C icing conditions would not have to be met in proposed appendix O icing conditions. The exception is that compliance with § 25.121(a), *Climb: One-engine-inoperative* would be required for appendix O icing conditions because, unlike for appendix C icing conditions, the FAA cannot justify an assumption that the ice accretion in this flight phase can be assumed insignificant. In practice, it is expected that some applicants may use an operating limitation to prohibit takeoff in appendix O icing conditions. Otherwise, the same rationales behind the requirements are used for both appendix C and appendix O icing conditions. For continued operation in appendix O icing conditions, there should effectively be no degradation in handling qualities, and any degradation in performance should be no greater than that allowed by the regulations for appendix C icing conditions.

Component Requirements for All Part 25 Transport Category Airplanes

In certification programs, both the airplane as a whole and its individual components are evaluated for flight in icing conditions. There are several rules in part 25 [15] that contain icing related requirements for specific components. We propose to revise those rules to ensure the airplane can safely operate in the new icing conditions established in this proposed rule.

Section 25.1419 requires that an airplane be able to safely operate in all of the conditions specified in appendix C, whereas the proposed § 25.1420 would not require an airplane to safely operate in all of the appendix O icing conditions. Proposed § 25.1420(a)(1) and (a)(2) only require an airplane to be capable of safely exiting icing conditions after encountering an appendix O icing condition for which that airplane will not be certified. The existing regulations for pilot compartment view, airspeed indication

[11] 14 CFR 25.21(g)(1) is proposed to be redesignated as § 25.21(g)(2).

[12] The exceptions listed in this requirement are §§ 25.121(a), 25.123(c), 25.143(b)(1) and (b)(2), 25.149, 25.201(c)(2), 25.207(c) and (d), 25.239, and 25.251(b) through (e).

[13] For a complete discussion of these requirements, *see* Amendment 25–121 (72 FR 44665, August 8, 2007).

[14] 14 CFR 25.105, 25.107, 25.109, 25.111, 25.113, 25.121, and 25.123.

[15] 14 CFR 25.773, 25.929, 25.1093, 25.1323, and 25.1325.

system, and static pressure system [16] contain requirements for operation in icing conditions. These sections would be revised to add requirements for operation in appendix O icing conditions. Section 25.1323, *Airspeed indicating system,* would also be revised to include and define mixed phase and ice crystal conditions. New proposed § 25.1324 includes an icing requirement for angle of attack systems. This would be similar to the icing requirements for airspeed indication systems. The proposed section would require the angle of attack system to be heated to prevent malfunction in appendices C and O icing conditions and in the mixed phase and ice crystal conditions defined in § 25.1323.

In the proposed revisions to the requirements for pilot compartment view, airspeed indication system, and static pressure system,[17] and the new proposed requirements for angle of attack systems, an airplane certified in accordance with § 25.1420(a)(1) or (a)(2) would not be required to be evaluated for all of appendix O. For airplanes certified in accordance with § 25.1420(a)(1), the icing conditions that the airplane is certified to safely exit following detection must be considered. For airplanes certified in accordance with § 25.1420(a)(2), the icing conditions that the airplane is certified to safely operate in, and to safely exit following detection, must be considered. For airplanes certified in accordance with § 25.1420(a)(3) and for airplanes not subject to § 25.1420, all icing conditions must be considered. Airplanes not certified for flight in icing need not consider appendix O.

The engine induction system icing section (§ 25.1093) and propeller deicing section (§ 25.929) contain requirements for operation in icing conditions. As a conservative approach to ensure safe operation of an airplane in an inadvertent encounter with icing, the existing language in § 25.1093 contains requirements for operation in icing conditions, even for an airplane that is not approved for flight in icing. Since proposed appendix O defines icing conditions that also may be inadvertently encountered, § 25.1093 would be revised to reference appendix O in its entirety. This would maintain the FAA's conservative approach for this section. Section 25.929 (propeller deicing) would also be revised to reference appendix O in its entirety.

Sections 25.929 and 25.1323 generically reference icing instead of specifically mentioning appendix C. Historically, the icing conditions specified in appendix C have been applied to these rules. For clarity, we are revising §§ 25.929 and 25.1323 so they specifically reference appendix C, as well as appendix O. The proposed revisions to icing regulations for pilot compartment view, propellers, engine induction system icing protection, airspeed indication system, static pressure system, and angle of attack system would be applicable to all transport category airplanes to ensure safe operation during operations in icing conditions.

The proposed revisions to § 25.903 would retain the existing regulations and add new subparagraphs to be consistent with the proposed part 33 changes in § 33.68. These revisions would allow for approving new aircraft type certification programs with engines certified to earlier amendment levels. The proposed revisions would make it clear that the proposed part 33 changes would not be retroactively imposed on an already type certified engine design, unless service history indicated that an unsafe condition was present.

The proposed revision to § 25.929 clarifies the meaning of the words "for airplanes intended for use where icing may be expected." The intent has been for the rule to be applicable to airplanes certified for flight in icing.

Engine and Engine Installation Requirements

The proposed revisions to §§ 25.1093, 33.68, and 33.77 would change the icing environmental requirements used to evaluate engine protection and operation in icing conditions. The reason for these changes is that the incident history of some airplanes has shown that the current icing environmental requirements are inadequate. The effect of the change would be to require an evaluation of safe operation in the revised icing environment. The proposed revision to § 25.1093 restructures paragraph (b) and adds a new Table 1—Icing Conditions for Ground Tests. The proposed rules would require engines and engine installations to operate safely throughout the SLD conditions defined in proposed new part 25, appendix O, and the newly defined mixed phase and ice crystal conditions defined in proposed new part 33, appendix D.[18] The proposed appendix D was developed by the ARAC Engine Harmonization Working Group and the Power Plant Installation Harmonization Working Group, which included meteorologists and icing research specialists from industry, FAA/FAA Tech Center, Meteorological Services of Canada, National Aeronautics and Space Administration (NASA), and Transport Canada/Transport Development Center. The ARAC recommended appendix D and the FAA concurs with the recommendation.

The proposed revision to § 25.1521 would retain the existing regulations and add a new subparagraph that would require an additional operating limitation for turbine engine installations during ground operation in icing conditions defined in § 25.1093(b)(2). That operating limitation would address the maximum time interval between any engine run-ups from idle and the minimum ambient temperature associated with that run-up interval. This limitation is necessary because we do not currently have any specific requirements for run-up procedures for engine ground operation in icing conditions. The engine run-up procedure, including the maximum time interval between run-ups from idle, run-up power setting, duration at power, and the minimum ambient temperature demonstrated for that run-up interval proposed in § 25.1521, would be included in the Airplane Flight Manual in accordance with existing § 25.1581(a)(1) and § 25.1583(b)(1).

The engine run-up procedure from ground idle to a moderate power or thrust setting is necessary to shed ice build-up on the fan blades before the quantity of ice reaches a level that could adversely affect engine operation if ice is shed into the engine. The proposed revision to § 25.1521 would not require additional testing. The ice shedding demonstration may be included as part of the § 33.68 engine icing testing.

Operating Limitations

The proposed revision to § 25.1533 would establish an operating limitation applicable to airplanes that are not certified in accordance with proposed § 25.1420(a)(1) or (a)(2). The flightcrews of these airplanes would be required to exit all icing conditions if they encounter appendix O icing conditions that the airplane has not been certified to operate in.

Expansion of Proposed Icing Requirements

The proposed regulations [19] for the airspeed indicating system and angle of

[16] 14 CFR 25.773, 25.1323, and 25.1325.

[17] *Ibid.*

[18] *See* FAA report DOT/FAA/AR–09/13, Technical Compendium from Meetings of the Engine Harmonization Working Group, March 2009 for details on appendix D and its development.

[19] 14 CFR 25.1323, and 25.1324.

attack system would address the operation of those systems in specific mixed phase and ice crystal conditions, as defined in proposed Appendix O. During the drafting of this NPRM the FAA became aware of airspeed indicating system malfunctions in environmental conditions that may not be addressed by these proposed regulations. The FAA is reviewing the malfunctions and is considering the need to change the proposed mixed phase and ice crystal parameters to include freezing rain. The maximum mixed phase and ice crystal parameters that we are considering are those defined in the proposed part 33, appendix D. The freezing rain parameters that we are considering are based on standards some manufacturers have used for airdata probes. The maximum freezing rain parameters that we are considering are:

Static air temperature	Altitude range		Liquid water content	Horizontal extent		Droplet MVD
(°C)	(ft)	(m)	(g/m3)	(km)	(nmiles)	(μm)
−2 to 0	0 to 10 000	0 to 3000	1	100	50	1000
			6	5	3	2000
			15	1	0.5	2000

We consider the mixed phase and ice crystal parameters defined in the proposed part 33, appendix D, plus the freezing rain parameters defined above to be adequate to prevent potential airspeed indicating system malfunctions in these newly defined environmental conditions. We request technical and economic comments on whether the proposed airspeed indicating system and angle of attack system regulations should include these expanded parameters. Based on comments we receive, we may add these parameters to the final rule.

Differences From the ARAC Recommendations

The IPHWG recommended changes to parts 25 and 33 to ensure the safe operation of airplanes and engines in icing conditions. The FAA concurs with the recommendations, but has determined it is necessary to revise to which airplanes the new airplane icing certification requirements in the proposed § 25.1420 would apply. The proposed § 25.1420 in this NPRM would apply to airplanes with either: (1) a takeoff maximum gross weight of less than 60,000 lbs (27,000 kg), or (2) reversible flight controls. An airplane with reversible flight controls in any axis (pitch, roll, or yaw), even if these flight controls are aerodynamically boosted and/or power-assisted, would be considered to have reversible flight controls under this proposed rule. An airplane with flight controls that are irreversible under normal operating conditions, but are reversible following a failure, would not be considered to have reversible flight controls under this proposed rule. Reversible, aerodynamically boosted, and power-assisted flight controls are defined in Appendix 1 to the preamble of this NPRM. The ADs described above in section B. "Prior FAA Actions to address the Safety Concern" are only applicable to airplanes equipped with both reversible flight controls in the roll axis and pneumatic deicing boots.

A group of IPHWG members (Boeing, Airbus, and Embraer, supported by Cessna) held a minority position in their belief that the applicability of the proposed § 25.1420 should exclude airplanes with certain design features. Their rationale for the position is that large transport airplanes still in production have not experienced any accidents or serious incidents as a result of flying in SLD icing conditions. These manufacturers proposed that airplanes having all three of the following design features should be excluded from compliance with § 25.1420:

(1) Gross weight in excess of 60,000 lbs (27,000 kg);

(2) Irreversible powered flight controls; and

(3) Wing leading-edge high-lift devices.

These manufacturers included the gross weight criterion in this list, in part, because size has a direct bearing on an airplane's susceptibility to the adverse effects of ice accretion. The size of an airplane determines the sensitivity of its flight characteristics to ice thickness and roughness. The relative effect of a given ice height (or ice roughness height) decreases as airplane size increases.

The irreversible powered flight controls design feature was chosen, in part, because using irreversible powered flight controls reduces an airplane's susceptibility to SLD conditions. The concern that SLD accretions can produce hinge moment or other anomalous control force/trim effects is not applicable to those systems.

The wing leading-edge high-lift devices design feature was chosen, in part, because, for wings without ice contamination, those devices provide a considerable increase in the maximum lift coefficient (CLmax) compared to fixed leading edges. When wings equipped with those devices are contaminated with ice, they have smaller relative CLmax losses due to ice accretion than wings with fixed leading edges.

The IPHWG majority (Air Line Pilots Association, International (ALPA), Civil Aviation Authority for the United Kingdom (CAA/UK), FAA/FAA Tech Center, Meteorological Services of Canada, National Aeronautics and Space Administration (NASA), SAAB, Transport Canada/Transport Development Center) did not accept the exclusion of airplanes with the three aforementioned design features because one cannot predict with confidence that the past service experience of airplanes with these specific design features will be applicable to future designs. The IPHWG majority recommended applying the new SLD airplane certification requirements proposed in the new § 25.1420 to all future transport category airplane type designs.

The IPHWG majority opposed limiting the applicability of the rule based on airplane gross weight, in part, because the ratio of wing and control surface sizes to airplane weight varies between airplane designs. Therefore, airplane takeoff weight is not a consistent indicator of lifting and control surface size or chord, which are the important parameters affecting sensitivity to a given ice accretion.

Excluding airplanes with irreversible flight controls was opposed, in part, because hinge moment and other anomalous control forces are not the only concern in SLD icing conditions. An irreversible control surface may not be deflected by the SLD accumulation but the aerodynamic efficiency of the control is likely to be degraded by the presence of SLD icing in front of the control surface.

Excluding airplanes with wing leading edge high-lift devices was opposed, in part, because there are many different designs for such devices, which may not all be equally effective

in mitigating the negative effects of SLD ice accretions. The designs for those devices include:

- Slats that may be slotted or sealed to the basic wing leading edge, over or under deflected, with deflection and slotting that may be automated as a function of stall warning or airplane angle of attack;
- Krueger flaps that may be slotted or sealed to the wing leading edge, flexed to optimum curvature or conformed to the wing's leading edge lower surface; and
- Vortilons or some other vortex creating devices.

In addition, for transport category airplanes with leading edge high-lift devices, the spanwise extent of ice protection varies from 100 percent for some early turbo-jet airplane slats, to the span of two slats for later airplane designs, to none for Krueger flaps. The variations in the designs lead to varying degrees of aerodynamic benefit. Without defining the specific performance benefits associated with the above designs, the potential safety margins for SLD conditions cannot be determined.

The complete minority and majority positions are discussed in the working group report, which is available in the public docket.[20]

In order to propose a rule with the estimated costs commensurate with the estimated benefits, the FAA determined the applicability of the proposed rule should be limited based on service histories of certified airplanes, and the assumption that similar future designs will continue to not experience the safety problems addressed by this proposal. Therefore, the FAA decided to revise the IPHWG rulemaking recommendation by incorporating, in part, the IPHWG minority position to exclude airplanes with certain design features.

The FAA continues to agree with the IPHWG majority position that the presence (or conversely, the absence) of leading edge high lift devices should not be used as a basis for determining the applicability of the proposed § 25.1420. There is insufficient data to conclude either that every type of leading edge high lift device, or that a specific leading edge high lift device design will affect (positively or negatively) an airplane's ability to operate in SLD atmospheric icing conditions. Also, leading edge high lift devices are only deployed in certain phases of flight (for example, takeoff and landing), and their deployment may differ for different flap configurations. For example, a leading edge slat may be sealed in one flap configuration, but slotted (that is, with a gap opened up between the trailing edge of the slat and the wing) in others. Therefore, the applicability of the proposed § 25.1420 is not affected by the presence or absence of leading edge high lift devices.

We request comment on whether this proposed rule, if adopted, should be applied to airplanes larger than 60,000 pounds MTOW or airplanes with other design features whose presence or absence would result in the airplane being susceptible to safety problems while operating in the SLD icing conditions defined in the proposed appendix O, as well as the economic analysis associated with these decisions.[21]

This NPRM also differs from the ARAC recommendation by proposing a revision to § 25.1533 for airplanes not certified to operate in all of the SLD atmospheric icing conditions specified in the proposed new appendix O (that is, airplanes certified in accordance with proposed § 25.1420(a)(1) or (a)(2)). The proposal would establish an operating limitation that requires the flightcrews to exit all icing conditions if they encounter appendix O icing conditions in which the airplane has not been certified to operate.

Another difference between this NPRM and the ARAC recommendation concerns an ARAC recommendation to establish separate stall warning margin and controllability requirements using the ice accretion associated with detection of appendix O icing conditions that require exiting all icing conditions. For airplanes that require exiting all icing conditions after encountering certain appendix O icing conditions, the ARAC recommended (and the FAA proposes in this NPRM) stall warning margin and controllability requirements that must be met with the ice accretion existing at the time the airplane exits all icing conditions. The ARAC was concerned that some future airplanes would be incapable of complying with these recommended requirements without including some means to increase the stall warning margin and airplane controllability upon detection of appendix O icing conditions. The ARAC recommended applying less stringent stall warning and controllability requirements with the ice accretion existing at the time appendix O icing conditions are detected, before the means to increase the stall warning margin and airplane controllability becomes effective.

The FAA considers these ARAC recommended requirements to add significant complexity to the proposed rule to address an issue that may not arise. The FAA considers it unlikely that future airplane designs will include means to increase the stall warning margin and airplane controllability upon detection of appendix O icing conditions in addition to the means that are incorporated in many current transport category airplane designs to change the stall warning device activation point upon activation of the ice protection system. Therefore, these ARAC recommendations are not included in this NPRM. If needed, the FAA can issue special conditions, in accordance with § 21.16, to provide adequate safety standards in the unlikely event that such design features are included in a future transport category airplane.

Another difference between this NPRM and the ARAC recommendation concerns the requirements for pilot compartment view, airspeed indication system, angle of attack system and static pressure system.[22] For these rules the ARAC recommendation would have required airplanes certified in accordance with § 25.1420(a)(1) or (a)(2) to consider all appendix O icing conditions. However, the ARAC recommended advisory circular material allowed these airplanes to consider less than the full appendix O icing conditions. The FAA is not proposing that these airplanes must meet the performance and handling qualities requirements for all of the icing conditions specified in appendix O. Therefore, for pilot compartment view, airspeed indication system, angle of attack system and static pressure system,[23] the agency concurs that it would only be necessary to show compliance under the applicable conditions in appendix O.

Discussion of Working Group Non-Consensus Issues

One goal of the ARAC process is to have a working group achieve consensus on all of the recommendations. The IPHWG did not unanimously agree on the following issues:

1. Whether it is necessary to flight test in natural SLD icing conditions.
2. Whether airplanes with certain design features should be exempt from the recommendation for § 25.1420.

[20] The complete IPHWG working group report is available on the Internet at *http://regulations.gov.* A copy will also be placed in the docket (FAA–2010–0636).

[21] A copy of the Initial Regulatory Evaluation (dated October 5, 2009) can be found in the docket (FAA–2010–0636).

[22] 14 CFR 25.773, 25.1323, 25.1324, and 25.1325.

[23] *Ibid.*

3. Whether it is acceptable to certificate an airplane to a portion of appendix O, as proposed in the recommendation for § 25.1420(a)(2).

4. Whether certain icing related accidents might have been prevented if an accident airplane had complied with the recommendations in the IPHWG report.

A detailed discussion of the IPHWG's minority and majority opinions on these issues is included in the working group report. A copy of the working group report is in the public docket.[24]

The FAA predominantly concurred with the ARAC's recommendations, but determined it was necessary to revise the applicability of the recommendation for § 25.1420, as discussed previously.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires that the FAA consider the impact of paperwork and other information collection burdens imposed on the public. The information collection requirements associated with this NPRM have been previously approved by the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) and have been assigned OMB Control Number 2120–0018.

International Compatibility

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is FAA policy to comply with International Civil Aviation Organization (ICAO) Standards and Recommended Practices to the maximum extent practicable. The FAA has determined that there are no ICAO Standards and Recommended Practices that correspond to these proposed regulations.

European Aviation Safety Agency

The European Aviation Safety Agency (EASA) was established by the European Community to develop standards to ensure safety and environmental protection, oversee uniform application of those standards, and promote them internationally. EASA formally became responsible for certification of aircraft, engines, parts, and appliances on September 28, 2003. EASA has a project similar to SLD on its rulemaking inventory and our intent is to harmonize these regulations.

[24] The complete IPHWG working group report is available on the Internet at *http://regulations.gov.* The docket number is FAA–2010–0636.

Regulatory Evaluation, Regulatory Flexibility Determination, International Trade Analysis, and Unfunded Mandates

Changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866 directs that each Federal agency shall propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 (Pub. L. 96–354) requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act (Pub. L. 96–39) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. In developing U.S. standards, this Trade Act requires agencies to consider international standards and, where appropriate, that they be the basis of U.S. standards. Fourth, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more annually (adjusted for inflation with base year of 1995). This portion of the preamble summarizes the FAA's analysis of the economic impacts of this proposed rule. We suggest readers seeking greater detail read the full regulatory evaluation, a copy of which we have placed in the docket for this rulemaking.

In conducting these analyses, FAA has determined that this proposed rule: (1) Has benefits that justify its costs; (2) is not an economically "significant regulatory action" as defined in section 3(f) of Executive Order 12866; (3) is "significant" as defined in DOT's Regulatory Policies and Procedures; (4) would not have a significant economic impact on a substantial number of small entities; (5) would not create unnecessary obstacles to the foreign commerce of the United States; and (6) would not impose an unfunded mandate on State, local, or tribal governments, or on the private sector by exceeding the threshold identified above. These analyses are summarized below.

Total Benefits and Costs of This Rule

This NPRM would amend the airworthiness standards applicable to certain transport category airplanes certified for flight in icing conditions and the icing airworthiness standards applicable to certain aircraft engines. The affected fleet and categories of benefits and costs are customized to the requirements contained in this proposal. So, depending on the category and type of airplane, the benefits and costs are analyzed over different time periods. It is important for the reader to focus on present value benefits and costs. The total estimated benefits are $405.6 million ($99.5 million present value). The total estimated costs are $71.0 million ($54.0 million present value). On an annualized basis, for the time period 2012–2064, the benefits are $7.0 million, and the costs are $3.8 million. Therefore, the benefits of the proposed rule justify the costs, and the proposed rule is cost beneficial.

Persons Potentially Affected by This Rule

- Part 25 airplane manufacturers.
- Engine manufacturers.
- Operators of Affected Equipment.

Assumptions

- Discount rate—7%.
- Costs and benefits are expressed in 2009 dollars and that both costs and benefits start to occur in 2011. We conservatively assume that all certifications are approved one year after the rule is codified (2011), and that production/deliveries begin to occur the following year (2012). Airplane deliveries continue to accumulate until the airplane is out of production and then begin to retire in the 25th year of service. We have customized different fleet types (smaller, medium, larger) based upon the actual historical production cycles and deliveries. The varying periods are based on all the historical data that we have available. The production cycles for smaller airplanes are shorter than the production cycles of larger airplanes, thus the differing time periods.
- Value of an Averted Fatality—$6.0 million.
- Fuel Cost per gallon—$1.92.

Benefits of This Proposed Rule

The industry, with the FAA, analyzed the SLD events for part 25 certified airplanes. We evaluated the events for applicability and preventability in context with the requirements contained in this proposed rule.

First, we develop an annual risk of a catastrophic SLD event per aircraft and assume a uniform annual likelihood. Next, we multiply the total annual affected aircraft by the annual risk per aircraft. Lastly, we multiply the total annual risk by the estimated cost of an average SLD event. When summed over time, the total estimated benefits are

$405.6 million ($99.5 million present value).

Costs of This Proposed Rule

The total estimated costs are $71.0 million ($54.0 million present value). We obtained the basis of our cost estimates from the industry. The manufacturers used accompanying advisory circulars (AC) describing acceptable means for showing compliance. The compliance costs are analyzed in context of the part 25 and part 33 certification requirements.

The FAA originally asked ARAC to estimate other operational costs beyond the additional hardware and fuel consumption costs. The additional hardware costs would be for SLD ice detectors that manufacturers would install to be in compliance with the proposed requirements. The additional hardware costs would be accompanied by additional fuel consumption costs from the accompanying weight changes due to the SLD ice detectors. Accordingly, ARAC provided this data to the FAA. However, as we neared completion of our cost analysis for these requirements, we queried individual operators and they informed us that they were already in compliance and there were no additional operational costs beyond fuel and hardware.

As summarized below, the cost categories in the regulatory evaluation incorporate both certification and operational costs. We analyze each cost category separately. The cost categories in this evaluation are the same as those provided by industry to comply with the requirements contained in this proposal. For this analysis, the estimated costs were:

	Nominal Cost	PV Cost
Engine Cert Cost	$7,936,000	$6,931,610
Engine Capital Cost	6,000,000	5,240,632
Total Engine	13,936,000	12,172,242
Small Aircraft Certification Cost	24,999,039	21,835,129
New Large Aircraft Certification Cost	3,154,600	2,755,350
Amended Type Certificate Large Airplane Certification Cost	10,438,800	9,117,652
Hardware Costs	10,390,000	5,842,024
Fuel Burn All	8,046,676	2,261,941
Total	70,965,115	53,984,338

Alternatives Considered

Alternative 1—Make all sizes of aircraft applicable to the proposal. Not all the requirements in this proposal extend to larger transport category aircraft (those with a maximum takeoff weight greater than 60,000 pounds). Under this alternative, the proposed design requirements would extend to all transport category aircraft. This alternative was rejected because this alternative would add significant cost without a commensurate increase in benefits.

Alternative 2—Limit the scope of applicability to small aircraft. Although this alternative would decrease the estimated cost, the FAA believes that medium airplanes have the same risk as small airplanes. The FAA does not want a significant proportion of the future fleet to be disproportionately at risk.

Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (Pub. L. 96–354) (RFA) establishes "as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration." The RFA covers a wide-range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions.

Agencies must perform a review to determine whether a rule will have a significant economic impact on a substantial number of small entities. If the agency determines that it will, the agency must prepare a regulatory flexibility analysis as described in the RFA.

However, if an agency determines that a rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) of the RFA provides that the head of the agency may so certify and a regulatory flexibility analysis is not required. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear. Based on the analysis presented below, we determined there would not be a significant impact on a substantial number of small entities.

Airplane and Engine Manufacturers

Aircraft and Engine Manufacturers would be affected by the requirements contained in this proposal.

For aircraft manufacturers, we use the size standards from the Small Business Administration for Air Transportation and Aircraft Manufacturing specifying companies having less than 1,500 employees as small entities. The current United States part 25 airplane manufacturers include: Boeing, Cessna Aircraft, Gulfstream Aerospace, Learjet (owned by Bombardier), Lockheed Martin, McDonnell Douglas (a wholly-owned subsidiary of The Boeing Company), Raytheon Aircraft, and Sabreliner Corporation. Because all U.S. transport-aircraft category manufacturers have more than 1,500 employees, none are considered small entities.

United States aircraft engine manufacturers include: General Electric, CFM International, Pratt & Whitney, International Aero Engines, Rolls-Royce Corporation, Honeywell, and Williams International. All but one exceeds the Small Business Administration small-entity criteria for aircraft engine manufacturers. Williams International is the only one of these manufacturers that is a U.S. small business. One small entity is not a substantial number.

Operators

In addition to the certification cost incurred by manufacturers, operators would incur fuel costs due to the estimated additional impact of weight changes from equipment on affected airplanes. On average, an affected airplane would incur additional fuel costs of roughly $525 per year.

Because this proposed rule would apply to airplanes that have yet to be designed, there would be no immediate cost to small entities. However, as of 2007, there are at least 54 small entity operators with 1,500 or fewer employees who would qualify as small entities.

According to the "Airliner Price Guide," the average cost of a new aircraft that would incur such expenses is approximately $17 million. The corresponding 3-year average total aircraft operating expenses on an affected per airplane basis was $758,000. The estimated additional cost of $525 would add only 0.07% to the total annual operating expenses. We do not consider this a significant economic impact.

Because this proposed rule would not have a significant economic impact on a substantial number of airplane manufacturers, engine manufacturers or operators, the FAA certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities. The FAA solicits comments regarding this determination.

International Trade Analysis

The Trade Agreements Act of 1979 (Pub. L. 96–39), as amended by the Uruguay Round Agreements Act (Pub. L. 103–465), prohibits Federal agencies from establishing standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. Pursuant to these Acts, the establishment of standards is not considered an unnecessary obstacle to the foreign commerce of the United States, so long as the standard has a legitimate domestic objective, such the protection of safety, and does not operate in a manner that excludes imports that meet this objective. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards.

The FAA has assessed the potential effect of this proposed rule and determined that it would impose the same costs on domestic and international entities and thus has a neutral trade impact.

Unfunded Mandates Assessment

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in an expenditure of $100 million or more (in 1995 dollars) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a "significant regulatory action." The FAA currently uses an inflation-adjusted value of $143.1 million in lieu of $100 million. This proposed rule does not contain such a mandate; therefore, the requirements of Title II do not apply.

Executive Order 13132, Federalism

The FAA has analyzed this proposed rule under the principles and criteria of Executive Order 13132, Federalism. We determined that this action 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, and, therefore, would not have federalism implications.

Regulations Affecting Intrastate Aviation in Alaska

Section 1205 of the FAA Reauthorization Act of 1996 (110 Stat. 3213) requires the Administrator, when modifying regulations in Title 14 of the CFR in a manner affecting intrastate aviation in Alaska, to consider the extent to which Alaska is not served by transportation modes other than aviation, and to establish appropriate regulatory distinctions. Because this proposed rule would apply to the certification of future designs of transport category airplanes and their subsequent operation, it could, if adopted, affect intrastate aviation in Alaska. The FAA, therefore, specifically requests comments on whether there is justification for applying the proposed rule differently in intrastate operations in Alaska.

Environmental Analysis

FAA Order 1050.1E identifies FAA actions that are categorically excluded from preparation of an environmental assessment or environmental impact statement under the National Environmental Policy Act in the absence of extraordinary circumstances. The FAA has determined this proposed rulemaking action qualifies for the categorical exclusion identified in paragraph 4(j) and involves no extraordinary circumstances.

Regulations That Significantly Affect Energy Supply, Distribution, or Use

The FAA has analyzed this NPRM under Executive Order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use (May 18, 2001). We have determined that it is not a "significant energy action" under the executive order because, while it is a "significant regulatory action," it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

Plain English

Executive Order 12866 (58 FR 51735, Oct. 4, 1993) requires each agency to write regulations that are simple and easy to understand. We invite your comments on how to make these proposed regulations easier to understand, including answers to questions such as the following:

- Are the requirements in the proposed regulations clearly stated?
- Do the proposed regulations contain unnecessary technical language or jargon that interferes with their clarity?
- Would the regulations be easier to understand if they were divided into more (but shorter) sections?
- Is the description in the preamble helpful in understanding the proposed regulations?

Please send your comments to the address specified in the **ADDRESSES** section of this preamble.

Additional Information

Comments Invited

The FAA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. We also invite comments relating to the economic, environmental, energy, or federalism impacts that might result from adopting the proposals in this document. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, please send only one copy of written comments, or if you are filing comments electronically, please submit your comments only one time.

We will file in the docket all comments we receive, as well as a report summarizing each substantive public contact with FAA personnel concerning this proposed rulemaking. Before acting on this proposal, we will consider all comments we receive on or before the closing date for comments. We will consider comments filed after the comment period has closed if it is possible to do so without incurring expense or delay. We may change this proposal in light of the comments we receive.

Proprietary or Confidential Business Information

Do not file in the docket information that you consider to be proprietary or confidential business information. Send or deliver this information directly to the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this document. You must mark the information that you consider

proprietary or confidential. If you send the information on a disk or CD ROM, mark the outside of the disk or CD ROM and also identify electronically within the disk or CD ROM the specific information that is proprietary or confidential.

Under 14 CFR 11.35(b), when we are aware of proprietary information filed with a comment, we do not place it in the docket. We hold it in a separate file to which the public does not have access, and we place a note in the docket that we have received it. If we receive a request to examine or copy this information, we treat it as any other request under the Freedom of Information Act (5 U.S.C. 552). We process such a request under the DOT procedures found in 49 CFR part 7.

Availability of Rulemaking Documents

You can get an electronic copy of rulemaking documents using the Internet by—

1. Searching the Federal eRulemaking Portal (*http://www.regulations.gov*);

2. Visiting the FAA's Regulations and Policies web page at *http://www.faa.gov/regulations_policies/*; or

3. Accessing the Government Printing Office's web page at *http://www.gpoaccess.gov/fr/index.html.*

You can also get a copy by sending a request to the Federal Aviation Administration, Office of Rulemaking, ARM–1, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267–9680. Make sure to identify the docket number or notice number of this rulemaking.

You may access all documents the FAA considered in developing this proposed rule, including economic analyses and technical reports, from the internet through the Federal eRulemaking Portal referenced in paragraph (1).

The following appendix will not appear in the Code of Federal Regulations.

Appendix 1 to the Preamble—Definition of Terms Used in This Preamble

For the purposes of this preamble, the following definitions are applicable. These definitions of terms are intended for use only with this preamble:

a. *Appendix C Icing Conditions:* The environmental conditions defined in appendix C of 14 CFR part 25.

b. *Appendix O Icing Conditions:* The environmental conditions defined in appendix O of 14 CFR part 25.

c. *Drizzle Drop:* A drop of water measuring 100 μm to 500 μm (0.1–0.5 mm) in diameter.

d. *Freezing Drizzle (FZDZ):* Supercooled drizzle drops that remain in liquid form and freeze upon contact with objects colder than 0°C.

e. *Freezing Rain (FZRA):* Supercooled rain drops that remain in liquid form and freeze upon contact with objects colder than 0°C.

f. *Icing Conditions:* The presence of atmospheric moisture and temperature conducive to airplane icing.

g. *Icing Conditions Detector:* A device that detects the presence of atmospheric moisture and temperature conducive to airplane icing.

h. *Irreversible Flight Controls:* Flight controls in the normal operating configuration that have loads generated at the control surfaces of an airplane which are reacted against the actuator and its mounting and cannot be transmitted directly back to the flight deck controls. This term refers to flight controls in which all of the force necessary to move the pitch, roll, or yaw control surfaces is provided by hydraulic or electric actuators, the motion of which is controlled by signals from the flight deck controls.

i. *Liquid Water Content (LWC):* The total mass of water contained in liquid drops within a unit volume or mass of air, usually given in units of grams of water per cubic meter (g/m^3).

j. *Mean Effective Diameter (MED):* The calculated drop diameter that divides the total liquid water content present in the drop size distribution in half. Half the water volume will be in larger drops and half the volume in smaller drops. This value is calculated, as opposed to being arrived at by measuring actual drop size. The MED is based on an assumed Langmuir drop size distribution. The fact that it is a calculated measurement is how it differs from median volume diameter, which is based on actual drop size.

k. *Median Volume Diameter (MVD):* The drop diameter that divides the total liquid water content present in the drop distribution in half. Half the water volume will be in larger drops and half the volume in smaller drops. The value is obtained by actual drop size measurements.

l. *Mixed Phase Icing Environment:* A combination of supercooled liquid and ice crystals.

m. *Rain Drop:* A drop of water greater than 500 μm (0.5 mm) in diameter.

n. *Reversible Flight Controls:* Flight controls in the normal operating configuration that have force or motion originating at the airplane's control surface (for example, through aerodynamic loads, static imbalance, or trim tab inputs) that is transmitted back to flight deck controls. This term refers to flight deck controls connected to the pitch, roll, or yaw control surfaces by direct mechanical linkages, cables, or push-pull rods in such a way that pilot effort produces motion or force about the hinge line.

(1) Aerodynamically boosted flight controls: Reversible flight control systems that employ a movable tab on the trailing edge of the main control surface linked to the pilot's controls or to the structure in such a way as to produce aerodynamic forces that move, or help to move, the surface. Among the various forms are flying tabs, geared or servo tabs, and spring tabs.

(2) Power-assisted flight controls: Reversible flight control systems in which some means is provided, usually a hydraulic actuator, to apply force to a control surface in addition to that supplied by the pilot to enable large surface deflections to be obtained at high speeds.

o. *Supercooled Large Drops (SLD):* Supercooled liquid water that includes freezing rain or freezing drizzle.

p. *Supercooled Water:* Liquid water at a temperature below the freezing point of 0°C.

List of Subjects

14 CFR Part 25

Aircraft, Aviation safety, Reporting and recordkeeping requirements, Safety, Transportation.

14 CFR Part 33

Aircraft, Aviation safety.

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend Chapter I of Title 14, Code of Federal Regulations parts 25 and 33 as follows:

PART 25—AIRWORTHINESS STANDARDS: TRANSPORT CATEGORY AIRPLANES

1. The authority citation for part 25 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701, 44702 and 44704.

2. Amend § 25.21 by revising paragraphs (g)(1) and (g)(2) and adding paragraphs (g)(3) and (g)(4) to read as follows:

§ 25.21 Proof of compliance.

* * * * *

(g) * * *

(1) Paragraphs (g)(3) and (g)(4) of this section apply only to airplanes with one or both of the following attributes:

(i) Takeoff maximum gross weight is less than 60,000 lbs; or

(ii) The airplane is equipped with reversible flight controls.

(2) Each requirement of this subpart, except §§ 25.121(a), 25.123(c), 25.143(b)(1) and (2), 25.149, 25.201(c)(2), 25.207(c) and (d), 25.239, and 25.251(b) through (e), must be met in the icing conditions specified in appendix C of this part. Compliance must be shown using the ice accretions defined in part II of appendix C of this part, assuming normal operation of the airplane and its ice protection system in accordance with the operating limitations and operating procedures established by the applicant and provided in the Airplane Flight Manual.

(3) If the applicant does not seek certification for flight in all icing conditions defined in appendix O of this part, each requirement of this subpart, except §§ 25.105, 25.107, 25.109, 25.111, 25.113, 25.115, 25.121, 25.123, 25.143(b)(1), (b)(2), and (c)(1), 25.149, 25.201(c)(2), 25.207(c) and (d), 25.239, and 25.251(b) through (e), must be met in the appendix O icing conditions for which certification is not sought in order to allow a safe exit from those conditions. Compliance must be shown using the ice accretions defined in part II, paragraphs (b) and (d) of appendix O of this part, assuming normal operation of the airplane and its ice protection system in accordance with the operating limitations and operating procedures established by the applicant and provided in the Airplane Flight Manual.

(4) If the applicant seeks certification for flight in any portion of the icing conditions of appendix O of this part, each requirement of this subpart, except §§ 25.123(c), 25.143(b)(1) and (2), 25.149, 25.201(c)(2), 25.207(c) and (d), 25.239, and 25.251(b) through (e), must be met in the appendix O icing conditions for which certification is sought. Compliance must be shown using the ice accretions defined in part II, paragraphs (c) and (d) of appendix O of this part, assuming normal operation of the airplane and its ice protection system in accordance with the operating limitations and operating procedures established by the applicant and provided in the Airplane Flight Manual.

3. Amend § 25.105 by revising paragraph (a)(2) introductory text to read as follows:

§ 25.105 Takeoff.

(a) * * *

(2) In icing conditions, if in the configuration used to show compliance with § 25.121(b), and with the most critical of the takeoff ice accretion(s) defined in appendices C and O of this part, as applicable, in accordance with § 25.21(g):

* * * * *

4. Amend § 25.111 by revising paragraphs (c)(5)(i) and (c)(5)(ii) to read as follows:

§ 25.111 Takeoff path.

* * * * *

(c) * * *

(5) * * *

(i) With the most critical of the takeoff ice accretion(s) defined in appendices C and O of this part, as applicable, in accordance with § 25.21(g), from a height of 35 feet above the takeoff surface up to the point where the airplane is 400 feet above the takeoff surface; and

(ii) With the most critical of the final takeoff ice accretion(s) defined in appendices C and O of this part, as applicable, in accordance with § 25.21(g), from the point where the airplane is 400 feet above the takeoff surface to the end of the takeoff path.

* * * * *

5. Amend § 25.119 by revising paragraph (b) to read as follows:

§ 25.119 Landing climb: All-engines-operating.

* * * * *

(b) In icing conditions with the most critical of the landing ice accretion(s) defined in appendices C and O of this part, as applicable, in accordance with § 25.21(g), and with a climb speed of V_{REF} determined in accordance with § 25.125(b)(2)(ii).

6. Amend § 25.121 by revising paragraphs (b)(2)(ii) introductory text, (c)(2)(ii) introductory text, and (d)(2)(ii) to read as follows:

§ 25.121 Climb: One-engine-inoperative.

* * * * *

(b) * * *

(2) * * *

(ii) In icing conditions with the most critical of the takeoff ice accretion(s) defined in appendices C and O of this part, as applicable, in accordance with § 25.21(g), if in the configuration used to show compliance with § 25.121(b) with this takeoff ice accretion:

* * * * *

(c) * * *

(2) * * *

(ii) In icing conditions with the most critical of the final takeoff ice accretion(s) defined in appendices C and O of this part, as applicable, in accordance with § 25.21(g), if in the configuration used to show compliance with § 25.121(b) with the takeoff ice accretion used to show compliance with § 25.111(c)(5)(i):

* * * * *

(d) * * *

(2) * * *

(ii) In icing conditions with the most critical of the approach ice accretion(s) defined in appendices C and O of this part, as applicable, in accordance with § 25.21(g). The climb speed selected for non-icing conditions may be used if the climb speed for icing conditions, computed in accordance with paragraph (d)(1)(iii) of this section, does not exceed that for non-icing conditions by more than the greater of 3 knots CAS or 3 percent.

7. Amend § 25.123 by revising paragraph (b)(2) introductory text to read as follows:

§ 25.123 En-route flight paths.

* * * * *

(b) * * *

(2) In icing conditions with the most critical of the en route ice accretion(s) defined in appendices C and O of this part, as applicable, in accordance with § 25.21(g), if:

* * * * *

8. Amend § 25.125 by revising paragraphs (a)(2), (b)(2)(ii)(B), and (b)(2)(ii)(C) to read as follows:

§ 25.125 Landing.

(a) * * *

(2) In icing conditions with the most critical of the landing ice accretion(s) defined in appendices C and O of this part, as applicable, in accordance with § 25.21(g), if V_{REF} for icing conditions exceeds V_{REF} for non-icing conditions by more than 5 knots CAS at the maximum landing weight.

(b) * * *

(2) * * *

(ii) * * *

(B) 1.23 V_{SR0} with the most critical of the landing ice accretion(s) defined in appendices C and O of this part, as applicable, in accordance with § 25.21(g), if that speed exceeds V_{REF} selected for non-icing conditions by more than 5 knots CAS; and

(C) A speed that provides the maneuvering capability specified in § 25.143(h) with the most critical of the landing ice accretion(s) defined in appendices C and O of this part, as applicable, in accordance with § 25.21(g).

* * * * *

9. Amend § 25.143 by revising paragraphs (c) introductory text, (i)(1), and (j) introductory text to read as follows:

§ 25.143 Controllability and maneuverability—General.

* * * * *

(c) The airplane must be shown to be safely controllable and maneuverable with the most critical of the ice accretion(s) appropriate to the phase of flight as defined in appendices C and O of this part, as applicable, in accordance

with § 25.21(g), and with the critical engine inoperative and its propeller (if applicable) in the minimum drag position:

* * * * *

(i) * * *

(1) Controllability must be demonstrated with the most critical of the ice accretion(s) for the particular flight phase as defined in appendices C and O of this part, as applicable, in accordance with § 25.21(g);

* * * * *

(j) For flight in icing conditions before the ice protection system has been activated and is performing its intended function, it must be demonstrated in flight with the most critical of the ice accretion(s) defined in appendix C, part II, paragraph (e) of this part and appendix O, part II, paragraph (d) of this part, as applicable, in accordance with § 25.21(g), that:

* * * * *

10. Amend § 25.207 by revising paragraphs (b), (e)(1) through (5), and (h) introductory text to read as follows:

§ 25.207 Stall warning.

* * * * *

(b) The warning must be furnished either through the inherent aerodynamic qualities of the airplane or by a device that will give clearly distinguishable indications under expected conditions of flight. However, a visual stall warning device that requires the attention of the crew within the cockpit is not acceptable by itself. If a warning device is used, it must provide a warning in each of the airplane configurations prescribed in paragraph (a) of this section at the speed prescribed in paragraphs (c) and (d) of this section. Except for the stall warning prescribed in paragraph (h)(3)(ii) of this section, the stall warning for flight in icing conditions must be provided by the same means as the stall warning for flight in non-icing conditions.

* * * * *

(e) * * *

(1) The most critical of the takeoff ice and final takeoff ice accretions defined in appendices C and O of this part, as applicable, in accordance with § 25.21(g), for each configuration used in the takeoff phase of flight;

(2) The most critical of the en route ice accretion(s) defined in appendices C and O of this part, as applicable, in accordance with § 25.21(g), for the en route configuration;

(3) The most critical of the holding ice accretion(s) defined in appendices C and O of this part, as applicable, in accordance with § 25.21(g), for the holding configuration(s);

(4) The most critical of the approach ice accretion(s) defined in appendices C and O of this part, as applicable, in accordance with § 25.21(g), for the approach configuration(s); and

(5) The most critical of the landing ice accretion(s) defined in appendices C and O of this part, as applicable, in accordance with § 25.21(g), for the landing and go-around configuration(s).

* * * * *

(h) The following stall warning margin is required for flight in icing conditions before the ice protection system has been activated and is performing its intended function. Compliance must be shown using the most critical of the ice accretion(s) defined in appendix C, part II, paragraph (e) of this part and appendix O, part II, paragraph (d) of this part, as applicable, in accordance with § 25.21(g). The stall warning margin in straight and turning flight must be sufficient to allow the pilot to prevent stalling without encountering any adverse flight characteristics when:

* * * * *

11. Amend § 25.237 by revising paragraph (a)(3)(ii) to read as follows:

§ 25.237 Wind velocities.

(a) * * *

(3) * * *

(ii) Icing conditions with the most critical of the landing ice accretion(s) defined in appendices C and O of this part, as applicable, in accordance with § 25.21(g).

* * * * *

12. Amend § 25.253 by revising paragraph (c) introductory text to read as follows:

§ 25.253 High-speed characteristics.

* * * * *

(c) *Maximum speed for stability characteristics in icing conditions.* The maximum speed for stability characteristics with the most critical of the ice accretions defined in appendices C and O of this part, as applicable, in accordance with § 25.21(g), at which the requirements of §§ 25.143(g), 25.147(e), 25.175(b)(1), 25.177 and 25.181 must be met, is the lower of:

* * * * *

13. Amend § 25.773 by revising paragraph (b)(1)(ii) to read as follows:

§ 25.773 Pilot compartment view.

* * * * *

(b) * * *

(1) * * *

(ii) The icing conditions specified in appendix C and the following icing conditions specified in appendix O of this part, if certification for flight in icing conditions is sought:

(A) For airplanes certificated in accordance with § 25.1420(a)(1), the icing conditions that the airplane is certified to safely exit following detection.

(B) For airplanes certificated in accordance with § 25.1420(a)(2), the icing conditions that the airplane is certified to safely operate in and the icing conditions that the airplane is certified to safely exit following detection.

(C) For airplanes certificated in accordance with § 25.1420(a)(3) and for airplanes not subject to § 25.1420, all icing conditions.

* * * * *

14. Amend § 25.903 by adding paragraph (a)(3) to read as follows:

§ 25.903 Engines.

(a) * * *

(3) Each turbine engine must comply with one of the following paragraphs:

(i) Section 33.68 of this chapter in effect on [effective date of final rule], or as subsequently amended; or

(ii) Section 33.68 of this chapter in effect on February 23, 1984, or as subsequently amended before [effective date of final rule], unless that engine's ice accumulation service history has resulted in an unsafe condition; or

(iii) Section 33.68 of this chapter in effect on October 1, 1974, or as subsequently amended prior to February 23, 1984, unless that engine's ice accumulation service history has resulted in an unsafe condition; or

(iv) Be shown to have an ice accumulation service history in similar installation locations which has not resulted in any unsafe conditions.

* * * * *

15. Amend § 25.929 by revising paragraph (a) to read as follows:

§ 25.929 Propeller deicing.

(a) If certification for flight in icing is sought there must be a means to prevent or remove hazardous ice accumulations that could form in the icing conditions defined in appendices C and O of this part on propellers or on accessories where ice accumulation would jeopardize engine performance.

* * * * *

16. Amend § 25.1093 by revising paragraph (b) to read as follows:

§ 25.1093 Induction system icing protection.

* * * * *

(b) *Turbine engines.* Each engine, with all icing protection systems operating, must:

(1) Operate throughout its flight power range, including the minimum descent idling speeds, in the icing

conditions defined in appendices C and O of this part, and appendix D of part 33 of this chapter, and in falling and blowing snow within the limitations established for the airplane for such operation, without the accumulation of ice on the engine, inlet system components or airframe components that would do any of the following:

(i) Adversely affect installed engine operation or cause a sustained loss of power or thrust; or an unacceptable increase in gas path operating temperature; or an airframe/engine incompatibility; or

(ii) Result in unacceptable temporary power loss or engine damage; or

(iii) Cause a stall, surge, or flameout or loss of engine controllability (for example, rollback).

(2) Idle for a minimum of 30 minutes on the ground in the following icing conditions shown in Table 1, unless replaced by similar test conditions that are more critical. These conditions must be demonstrated with the available air bleed for icing protection at its critical condition, without adverse effect, followed by an acceleration to takeoff power or thrust. During the idle operation the engine may be run up periodically to a moderate power or thrust setting in a manner acceptable to the Administrator. The applicant must document the engine run-up procedure (including the maximum time interval between run-ups from idle, run-up power setting, and duration at power) and associated minimum ambient temperature demonstrated for the maximum time interval, and these conditions must be used in establishing the airplane operating limitations in accordance with § 25.1521.

TABLE 1—ICING CONDITIONS FOR GROUND TESTS

Condition	Total air temperature	Water concentration (minimum)	Mean effective particle diameter	Demonstration
(i) Rime ice condition	0 to 15 °F (−18 to −9 °C).	Liquid—0.3 g/m³	15–25 microns	By test, analysis or combination of the two.
(ii) Glaze ice condition	20 to 30 °F (−7 to −1 °C).	Liquid—0.3 g/m³	15–25 microns	By test, analysis or combination of the two.
(iii) Large drop condition	15 to 30 °F (−9 to −1 °C).	Liquid—0.3 g/m³	100 microns (minimum)	By test, analysis or combination of the two.

* * * * *

17. Amend § 25.1323 by revising paragraph (i) to read as follows:

§ 25.1323 Airspeed indicating system.

* * * * *

(i) Each system must have a heated pitot tube or an equivalent means of preventing malfunction in mixed phase and ice crystal conditions as defined in Table 1 of this section, the icing conditions defined in appendix C of this part, and the following icing conditions specified in appendix O of this part:

(1) For airplanes certificated in accordance with § 25.1420(a)(1), the icing conditions that the airplane is certified to safely exit following detection.

(2) For airplanes certificated in accordance with § 25.1420(a)(2), the icing conditions that the airplane is certified to safely operate in and the icing conditions that the airplane is certified to safely exit following detection.

(3) For airplanes certificated in accordance with § 25.1420(a)(3) and for airplanes not subject to § 25.1420, all icing conditions.

TABLE 1—ICING CONDITIONS FOR AIRSPEED INDICATING SYSTEM TESTS

Air temperature	Altitude range		Ice water content	Liquid water content	Horizontal extent		Ice median mass dimension	Liquid water MVD
(°C)	(ft)	(m)	g/m³	g/m³	(km)	(n miles)	(μm)	(μm)
0 to −20	10,000 to 30,000	3,000 to 9,000	4	1	5	3	100 to 1,000	20
			1	1	100	50		
			0.5	0.5	500	300		
−20 to −40	15,000 to 40,000	4,500 to 12,000	5	0	5	3		
			2	0	20	10		
			1	0	100	50		
			0.5	0	500	300		

* * * * *

18. Add § 25.1324 to read as follows:

§ 25.1324 Angle of attack system.

Each angle of attack system sensor must be heated or have an equivalent means of preventing malfunction in the mixed phase and ice crystal conditions as defined in § 25.1323, the icing conditions defined in appendix C of this part, and the following icing conditions specified in appendix O of this part:

(a) For airplanes certificated in accordance with § 25.1420(a)(1), the icing conditions that the airplane is certified to safely exit following detection.

(b) For airplanes certificated in accordance with § 25.1420(a)(2), the icing conditions that the airplane is certified to safely operate in and the icing conditions that the airplane is certified to safely exit following detection.

(c) For airplanes certificated in accordance with § 25.1420(a)(3) and for airplanes not subject to § 25.1420, all icing conditions.

19. Amend § 25.1325 by revising paragraph (b) to read as follows:

§ 25.1325 Static pressure systems.

* * * * *

(b) Each static port must be designed and located so that:

(1) The static pressure system performance is least affected by airflow variation, or by moisture or other foreign matter, and

(2) The correlation between air pressure in the static pressure system and true ambient atmospheric static pressure is not changed when the

airplane is exposed to the icing conditions defined in appendix C of this part, and the following icing conditions specified in appendix O of this part:

(i) For airplanes certificated in accordance with § 25.1420(a)(1), the icing conditions that the airplane is certified to safely exit following detection.

(ii) For airplanes certificated in accordance with § 25.1420(a)(2), the icing conditions that the airplane is certified to safely operate in and the icing conditions that the airplane is certified to safely exit following detection.

(iii) For airplanes certificated in accordance with § 25.1420(a)(3) and for airplanes not subject to § 25.1420, all icing conditions.

* * * * *

20. Add § 25.1420 to read as follows:

§ 25.1420 Supercooled large drop icing conditions.

(a) If certification for flight in icing conditions is sought, in addition to the requirements of § 25.1419, an airplane with a maximum takeoff weight less than 60,000 pounds or with reversible flight controls must be capable of operating in accordance with paragraphs (a)(1), (2), or (3), of this section.

(1) Operating safely after encountering the icing conditions defined in appendix O of this part:

(i) There must be a means provided to detect that the airplane is operating in appendix O icing conditions; and

(ii) Following detection of appendix O icing conditions, the airplane must be capable of operating safely while exiting all icing conditions.

(2) Operating safely in a portion of the icing conditions defined in appendix O of this part as selected by the applicant.

(i) There must be a means provided to detect that the airplane is operating in conditions that exceed the selected portion of appendix O icing conditions; and

(ii) Following detection, the airplane must be capable of operating safely while exiting all icing conditions.

(3) Operating safely in the icing conditions defined in appendix O of this part.

(b) To establish that the airplane can operate safely as required in paragraph (a) of this section, an analysis must be performed to establish that the ice protection for the various components of the airplane is adequate, taking into account the various airplane operational configurations. To verify the analysis, one, or more as found necessary, of the following methods must be used:

(1) Laboratory dry air or simulated icing tests, or a combination of both, of the components or models of the components.

(2) Laboratory dry air or simulated icing tests, or a combination of both, of models of the airplane.

(3) Flight tests of the airplane or its components in simulated icing conditions, measured as necessary to support the analysis.

(4) Flight tests of the airplane with simulated ice shapes.

(5) Flight tests of the airplane in natural icing conditions, measured as necessary to support the analysis.

(c) For an airplane certified in accordance with paragraph (a)(2) or (a)(3) of this section, the requirements of § 25.1419 (e), (f), (g), and (h) must be met for the icing conditions defined in appendix O of this part in which the airplane is certified to operate.

21. Amend § 25.1521 by redesignating paragraph (c)(3) as (c)(4) and revising it, and by adding new paragraph (c)(3) to read as follows:

§ 25.1521 Powerplant limitations.

* * * * *

(c) * * *

(3) Maximum time interval between engine run-ups from idle, run-up power setting, duration at power, and the associated minimum ambient temperature demonstrated for the maximum time interval, for ground operation in icing conditions, as defined in § 25.1093(b)(2).

(4) Any other parameter for which a limitation has been established as part of the engine type certificate except that a limitation need not be established for a parameter that cannot be exceeded during normal operation due to the design of the installation or to another established limitation.

* * * * *

22. Amend § 25.1533 by adding paragraph (c) to read as follows:

§ 25.1533 Additional operating limitations.

* * * * *

(c) For airplanes certified in accordance with § 25.1420(a)(1) or (a)(2), an operating limitation must be established to require exiting all icing conditions if icing conditions defined in appendix O of this part are encountered for which the airplane has not been certified to safely operate.

23. Amend part 25 by adding Appendix O to part 25 to read as follows:

Appendix O to Part 25—Supercooled Large Drop Icing Conditions

Appendix O consists of two parts. Part I defines appendix O as a description of supercooled large drop (SLD) icing conditions in which the drop median volume diameter (MVD) is less than or greater than 40 μm, the maximum mean effective drop diameter (MED) of appendix C continuous maximum (stratiform clouds) icing conditions. For appendix O, SLD icing conditions consist of freezing drizzle and freezing rain occurring in and/or below stratiform clouds. Part II defines ice accretions used to show compliance with part 25, subpart B, airplane performance and handling qualities requirements.

Part I—Meteorology

Appendix O icing conditions are defined by the parameters of altitude, vertical and horizontal extent, temperature, liquid water content, and water mass distribution as a function of drop diameter distribution.

(a) Freezing Drizzle (Conditions with spectra maximum drop diameters from 100 μm to 500 μm):

(1) Pressure altitude range: 0 to 22,000 feet MSL.

(2) Maximum vertical extent: 12,000 feet.

(3) Horizontal extent: standard distance of 17.4 nautical miles.

(4) Total liquid water content.

Note: Liquid water content (LWC) in grams per cubic meter (g/m^3) based on horizontal extent standard distance of 17.4 nautical miles.

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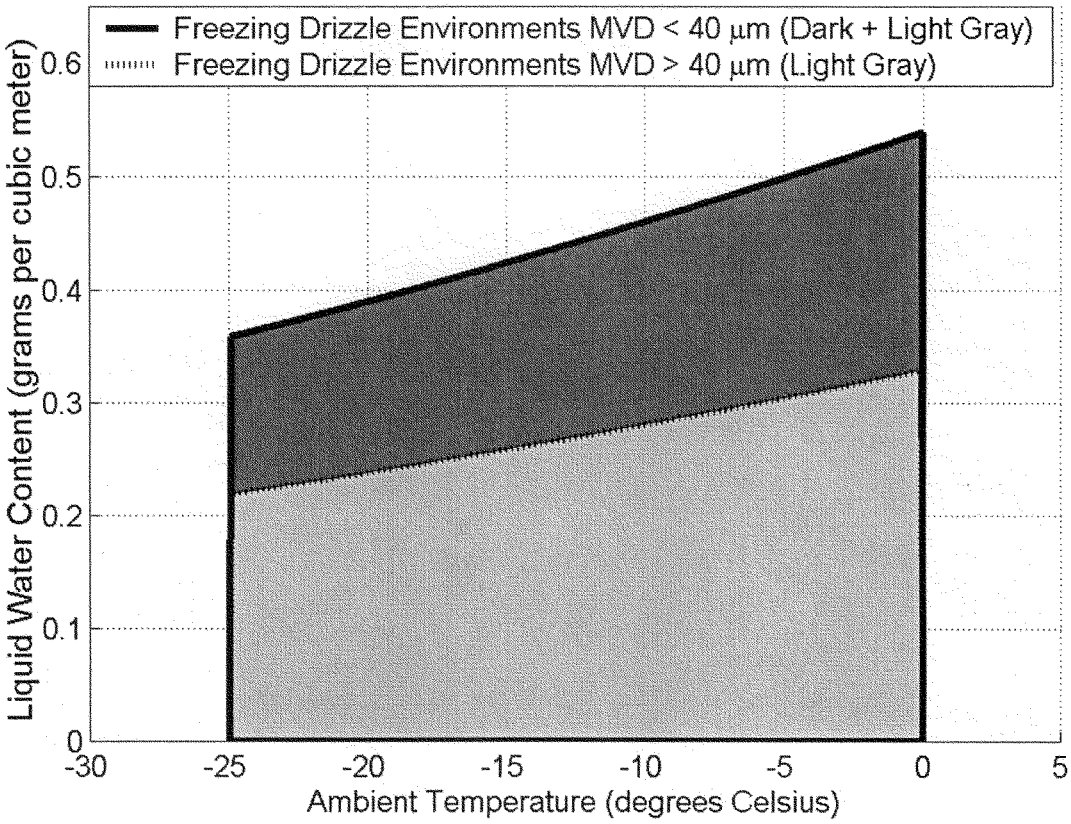
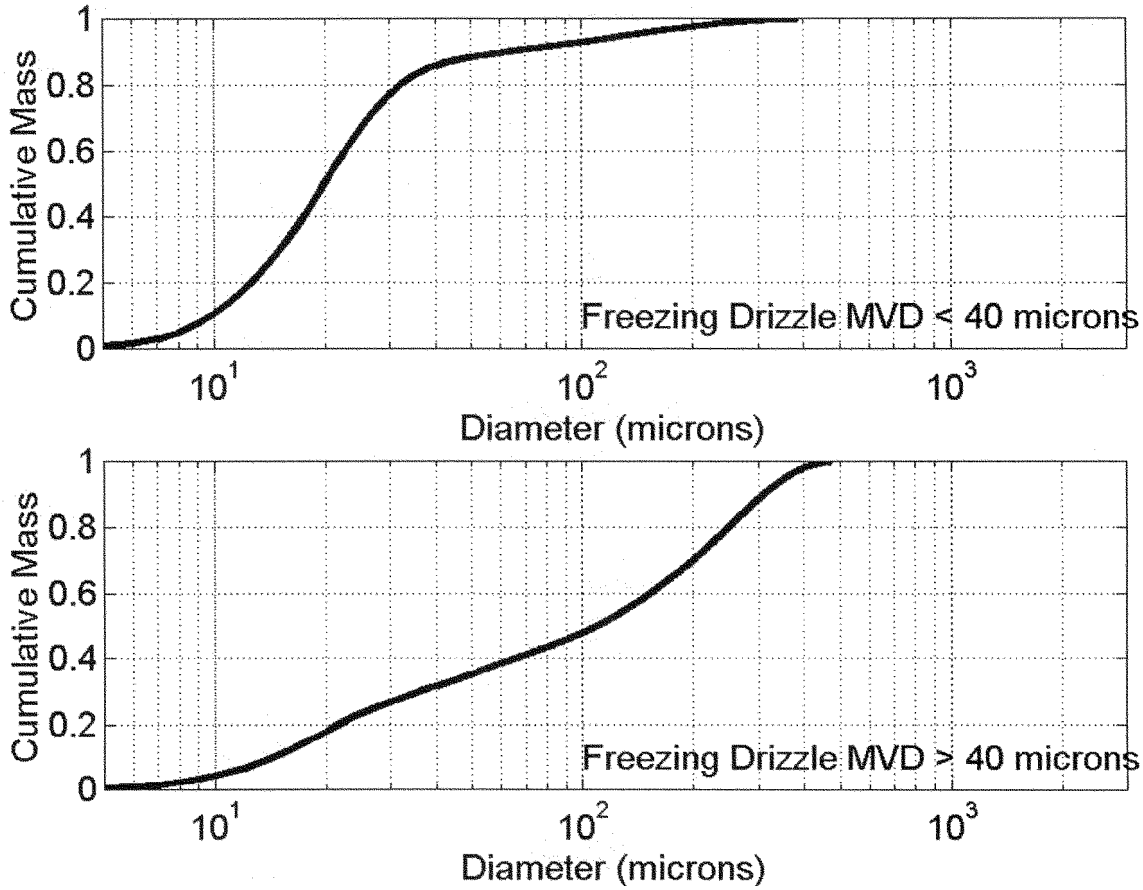
FIGURE 1 - Appendix O, Freezing Drizzle, Liquid Water Content



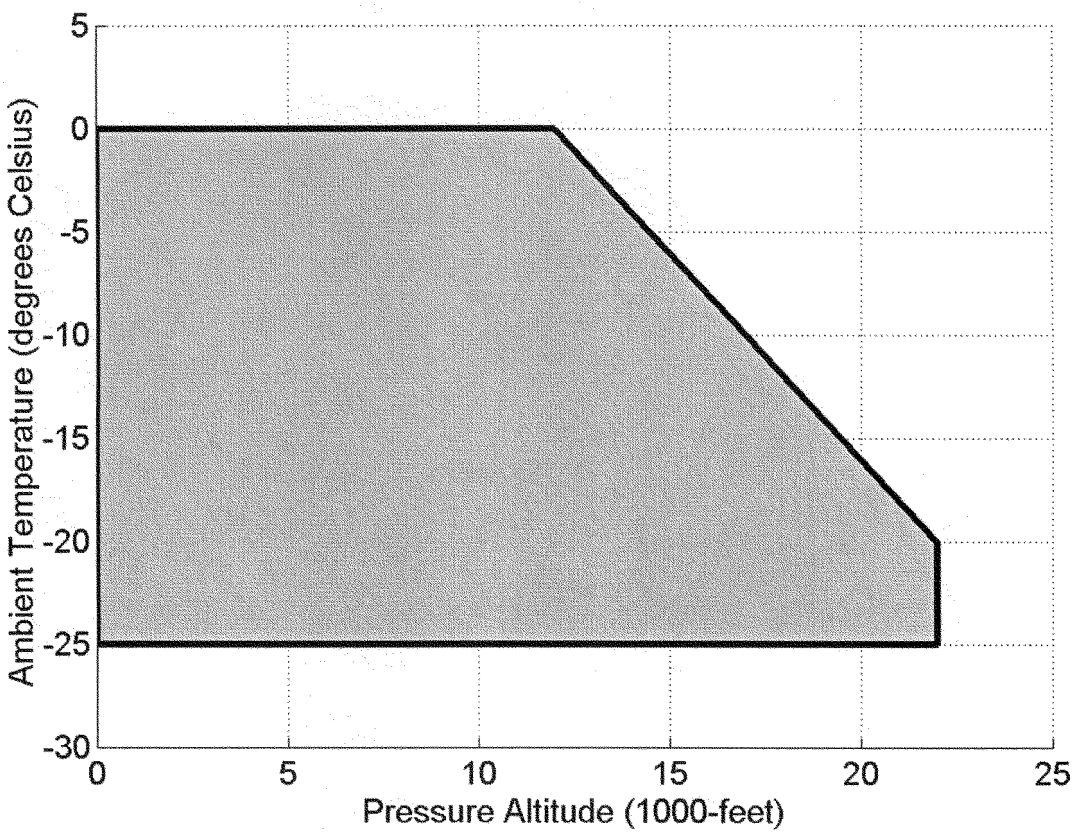
(5) Drop diameter distribution:

FIGURE 2 - Appendix O, Freezing Drizzle, Drop Diameter Distribution



(6) Altitude and temperature envelope:

FIGURE 3 - Appendix O, Freezing Drizzle, Temperature and Altitude



(b) Freezing Rain (Conditions with spectra maximum drop diameters greater than 500 μm):

(1) Pressure altitude range: 0 to 12,000 ft MSL.

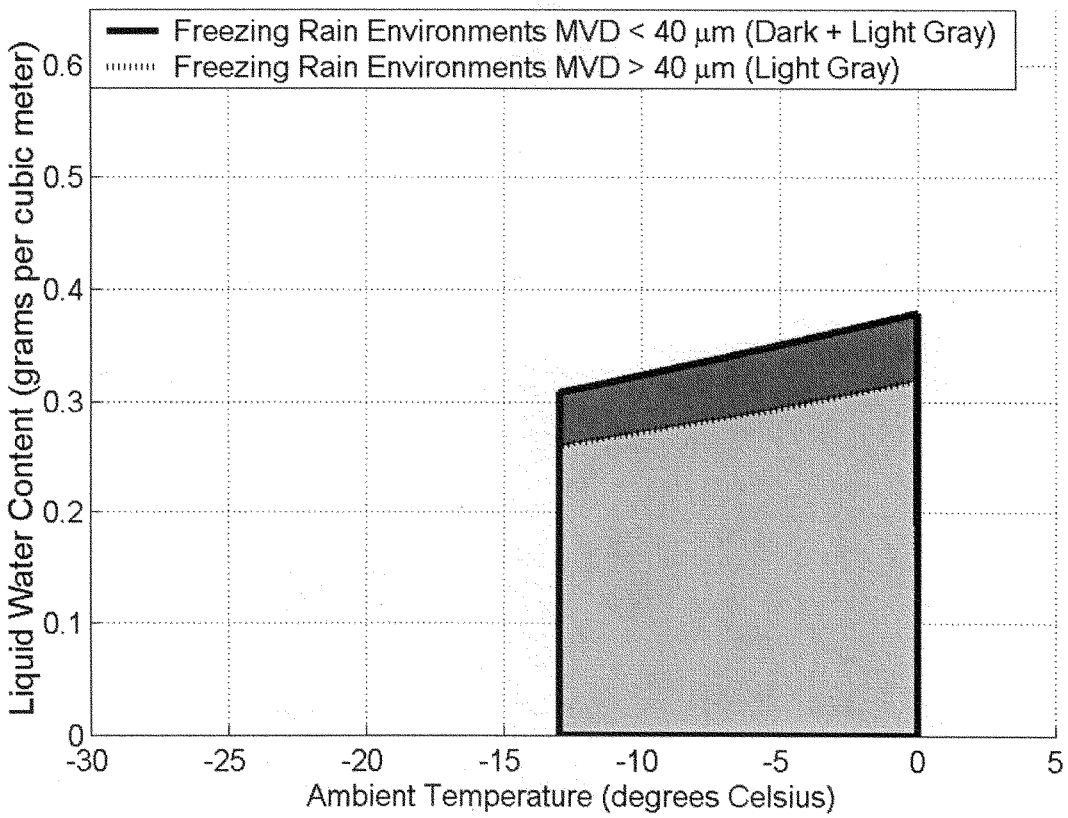
(2) Maximum vertical extent: 7,000 ft.

(3) Horizontal extent: standard distance of 17.4 nautical miles.

(4) Total liquid water content.

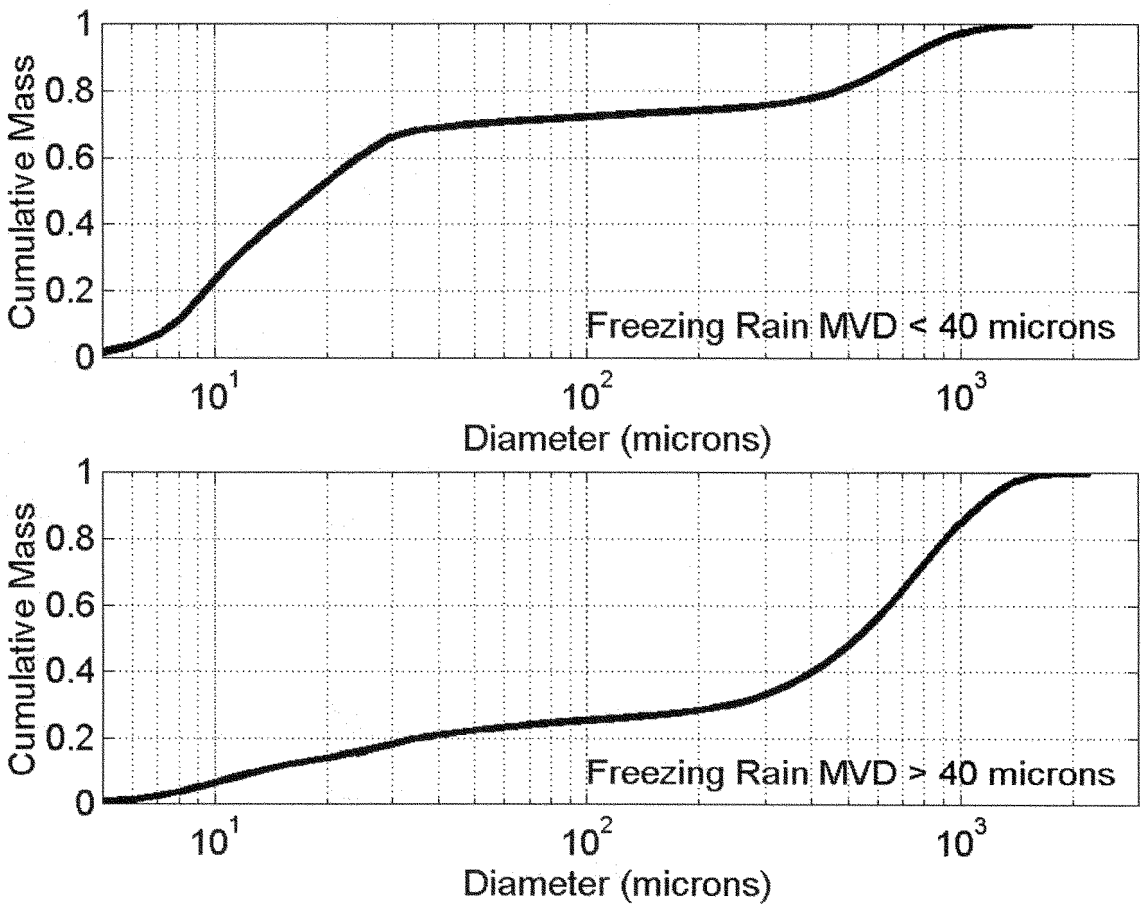
Note: LWC in grams per cubic meter (g/m^3) based on horizontal extent standard distance of 17.4 nautical miles.

FIGURE 4 - Appendix O, Freezing Rain, Liquid Water Content



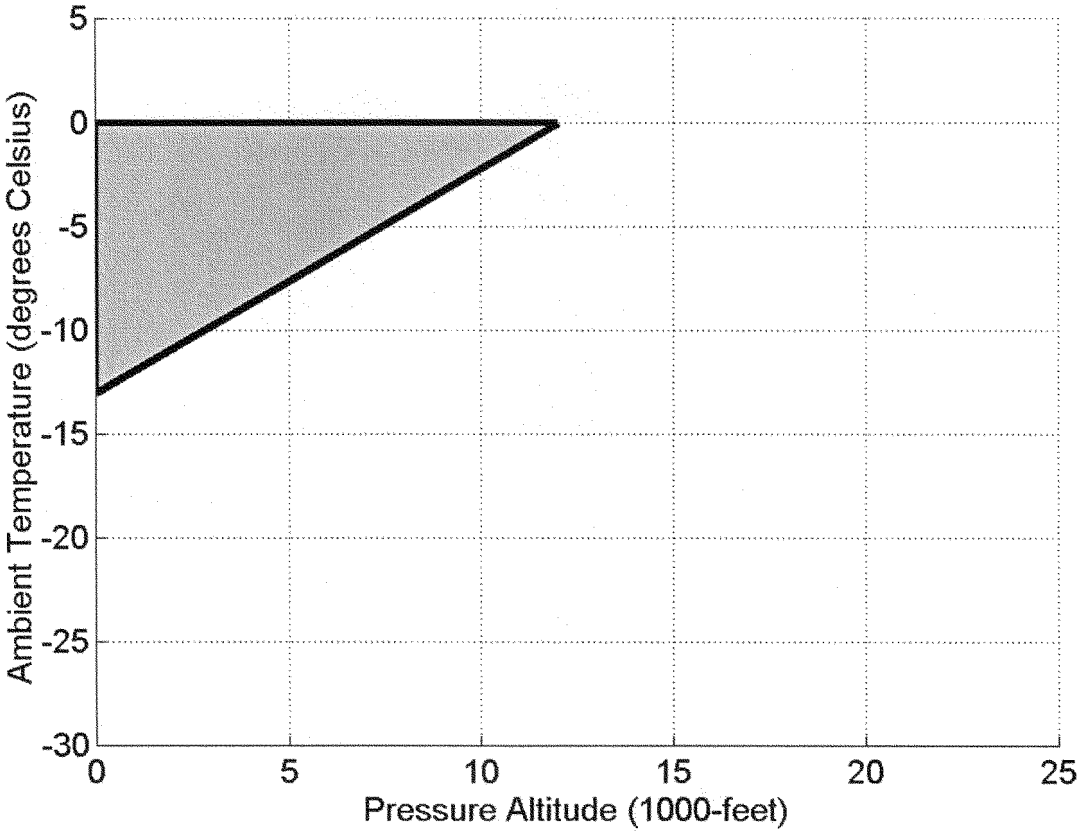
(5) Drop Diameter Distribution

FIGURE 5 - Appendix O, Freezing Rain, Drop Diameter Distribution



(6) Altitude and temperature envelope:

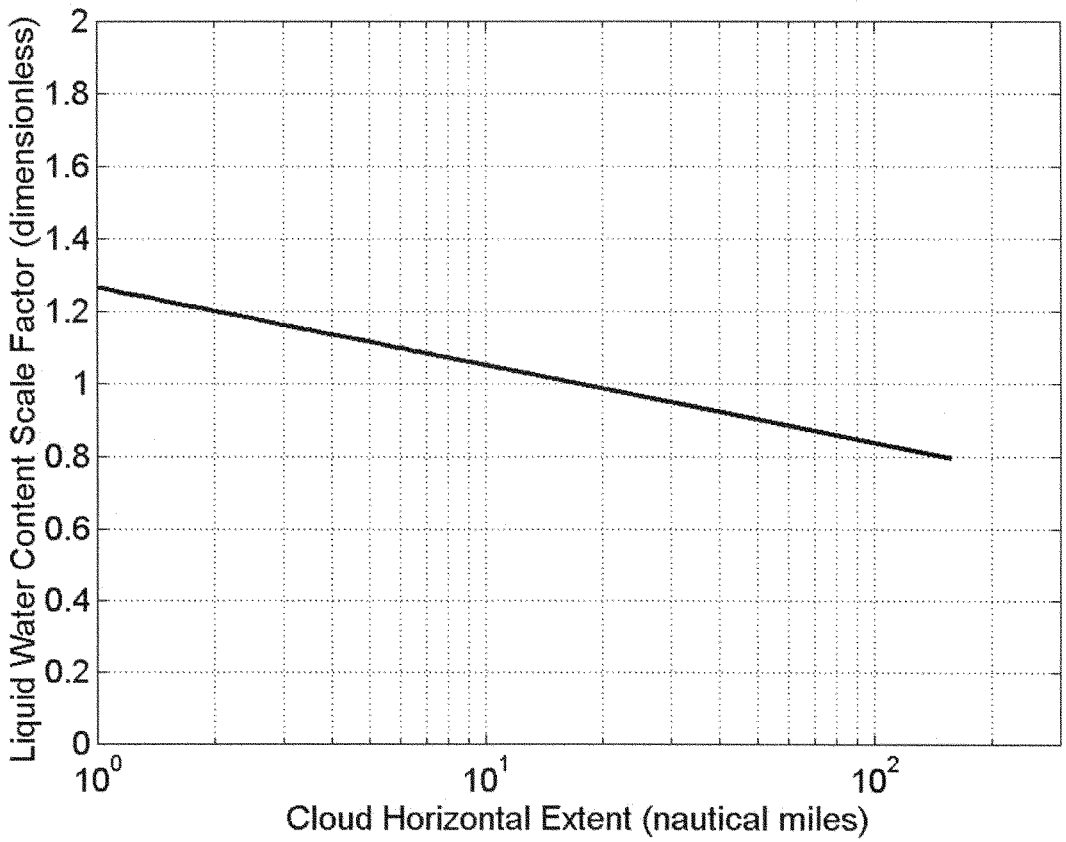
FIGURE 6 - Appendix O, Freezing Rain, Temperature and Altitude



(c) Horizontal extent.

The liquid water content for freezing drizzle and freezing rain conditions for horizontal extents other than the standard 17.4 nautical miles can be determined by the value of the liquid water content determined from Figure 1 or Figure 4, multiplied by the factor provided in Figure 7.

FIGURE 7 - Horizontal Extent, Freezing Drizzle and Freezing Rain



Part II—Airframe Ice Accretions for Showing Compliance With Subpart B

(a) *General.*

The most critical ice accretion in terms of airplane performance and handling qualities for each flight phase must be used to show compliance with the applicable airplane performance and handling qualities requirements for icing conditions contained in subpart B of this part. Applicants must demonstrate that the full range of atmospheric icing conditions specified in part I of this appendix have been considered, including drop diameter distributions, liquid water content, and temperature appropriate to the flight conditions (for example, configuration, speed, angle-of-attack, and altitude).

(1) For an airplane certified in accordance with § 25.1420(a)(1), the ice accretions for each flight phase are defined in part II, paragraph (b) of this appendix.

(2) For an airplane certified in accordance with § 25.1420(a)(2), the most critical ice accretion for each flight phase defined in part II, paragraphs (b) and (c) of this appendix, must be used. For the ice accretions defined in part II, paragraph (c) of this appendix, only the portion of part I of this appendix in which the airplane is capable of operating safely must be considered.

(3) For an airplane certified in accordance with § 25.1420(a)(3), the ice accretions for each flight phase are defined in part II, paragraph (c) of this appendix.

(b) Ice accretions for airplanes certified in accordance with § 25.1420(a)(1) or (a)(2).

(1) *En route ice* is the en route ice as defined by part II, paragraph (c)(3), of this appendix, for an airplane certified in accordance with § 25.1420(a)(2), or defined by part II, paragraph (a)(3), of appendix C of this part, for an airplane certified in accordance with § 25.1420(a)(1), plus:

(i) Pre-detection ice as defined by part II paragraph (b)(5) of this appendix; and

(ii) The ice accumulated during the transit of one cloud with a horizontal extent of 17.4 nautical miles in the most critical of the icing conditions defined in part I of this appendix and one cloud with a horizontal extent of 17.4 nautical miles in the continuous maximum icing conditions defined in appendix C of this part.

(2) *Holding ice* is the holding ice defined by part II, paragraph (c)(4), of this appendix, for an airplane certified in accordance with § 25.1420(a)(2), or defined by part II, paragraph (a)(4) of appendix C of this part, for an airplane certified in accordance with § 25.1420(a)(1), plus:

(i) Pre-detection ice as defined by part II, paragraph (b)(5) of this appendix; and

(ii) The ice accumulated during the transit of one cloud with a 17.4 nautical miles horizontal extent in the most critical of the icing conditions defined in part I of this appendix and one cloud with a horizontal extent of 17.4 nautical miles in the continuous maximum icing conditions defined in appendix C of this part. The total exposure to the icing conditions need not exceed 45 minutes.

(3) *Approach ice* is the more critical of the holding ice defined by part II, paragraph (b)(2) of this appendix, or the ice calculated in the applicable paragraph (b)(3)(i) or (ii) of part II of this appendix:

(i) For an airplane certified in accordance with § 25.1420(a)(2), the ice accumulated during descent from the maximum vertical extent of the icing conditions defined in part I of this appendix to 2,000 feet above the landing surface in the cruise configuration, plus transition to the approach configuration, plus:

(A) Pre-detection ice, as defined by part II, paragraph (b)(5) of this appendix; and

(B) The ice accumulated during the transit at 2,000 feet above the landing surface of one cloud with a horizontal extent of 17.4 nautical miles in the most critical of the icing conditions defined in part I of this appendix and one cloud with a horizontal extent of 17.4 nautical miles in the continuous

maximum icing conditions defined in appendix C of this part.

(ii) For an airplane certified in accordance with § 25.1420(a)(1), the ice accumulated during descent from the maximum vertical extent of the maximum continuous icing conditions defined in part I of appendix C to 2,000 feet above the landing surface in the cruise configuration, plus transition to the approach configuration, plus:

(A) Pre-detection ice, as defined by part II, paragraph (b)(5) of this appendix; and

(B) The ice accumulated during the transit at 2,000 feet above the landing surface of one cloud with a horizontal extent of 17.4 nautical miles in the most critical of the icing conditions defined in part I of this appendix and one cloud with a horizontal extent of 17.4 nautical miles in the continuous maximum icing conditions defined in appendix C of this part.

(4) *Landing ice* is the more critical of the holding ice as defined by part II, paragraph (b)(2) of this appendix, or the ice calculated in the applicable paragraph (b)(4)(i) or (ii) of part II of this appendix:

(i) For an airplane certified in accordance with § 25.1420(a)(2), the ice accretion defined by part II, paragraph (c)(5)(i) of this appendix, plus a descent from 2,000 feet above the landing surface to a height of 200 feet above the landing surface with a transition to the landing configuration in the icing conditions defined in part I of this appendix, plus:

(A) Pre-detection ice, as defined in part II, paragraph (b)(5) of this appendix; and

(B) The ice accumulated during an exit maneuver, beginning with the minimum climb gradient required by § 25.119, from a height of 200 feet above the landing surface through one cloud with a horizontal extent of 17.4 nautical miles in the most critical of the icing conditions defined in part I of this appendix and one cloud with a horizontal extent of 17.4 nautical miles in the continuous maximum icing conditions defined in appendix C of this part.

(ii) For an airplane certified in accordance with § 25.1420(a)(1), the ice accumulated in the maximum continuous icing conditions defined in appendix C of this part, during a descent from the maximum vertical extent of the icing conditions defined in appendix C of this part, to 2,000 feet above the landing surface in the cruise configuration, plus transition to the approach configuration and flying for 15 minutes at 2,000 feet above the landing surface, plus a descent from 2,000 feet above the landing surface to a height of 200 feet above the landing surface with a transition to the landing configuration, plus:

(A) Pre-detection ice, as described by part II, paragraph (b)(5) of this appendix; and

(B) The ice accumulated during an exit maneuver, beginning with the minimum climb gradient required by § 25.119, from a height of 200 feet above the landing surface through one cloud with a horizontal extent of 17.4 nautical miles in the most critical of the icing conditions defined in part I of this appendix and one cloud with a horizontal extent of 17.4 nautical miles in the continuous maximum icing conditions defined in appendix C of this part.

(5) *Pre-detection ice* is the ice accretion before detection of appendix O conditions that require exiting per § 25.1420(a)(1) and (a)(2). It is the pre-existing ice accretion that may exist from operating in icing conditions in which the airplane is approved to operate prior to encountering the icing conditions requiring an exit, plus the ice accumulated during the time needed to detect the icing conditions, followed by two minutes of further ice accumulation to take into account the time for the flight crew to take action to exit the icing conditions, including coordination with air traffic control.

(i) For an airplane certified in accordance with § 25.1420(a)(1), the pre-existing ice accretion must be based on the icing conditions defined in appendix C of this part.

(ii) For an airplane certified in accordance with § 25.1420(a)(2), the pre-existing ice accretion must be based on the more critical of the icing conditions defined in appendix C of this part, or the icing conditions defined in part I of this appendix in which the airplane is capable of safely operating. The pre-detection ice accretion applies in showing compliance with §§ 25.143(k) and 25.207(k), and as part of the ice accretion definitions of part II, paragraph (b)(1) through (b)(4) of this appendix.

(c) *Ice accretions for airplanes certified in accordance with §§ 25.1420(a)(2) or 25.1420(a)(3).* For an airplane certified in accordance with § 25.1420(a)(2), only the portion of the icing conditions of part I of this appendix in which the airplane is capable of operating safely must be considered.

(1) *Takeoff ice* is the most critical ice accretion on unprotected surfaces, and any ice accretion on the protected surfaces appropriate to normal ice protection system operation, occurring between liftoff and 400 feet above the takeoff surface, assuming accretion starts at liftoff in the icing conditions defined in part I of this appendix.

(2) *Final takeoff ice* is the most critical ice accretion on unprotected surfaces, and any ice accretion on the protected surfaces appropriate to normal ice protection system operation, between 400 feet and either 1,500 feet above the takeoff surface, or the height at which the transition from the takeoff to the en route configuration is completed and V_{FTO} is reached, whichever is higher. Ice accretion is assumed to start at liftoff in the icing conditions defined in part I of this appendix.

(3) *En route ice* is the most critical ice accretion on the unprotected surfaces, and any ice accretion on the protected surfaces appropriate to normal ice protection system operation, during the en route flight phase in the icing conditions defined in part I of this appendix.

(4) *Holding ice* is the most critical ice accretion on the unprotected surfaces, and any ice accretion on the protected surfaces appropriate to normal ice protection system operation, resulting from 45 minutes of flight within a cloud with a 17.4 nautical miles horizontal extent in the icing conditions defined in part I of this appendix, during the holding phase of flight.

(5) *Approach ice* is the ice accretion on the unprotected surfaces, and any ice accretion on the protected surfaces appropriate to normal ice protection system operation, resulting from the more critical of the:

(i) Ice accumulated in the icing conditions defined in part I of this appendix during a descent from the maximum vertical extent of the icing conditions defined in part I of this appendix, to 2,000 feet above the landing surface in the cruise configuration, plus transition to the approach configuration and flying for 15 minutes at 2,000 feet above the landing surface; or

(ii) Holding ice as defined by part II, paragraph (c)(4) of this appendix.

(6) *Landing ice* is the ice accretion on the unprotected surfaces, and any ice accretion on the protected surfaces appropriate to normal ice protection system operation, resulting from the more critical of the:

(i) Ice accretion defined by part II, paragraph (c)(5)(i), of this appendix, plus ice accumulated in the icing conditions defined in part I of this appendix during a descent from 2,000 feet above the landing surface to a height of 200 feet above the landing surface with a transition to the landing configuration, followed by a go-around at the minimum climb gradient required by § 25.119, from a height of 200 feet above the landing surface to 2,000 feet above the landing surface, flying for 15 minutes at 2,000 feet above the landing surface in the approach configuration, and a descent to the landing surface (touchdown) in the landing configuration; or

(ii) Holding ice as defined by part II paragraph (c)(4) of this appendix.

(7) For both unprotected and protected parts, the ice accretion for the takeoff phase must be determined for the icing conditions defined in part I of this appendix, using the following assumptions:

(i) The airfoils, control surfaces, and, if applicable, propellers are free from frost, snow, or ice at the start of takeoff;

(ii) The ice accretion begins at liftoff;

(iii) The critical ratio of thrust/power-to-weight;

(iv) Failure of the critical engine occurs at V_{EF}; and

(v) Crew activation of the ice protection system is in accordance with a normal operating procedure provided in the Airplane Flight Manual, except that after beginning the takeoff roll, it must be assumed that the crew takes no action to activate the ice protection system until the airplane is at least 400 feet above the takeoff surface.

(d) The ice accretion before the ice protection system has been activated and is performing its intended function is the critical ice accretion formed on the unprotected and normally protected surfaces before activation and effective operation of the ice protection system in the icing conditions defined in part I of this appendix. This ice accretion only applies in showing compliance to §§ 25.143(j) and 25.207(h).

(e) In order to reduce the number of ice accretions to be considered when demonstrating compliance with the requirements of § 25.21(g), any of the ice accretions defined in this appendix may be used for any other flight phase if it is shown to be more critical than the specific ice accretion defined for that flight phase. Configuration differences and their effects on ice accretions must be taken into account.

(f) The ice accretion that has the most adverse effect on handling qualities may be

used for airplane performance tests provided any difference in performance is conservatively taken into account.

PART 33—AIRWORTHINESS STANDARDS: AIRCRAFT ENGINES

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

Authority: 49 U.S.C. 106(g), 40113, 44701, 44702, 44704.

25. Revise § 33.68 to read as follows:

§ 33.68 Induction system icing.

Each engine, with all icing protection systems operating, must:

(a) Operate throughout its flight power range, including the minimum descent idle rotor speeds achievable in flight, in the icing conditions defined in appendices C and O of part 25 of this chapter, and appendix D of this part 33, without the accumulation of ice on the engine components that:

(1) Adversely affects engine operation or that causes an unacceptable permanent loss of power or thrust or unacceptable increase in engine operating temperature; or

(2) Results in unacceptable temporary power loss or engine damage; or

(3) Causes a stall, surge, or flameout or loss of engine controllability (for example, rollback). The applicant must account for in-flight ram effects (for example; scoop factor amplification, water temperature, air density) in any critical point analysis or test demonstration of these flight conditions.

(b) Operate throughout its flight power range, including minimum descent idle rotor speeds achievable in flight, in the icing conditions defined in appendices C and O of part 25 of this chapter. In addition,

(1) It must be shown through Critical Point Analysis (CPA) that the complete ice envelope has been analyzed, and that the most critical points must be demonstrated by engine test, analysis or a combination of the two to operate acceptably. Extended flight in critical flight conditions such as hold, descent, approach, climb, and cruise, must be addressed, for the ice conditions defined in these appendices.

(2) It must be shown by engine test, analysis or a combination of the two that the engine can operate acceptably for the following durations:

(i) At engine powers that can sustain level flight: A duration that achieves repetitive, stabilized operation in the icing conditions defined in appendices C and O of part 25 of this chapter.

(ii) At engine power below that which can sustain level flight:

(A) Demonstration in altitude flight simulation test facility: A duration of 10 minutes consistent with a simulated flight descent of 10,000 ft (3 km) in altitude while operating in Continuous Maximum icing conditions defined in appendix C of part 25 of this chapter, plus 40 percent liquid water content margin, at the critical level of airspeed and air temperature, or

(B) Demonstration in ground test facility: A duration of 3 cycles of alternating icing exposure corresponding to the liquid water content levels and standard cloud lengths in Intermittent Maximum and Continuous Maximum icing conditions defined in appendix C of part 25 of this chapter, at the critical level of air temperature.

(c) In addition to complying with § 33.68(b), the following conditions shown in Table 1 of this section unless replaced by similar CPA test conditions that are more critical or produce an equivalent level of severity, must be demonstrated by an engine test:

TABLE 1—CONDITIONS THAT MUST BE DEMONSTRATED BY AN ENGINE TEST

Condition	Total air temperature	Supercooled water concentrations (minimum)	Median volume drop diameter (±3 microns)	Duration
1. Glaze ice conditions.	21 to 25 °F (−6 to −4 °C).	2 g/m³	25 microns	(a) 10 minutes for power below sustainable level flight (idle descent). (b) Must show repetitive, stabilized operation for higher powers (50%, 75%, 100% MC).
2. Rime ice conditions.	−10 to 0 °F (−23 to −18 °C).	1 g/m³	15 microns	(a) 10 minutes for power below sustainable level flight (idle descent). (b) Must show repetitive, stabilized operation for higher powers (50%, 75%, 100% MC).
3. Glaze ice holding conditions (Turboprop and turbofan, only).	Turbofan, only: 10 to 18 °F (−12 to −8 °C). Turboprop, only: 2 to 10 °F (−17 to −12 °C).	Alternating cycle: 0.3 g/m³ (6 minute) 1.7 g/m³ (1 minute).	20 microns	Must show repetitive, stabilized operation (or 45 minutes max).
4. Rime ice holding conditions (Turboprop and turbofan, only).	Turbofan, only: −10 to 0 °F (−23 to −18 °C) Turboprop, only: 2 to 10 °F (−17 to −12 °C).	0.25 g/m³	20 microns	Must show repetitive, stabilized operation (or 45 minutes max).

(d) The engine should be run at ground idle speed for a minimum of 30 minutes at each of the following icing conditions shown in Table 2 of this section with the available air bleed for icing protection at its critical condition, without adverse effect, followed by acceleration to takeoff power or thrust. During the idle operation the engine may be run up periodically to a moderate power or thrust setting in a manner acceptable to the Administrator. The applicant must document any demonstrated run ups and minimum ambient temperature capability during the conduct of icing testing in the engine operating manual as mandatory in icing conditions. The applicant must demonstrate, with consideration of expected airport elevations, the following:

TABLE 2—DEMONSTRATION METHODS FOR SPECIFIC ICING CONDITIONS

Condition	Total air temperature	Supercooled water concentrations (minimum)	Mean effective particle diameter	Demonstration
1. Rime ice condition	0 to 15 °F (−8 to −9 °C).	Liquid—0.3 g/m³	15–25 microns	By engine test.
2. Glaze ice condition	20 to 30 °F (−7 to −1 °C).	Liquid—0.3 g/m³	15–25 microns	By engine test.
3. Snow ice condition	26 to 32 °F (−3 to 0 °C)	Ice—0.9 g/m³	100 microns (minimum)	By test, analysis or combination of the two.
4. Large drop glaze ice condition.	15 to 30 °F (−9 to −1 °C).	Liquid—0.3 g/m³	100 microns (minimum); 3000 microns (maximum).	By test, analysis or combination of the two.

(e) The applicant must demonstrate by test, analysis, or combination of the two, acceptable operation in ice crystals and mixed phase icing conditions throughout part 33, appendix D, icing envelope throughout its flight power range, including minimum descent idling speeds.

26. Amend § 33.77 by adding paragraph (a) and by revising paragraphs (c) introductory text, (c)(1), (d), and (e)(1) through (4) to read as follows:

§ 33.77 Foreign object ingestion—ice.

(a) Compliance with the requirements of this paragraph shall be demonstrated by engine ice ingestion test or by validated analysis showing equivalence of other means for demonstrating soft body damage tolerance.

* * * * *

(c) Ingestion of ice under the conditions of this section may not —

(1) Cause an immediate or ultimate unacceptable sustained power or thrust loss; or

* * * * *

(d) For an engine that incorporates a protection device, compliance with this section need not be demonstrated with respect to ice formed forward of the protection device if it is shown that—

(1) Such ice is of a size that will not pass through the protective device;

(2) The protective device will withstand the impact of the ice; and

(3) The ice stopped by the protective device will not obstruct the flow of induction air into the engine with a resultant sustained reduction in power or thrust greater than those values defined by paragraph (c) of this section.

(e) * * *

(1) The minimum ice quantity and dimensions will be established by the engine size as defined in Table 1 of this section.

(2) The ingested ice dimensions are determined by linear interpolation between table values, and are based on the actual engine's inlet hilite area.

(3) The ingestion velocity will simulate ice from the inlet being sucked into the engine.

(4) Engine operation will be at the maximum cruise power or thrust unless lower power is more critical.

TABLE 1—MINIMUM ICE SLAB DIMENSIONS BASED ON ENGINE INLET SIZE

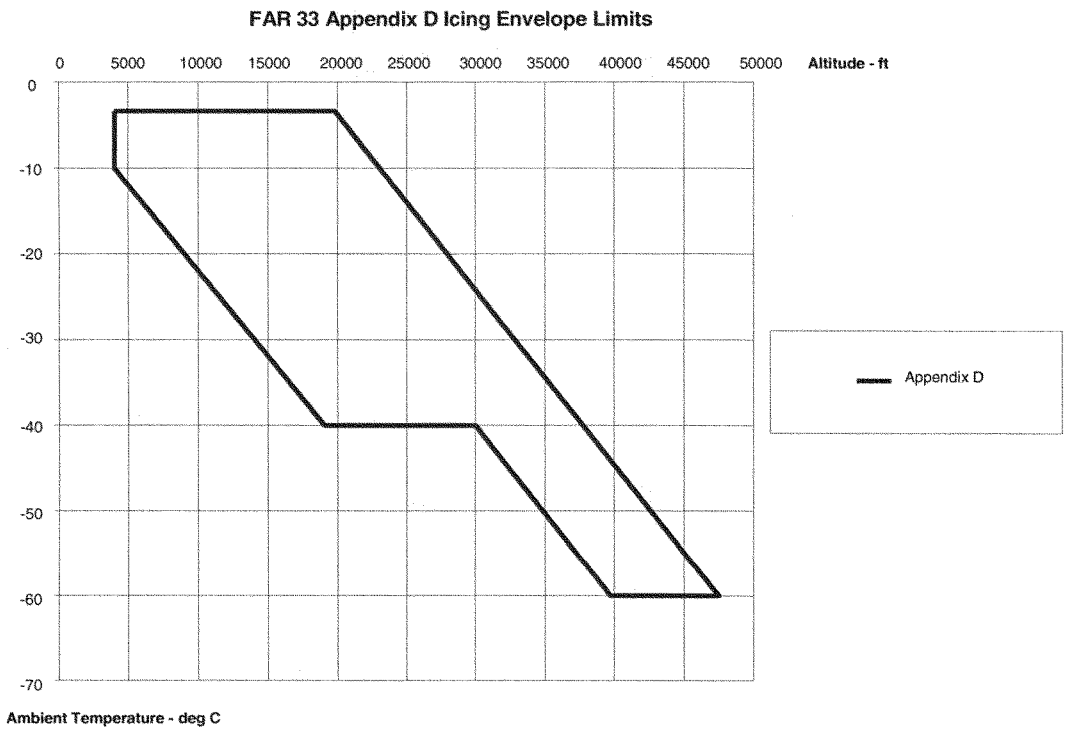
Engine inlet hilite area (sq inch)	Thickness (inch)	Width (inch)	Length (inch)
0	0.25	0	3.6
80	0.25	6	3.6
300	0.25	12	3.6
700	0.25	12	4.8
2800	0.35	12	8.5
5000	0.43	12	11.0
7000	0.50	12	12.7
7900	0.50	12	13.4
9500	0.50	12	14.6
11300	0.50	12	15.9
13300	0.50	12	17.1
16500	0.5	12	18.9
20000	0.5	12	20.0

27. Amend part 33 by adding appendix D to read as follows:

Appendix D to Part 33—Mixed Phase And Ice Crystal Icing Envelope (Deep Convective Clouds)

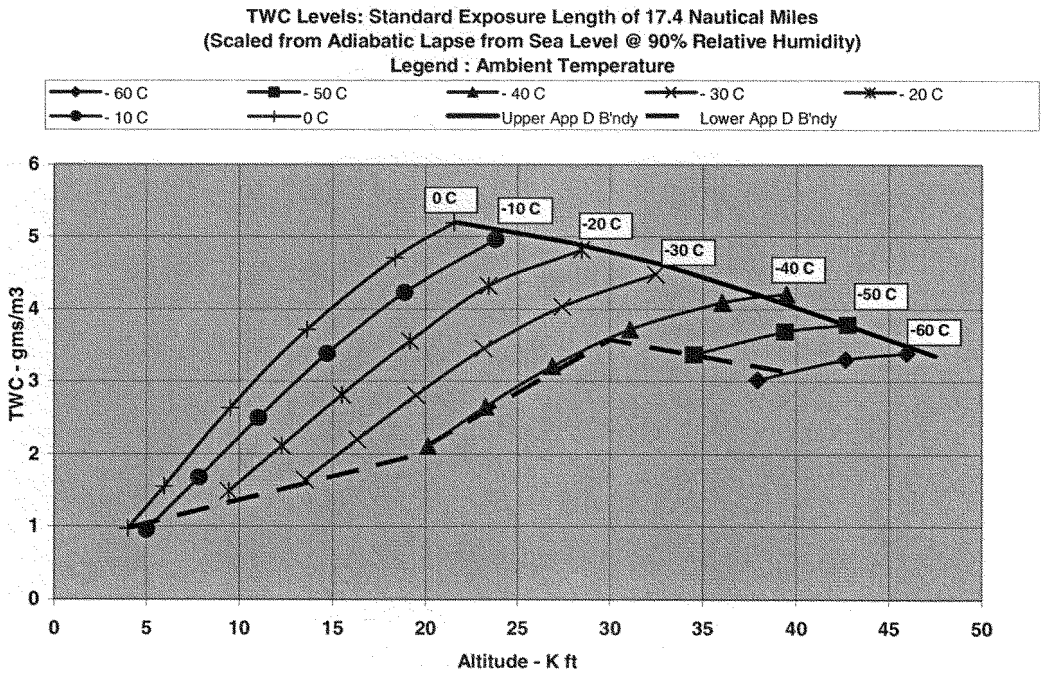
Ice crystal conditions associated with convective storm cloud formations exist within the part 25, appendix C, Intermittent Maximum Icing envelope (including the extension to −40 deg C) and the Mil Standard 210 Hot Day envelope. This ice crystal icing envelope is depicted in Figure D1, below.

Figure D1 - Convective Cloud Ice Crystal Envelope



Within the envelope, total water content (TWC) in g/m³ has been determined based upon the adiabatic lapse defined by the convective rise of 90% relative humidity air from sea level to higher altitudes and scaled by a factor of 0.65 to a standard cloud length of 17.4 nautical miles. Figure D2 displays TWC for this distance over a range of ambient temperature within the boundaries of the ice crystal envelope specified in Figure D1.

FIGURE D2 - Total Water Content



Ice crystal size median mass dimension (MMD) range is 50–200 microns (equivalent spherical size) based upon measurements near convective storm cores.

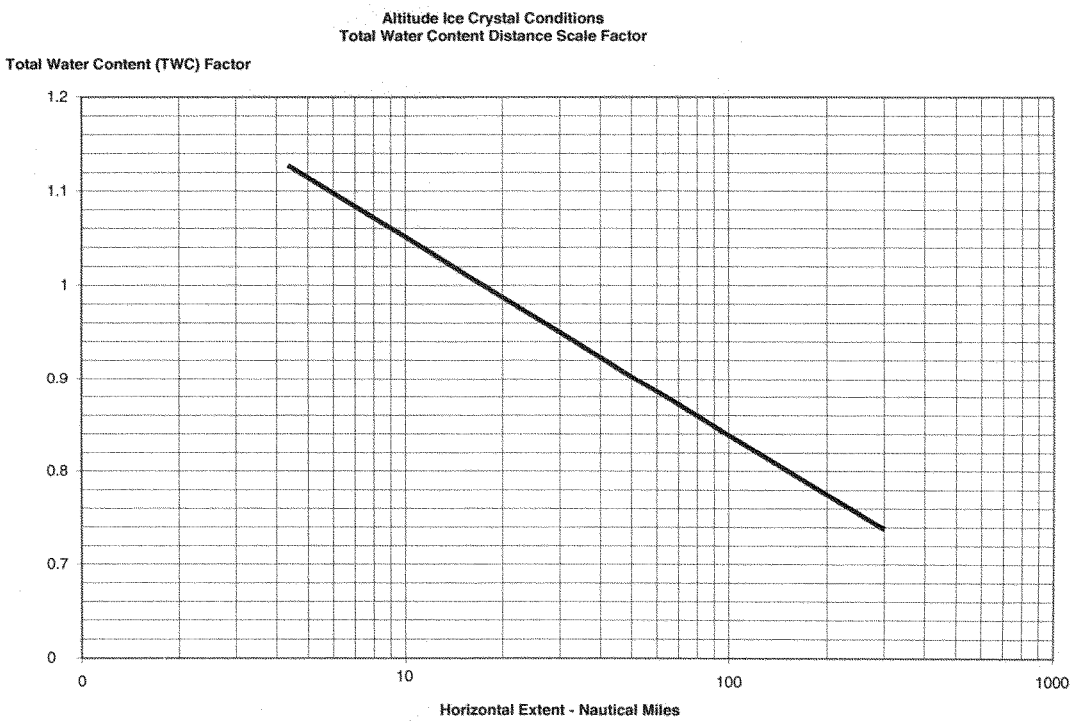
The TWC can be treated as completely glaciated (ice crystal) except as noted in the Table 1.

TABLE 1—SUPERCOOLED LIQUID PORTION OF TWC

Temperature range—deg C	Horizontal cloud length	LWC—g/m³
0 to −20	</= 50 miles	</=1.0
0 to −20	Indefinite	</=0.5
<−20		0

The TWC levels displayed in Figure D2 represent TWC values for a standard exposure distance (horizontal cloud length) of 17.4 nautical miles that must be adjusted with length of icing exposure. The assessment from data measurements in Reference 1 supports the reduction factor with exposure length shown in Figure D3.

FIGURE D3 Exposure Length Influence on TWC



Issued in Washington, DC, on June 23, 2010.

KC Yanamura,

Acting Director, Aircraft Certification Service.

[FR Doc. 2010–15726 Filed 6–28–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–0640; Directorate Identifier 2009–NM–142–AD]

RIN 2120–AA64

Airworthiness Directives; EADS CASA (Type Certificate Previously Held by Construcciones Aeronauticas, S.A.) Model CN–235, CN–235–100, CN–235–200, and CN–235–300 Airplanes, and Model C–295 Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of Proposed Rulemaking (NPRM).

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

Prompted by [an] accident * * * the FAA published SFAR 88 (Special Federal Aviation Regulation 88) * * *.

* * * * *

Fuel Airworthiness Limitations arising from the required systems safety analysis are items 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 corrective actions(s) developed by the TC [type certificate] holder.

The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

DATES: We must receive comments on this proposed AD by August 13, 2010.

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 proposed AD, contact EADS–CASA, Military Transport Aircraft Division (MTAD), Integrated Customer Services (ICS), Technical Services, Avenida de Aragón 404, 28022 Madrid, Spain; telephone +34 91 585 55 84; fax +34 91 585 55 05; e-mail *MTA.TechnicalService@casa.eads.net;* Internet *http://www.eads.net.* You may review copies of the referenced 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.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: 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:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2010–0640; Directorate Identifier 2009–NM–142–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

We have lengthened the 30-day comment period for proposed ADs that address MCAI originated by aviation authorities of other countries to provide adequate time for interested parties to submit comments. The comment period for these proposed ADs is now typically 45 days, which is consistent with the comment period for domestic transport ADs.

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

Discussion

On April 24, 2008, we issued AD 2008–09–22, Amendment 39–15503 (73 FR 23939, May 1, 2008). That AD required actions intended to address an unsafe condition on the products listed above.

Since we issued AD 2008–09–22, the fuel airworthiness limitations have been revised. The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Airworthiness Directive 2009–0146, dated July 3, 2009 (referred to after this as "the MCAI"), to correct an unsafe condition for the specified products. The MCAI states:

Prompted by [an] accident * * *, the FAA published SFAR 88 (Special Federal Aviation Regulation 88). Subsequently, the Joint Aviation Authorities (JAA) recommended the application of a similar regulation to the National Aviation Authorities (NAA) of its member countries.

Under this regulation, all holders of type certificates for passenger transport aeroplanes with either a passenger capacity of 30 or more, or a payload capacity of 3 402 kg (7 500 lbs) or more, which have received their certification since 01 January 1958, are required to conduct a design review against explosion risks.

In August 2005, EASA 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), 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.

Fuel Airworthiness Limitations arising from the required systems safety analysis are items that have been shown to have failure mode(s) associated with an 'unsafe condition' as defined in the FAA 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 corrective action(s) developed by the TC [type certificate] holder.

To address these potential unsafe conditions, EASA issued AD 2007–0007, mandating the Fuel System Airworthiness Limitations, comprising maintenance and inspection tasks and Critical Design Configuration Control Limitations (CDCCL) that were, at that moment, defined in issue C of EADS–CASA document DT–0–C00–05001. That document has now been revised and updated to issue D.

For the reasons described above, this EASA AD retains the requirements of AD 2007–0007, which is superseded [and corresponds to FAA AD 2008–09–22], and requires the implementation of the revised Fuel Airworthiness Limitations contained in issue D of EADS–CASA document DT–0–C00–05001 and accomplishment of related modifications.

The required actions are retaining the limitations for fuel tank systems, adding thermal insulation to the air conditional compression system, applying double bonding connection on fuel tubes, and modifying the separation between the center wing electrical harness and fuel tubes. The application of double bonding connections on fuel tubes includes doing general visual inspections for damage of the inside of the fuel tanks, and corrective actions if necessary. The corrective actions include contacting EADS CASA for repair instructions and doing the repair. You may obtain further information by examining the MCAI in the AD docket.

We have changed Table 1 of this AD to fix a typographical error, which is specified in EADS CASA Component Maintenance Manual with Illustrated Parts List 28–21–12, Revision 003, dated June 15, 2007. The title page of that document specifies "Revision 002." The correct revision level is "Revision 003."

Relevant Service Information

EADS CASA has issued the following service bulletins:

- EADS CASA Service Bulletin SB–235–21–18, dated August 2, 2007;
- EADS CASA Service Bulletin SB–235–24–20, dated August 2, 2007; and
- EADS CASA Service Bulletin SB–235–28–18, dated August 2, 2007.

EADS CASA has also issued CN–235/C–295 Technical Document, DT–0–C00–05001, Issue D, dated October 2008. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of This Proposed AD

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

Differences Between This AD and the MCAI or Service Information

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

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

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 8 products of U.S. registry.

The actions that are required by AD 2008–09–22 and retained in this proposed AD take about 1 work-hour per product, at an average labor rate of $85 per work hour. Based on these figures, the estimated cost of the currently required actions is $85 per product.

We estimate that it would take about 90 work-hours per product, depending on airplane configuration, to comply with the new basic requirements of this proposed AD. The average labor rate is $85 per work-hour. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $61,200, or $7,650 per product, depending on airplane configuration.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The FAA amends § 39.13 by removing Amendment 39–15503 (73 FR 23939, May 1, 2008) and adding the following new AD:

EADS CASA (Type Certificate Previously Held by Construcciones Aeronauticas, S.A.): Docket No. FAA–2010–0640; Directorate Identifier 2009–NM–142–AD.

Comments Due Date

(a) We must receive comments by August 13, 2010.

Affected ADs

(b) This AD supersedes AD 2008–09–22, Amendment 39–15503.

Applicability

(c) This AD applies to EADS CASA (Type Certificate previously held by Construcciones Aeronauticas, S.A.) Model CN–235, CN–235–100, CN–235–200, and CN–235–300 airplanes, and Model C–295 airplanes, all serial numbers; certificated in any category.

Subject

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

Reason

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

"Prompted by [an] accident * * *, the FAA published SFAR 88 (Special Federal Aviation Regulation 88). Subsequently, the Joint Aviation Authorities (JAA) recommended the application of a similar regulation to the National Aviation Authorities (NAA) of its member countries.

"Under this regulation, all holders of type certificates for passenger transport aeroplanes with either a passenger capacity of 30 or more, or a payload capacity of 3 402 kg (7 500 lbs) or more, which have received their certification since 01 January 1958, are required to conduct a design review against explosion risks.

"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), 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.

"Fuel Airworthiness Limitations arising from the required systems safety analysis are items that have been shown to have failure mode(s) associated with an 'unsafe condition' as defined in the FAA 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 corrective action(s) developed by the TC [type certificate] holder.

"To address these potential unsafe conditions, EASA issued AD 2007–0007, mandating the Fuel System Airworthiness Limitations, comprising maintenance and inspection tasks and Critical Design Configuration Control Limitations (CDCCL) that were, at that moment, defined in issue C of EADSCASA document DT–0–C00–05001. That document has now been revised and updated to issue D.

"For the reasons described above, this EASA AD retains the requirements of AD 2007–0007, which is superseded [and corresponds to FAA AD 2008–09–22], and requires the implementation of the revised Fuel Airworthiness Limitations contained in issue D of EADS–CASA document DT–0–C00–05001 and accomplishment of related modifications."

The required actions are retaining the limitations for fuel tank systems, adding thermal insulation to the air conditional compression system, applying double bonding connection on fuel tubes, and modifying the separation between the center wing electrical harness and fuel tubes. The application of double bonding connections on fuel tubes includes doing general visual inspections for damage of the inside of the fuel tanks, and corrective actions if necessary. The corrective actions include contacting EADS CASA for repair instructions and doing the repair. You may obtain further information by examining the MCAI in the AD docket.

Compliance

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

Restatement of Requirements of AD 2008–09–22, With Revised Paragraph Formatting

(g) Do the following actions.

(1) Within 6 months after June 5, 2008 (the effective date of AD 2008–09–22), do the revisions specified in (g)(1)(i) or (g)(1)(ii) of this AD.

(i) Revise the Airworthiness Limitations section of the Instructions for Continued Airworthiness to include the CDCCL data using a method approved in accordance with the procedures specified in paragraph (i)(1) of this AD.

(ii) Revise the Airworthiness Limitations section of the Instructions for Continued Airworthiness by incorporating the information in EADS CASA CN–235/C–295 Technical Document DT–0–C00–05001, Issue C, dated October 2006. Where this EADS CASA technical document refers to an EADS CASA component maintenance manual (CMM), use the applicable CMM specified in Table 1 of this AD.

TABLE 1—APPLICABLE CMMS

CDCCL No.	CDCCL description	CMM	Revision	Date
8	Fuel pumps	Parker Hannifin CMM with Illustrated Parts List 28–22–12 (replaces CM 1C12–34).	5	January 10, 2008.
8	Centrifugal fuel boost pump.	Parker Hannifin CMM with Illustrated Parts List CM 1C7–20, –21 (replaces CMM RR54170).	B	November 20, 2006.
9	Low level sensor	EADS CASA CMM with Illustrated Parts List 28–21–12.	003	June 15, 2007.
10	3/4″ shutoff motorized valve.	Eaton CMM with Illustrated Parts List 28–20–81	2	June 20, 2006.
11	2″ motorized spherical plug pressure relief valve.	Eaton CMM with Illustrated Parts List 28–0–63	3	June 20, 2006.
12	Signal conditioner	Gull CMM with Illustrated Parts List 28–40–61	3	June 28, 2007.
13	Fuel control unit	Zodiac Intertechnique CMM with Illustrated Parts List 28–41–05.	3	September 25, 2006.

Note 1: Table 1 of this AD does not include CMM 28–22–15, CE400150–E01, and C 17MQ0020–005SE, which are listed in EADS CASA CN–235/C–295 Technical Document DT–0–C00–05001, Issue C, dated October 2006. These CMM document numbers no longer apply. In addition, CMM document number 28–21–81 in EADS CASA CN–235/C–295 Technical Document DT–0–C00–05001, Issue C, dated October 2006, should be CMM document number 28–20–81.

(2) After accomplishing the actions specified in paragraph (g)(1) of this AD, no alternative CDCCLs may be used unless the CDCCLs are approved as an alternative method of compliance (AMOC) in accordance with the procedures specified in paragraph (i)(1) of this AD.

New Requirements of This AD

(h) Do the following actions.

(1) Within 3 months after the effective date of this AD, revise the Airworthiness Limitations section of the Instructions for Continued Airworthiness by incorporating the information in EADS CASA CN–235/C–295 Technical Document DT–0–C00–05001, Issue D, dated October 2008. Where this EADS CASA technical document refers to an EADS CASA CMM, use the applicable CMM specified in Table 1 of this AD. Doing this revision terminates the requirements specified in paragraph (g) of this AD.

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 fuel airworthiness limitations, as required by paragraphs (g) and (h) of this AD, do not need to be reworked in accordance with the CDCCLs. However, once the fuel airworthiness limitations have been revised, future maintenance actions on these components must be done in accordance with the CDCCLs.

(2) After accomplishing the actions specified in paragraph (h)(1) of this AD, no alternative CDCCLs may be used unless the CDCCLs are approved as an AMOC in accordance with the procedures specified in paragraph (i)(1) of this AD.

(3) Within 6 months after the effective date of this AD, accomplish the modifications specified in paragraphs (h)(3)(i), (h)(3)(ii), and (h)(3)(iii) of this AD, as applicable.

(i) For Model CN–235, CN–235–200, and CN–235–300 airplanes having serial numbers identified in EADS CASA Service Bulletin SB–235–21–18, dated August 2, 2007: Add thermal insulation to the air condition compression system, in accordance with the Accomplishment Instructions of EADS CASA Service Bulletin SB–235–21–18, dated August 2, 2007.

(ii) For Model CN–235, CN–235–200, and CN–235–300 airplanes having serial numbers identified in EADS CASA Service Bulletin SB–235–28–18, dated August 2, 2007: Apply double bonding connections on fuel tubes and do general visual inspections for damage inside of the tank, in accordance with the Accomplishment Instructions of EADS CASA Service Bulletin SB–235–28–18, dated August 2, 2007. If any damage is found inside the tank, before further flight, contact EADS CASA for repair instructions and do the repair.

(iii) For Model CN–235, CN–235–200, and CN–235–300 airplanes having serial numbers identified in EADS CASA Service Bulletin SB–235–24–20, dated August 2, 2007: Modify the separation between the center wing electrical harnesses and fuel tubes, in accordance with the Accomplishment Instructions of EADS CASA Service Bulletin SB–235–24–20, dated August 2, 2007.

FAA AD Differences

Note 3: This AD differs from the MCAI and/or service information as follows:

(1) The European Aviation Safety Agency (EASA) AD 2009–0146, dated July 3, 2009,

inadvertently refers to the incorrect service bulletins. For applying double bonding connections on fuel tubes and doing general visual inspections for damage inside the tank, we refer to EADS CASA Service Bulletin SB–235–28–18, dated August 2, 2007. For modifying the separation between the center wing electrical harnesses and fuel tubes, we refer to EADS CASA Service Bulletin SB–235–24–20, dated August 2, 2007.

(2) The EASA AD 2009–0146, dated July 3, 2009; and EADS CASA Service Bulletin SB–235–28–18, dated August 2, 2007; do not specify corrective actions if any damage is found inside the tank. If any damage is found inside the tank, this AD requires contacting EADS CASA for repair instructions and doing the repair.

Other FAA AD Provisions

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

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to *Attn:* 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 (44 U.S.C. 3501 *et seq.*), the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120–0056.

Related Information

(j) Refer to MCAI EASA Airworthiness Directive 2009–0146, dated July 3, 2009, the CMMs identified in Table 1 of this AD, and the service information identified in Table 2 of this AD, for related information.

TABLE 2—SERVICE INFORMATION

Document	Issue	Date
EADS CASA Service Bulletin SB–235–21–18	Original	August 2, 2007.
EADS CASA Service Bulletin SB–235–24–20	Original	August 2, 2007.
EADS CASA Service Bulletin SB–235–28–18	Original	August 2, 2007.
EADS CASA CN–235/C–295 Technical Document DT–0–C00–05001	Issue C	October 2006.
EADS CASA CN–235/C295 Technical Document, DT–0–C00–05001	Issue D	October 2008.

Issued in Renton, Washington, on June 21, 2010.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2010–15708 Filed 6–28–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 571

[Docket No. NHTSA–2010–0061]

Federal Motor Vehicle Safety Standards; Occupant Crash Protection

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation.

ACTION: Request for comments.

SUMMARY: This document requests public comments on a petition for rulemaking submitted by Public Citizen and Advocates for Highway and Auto Safety, to amend the Federal motor vehicle safety standard on occupant crash protection to require automobile manufacturers to install seat belt reminder systems for rear designated seating positions in light passenger vehicles. The document discusses the agency's research and findings as well as our knowledge of the different types of rear seat belt reminder systems. In general, we are encouraged by new methods to increase seat belt use. NHTSA requests comments and information to assist the agency in determining whether to grant or deny the petition.

DATES: Comments must be received on or before August 30, 2010.

ADDRESSES: You may submit comments (identified by the DOT Docket ID Number above) by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal Holidays.
- *Fax:* 202–493–2251.

Instructions: For detailed instructions on submitting comments and additional information on the rulemaking process, *see* the Public Participation heading of the **SUPPLEMENTARY INFORMATION** section of this document. It is requested, but not required, that two copies of the comment be provided. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. Please see the Privacy Act heading below.

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

FOR FURTHER INFORMATION CONTACT:

For Non-Legal Issues: Ms. Carla Rush, Office of Crashworthiness Standards, National Highway Traffic Safety Administration, 1200 New Jersey Ave., SE., Washington, DC 20590, Telephone: (202) 366–4583, Facsimile: (202) 493–2739.

For Legal Issues: Mr. J. Edward Glancy, Office of Chief Counsel, National Highway Traffic Safety Administration, 1200 New Jersey Ave., SE., Washington, DC 20590, Telephone: (202) 366–2992, Facsimile: (202) 366–3820.

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I. Background

A. Seat Belt Reminder Systems in the United States

Increasing seat belt use in the United States (U.S.) has been a long-standing priority for the National Highway Traffic Safety Administration (NHTSA). When used properly, NHTSA estimates that seat belts (lap/shoulder belts) reduce the risk of fatal injury to front seat passenger car occupants by 45 percent and the risk of moderate-to-severe injury by 50 percent. Seat belts are even more effective for light truck occupants, reducing the fatality risk by 60 percent and the moderate-to-serious injury risk by 65 percent.[1] For rear seat passenger car occupants, seat belts reduce the risk of fatal injury by 44 percent. For rear seat passenger van and sport utility vehicle occupants, seat belts reduce the risk of fatal injury by 73 percent.[2] During the 5-year period from 2004 to 2008, seat belts saved over 75,000 lives.[3] Historically, NHTSA has pursued two strategic approaches for increasing seat belt use: Behavioral programs and vehicle-based technologies.

Behavioral programs aimed at increasing seat belt use have included providing educational and technical assistance to the public, policy-makers and intermediaries on the benefits of seat belt use and the effectiveness of primary seat belt use laws and strengthening existing laws. NHTSA has also worked with the States to encourage high visibility seat belt use enforcement through programs such as safety checkpoints and associated media campaigns. The agency has also worked on national communication plans directed towards media opportunities to support seat belt use mobilization efforts, as well as initiatives that partner with employers and the insurance industry.

In parallel with our behavioral strategies, the agency has also pursued vehicle-based technologies for increasing seat belt use. These include sensors in the seat belt system that can detect seat belt non-use and provide audio/visual warnings or other incentives to encourage unbelted occupants to fasten their seat belts. In this notice we will discuss four different types of vehicle-based technologies: Driver seat belt warning systems, seat belt interlocks, rear seat belt reminder systems (SBRSs) and enhanced SBRSs.[4] For the purposes of this notice, the term rear SBRS does not necessarily limit the system to the requirements of the driver seat belt warning systems that are regulated by Federal Motor Vehicle Safety Standard (FMVSS) No. 208, "Occupant crash protection," which will be discussed in the following section. However, as further discussed below, there are statutory limitations with respect to our ability to require some types of enhanced SBRSs.

1. Regulatory History

Early driver seat belt warning systems and seat belt interlocks date back to the 1970s, when seat belt use was only 12 to 15 percent.[5] In 1971, NHTSA sought to increase seat belt use by adopting occupant protection options for vehicles manufactured after 1972 that required the use of a SBRS for the front outboard seating positions (36 FR 4600).[6] Then in 1972, NHTSA adopted an occupant protection option for passenger cars manufactured between August 15, 1973 and August 15, 1975, that required an interlock system which would prevent a vehicle from starting if any of the front seat belts were not fastened (37 FR 3911).[7]

Contrary to the agency's expectations, the initial vehicle introduction of these systems in the early 1970s was not well received by the public. In particular, continuous buzzers and ignition interlocks annoyed many consumers to the point of disabling or circumventing the systems.[8] As a result of the negative consumer reaction, Congress adopted a provision, as part of the Motor Vehicle and School Bus Safety Amendments of 1974, prohibiting the agency from prescribing a motor vehicle safety standard that requires, or permits as a compliance option, either ignition interlocks designed to prevent starting or operating a motor vehicle if an occupant is not using a seat belt, or a buzzer designed to indicate a seat belt is not in use for a period of more than eight (8) seconds after the ignition was turned to the "start" or "on" position (49 U.S.C. 30124).[9]

FMVSS No. 208 was ultimately amended to only require that the driver's seating position be equipped with a seat belt warning system that activates, under circumstances when the driver's seat belt is not buckled, a continuous or intermittent audible signal for a period of not less than 4 seconds and not more than 8 seconds, and a continuous or flashing warning light for not less than 60 seconds after the ignition switch is turned on (39 FR 42692).[10] This provision was more readily accepted by the public and has remained a part of the standard for vehicles manufactured since 1974. Likewise, the Congressional statutory provision of 1974 is still in effect today (49 U.S.C. 30124).

2. NHTSA Research and Consumer Information Programs

As seat belt use increased to 73 percent in calendar year 2001,[11] Congress directed NHTSA to study the potential benefits of technologies designed to increase seat belt use (through contract with the Transportation Research Board of the National Academy of Sciences (NAS)).[12] The study aimed to determine how current drivers might accept technologies designed to increase seat belt use, and consider whether legislative or regulatory actions were

[1] Traffic Safety Facts: Occupant Protection, 2006 Data. DOT HS 810 807. Washington, DC: National Highway Traffic Safety Administration.

[2] Morgan, Christina. "Effectiveness of Lap/Shoulder Belts in the Back Outboard Seating Positions," DOT HS 808 945, NHTSA Technical Report, 1999.

[3] Traffic Safety Facts: Crash Stats: Lives Saved in 2008 by Restraint Use. DOT HS 811 153. Washington, DC: National Highway Traffic Safety Administration.

[4] For the purposes of this notice an "enhanced SBRS" is a seat belt warning system that goes beyond the specifications of the driver seat belt warning system that are set forth in S7.3 of FMVSS No. 208.

[5] "Buckling Up, Technologies to Increase Seat Belt Use," Special Report 278, Committee for the Safety Belt Technology Study, *http://www.TRB.org,* 2003, page 4. Haseltine, P.W. 2001. Seat Belt Use in Motor Vehicles: The U.S. Experience. In 2001 Seat Belt Summit, Automotive Coalition for Traffic Safety, Inc., Jan. 11–13.

[6] NHTSA Docket No. 69–7; Notice 9.

[7] NHTSA Docket No. 69–7; Notice 16.

[8] Kratzke, S.R. 1995. Regulatory History of Automatic Crash Protection in FMVSS 208. SAE Technical Paper 950865. International Congress and Exposition, Society of Automotive Engineers, Detroit, Mich., Feb. 27–March 2.

[9] There is no statutory requirement that the warning system be limited to the driver's seating position.

[10] NHTSA Docket No. 74–39; Notice 3.

[11] Glassbrenner, Donna, *Safety Belt and Helmet Use in 2002—Overall Results.* DOT HS 809 500. September 2002.

[12] House of Representatives Report 107–108 Department of Transportation and Related Agencies Appropriation Bill, 2002, June 22, 2001.

necessary to enable their installation on passenger vehicles.

The study found that enhanced SBRSs that went beyond the required FMVSS No. 208 driver seat belt warning system showed promise for increasing seat belt use. It concluded that the data available at that time provided "strongly converging evidence in support of both the potential effectiveness and consumer acceptance of many new seat belt use technologies, particularly enhanced belt reminder systems."

The study also made eight recommendations for the continued development of these technologies. One of the recommendations stated that Congress should amend the statute regarding seat belt reminder systems by lifting the restrictions on systems with visual and audible signals that stay activated beyond the initial 8 seconds. It further stated that amending the statute would provide NHTSA more flexibility and the authority to require effective seat belt reminder technologies.[13] It also recommended that if voluntary efforts to install effective SBRSs did not produce sufficient results, NHTSA should mandate the most effective acceptable systems as determined by the current data. In addition, the study recommended that Congress provide NHTSA funding to support a multi-year program of research on the effectiveness of different enhanced SBRSs, because the findings of such research could help establish the scientific basis for regulation should regulation be needed.

Concurrent with the NAS study, NHTSA's Administrator sent letters to vehicle manufacturers in 2002, and again in 2003, encouraging them to enhance their driver seat belt warning systems beyond the minimum required by FMVSS No. 208. In addition, the agency explained through a series of legal interpretations the attributes of various specific enhanced SBRS designs contemplated by vehicle manufacturers that would enable them to comply with FMVSS No. 208.[14]

Based on the number of vehicle manufacturer responses, we were pleased that many manufacturers were voluntarily moving in the direction of installing enhanced SBRSs.[15] However, we found that there was a spectrum of enhanced SBRS types that were being introduced into the fleet. Some of the more rudimentary systems had a visual signal that stayed activated until the belt was buckled, some had audible signals that activated beyond the initial 8 seconds, and others had visual signals that stay activated beyond the initial 60 seconds. Some even had audible and visual signals that stay activated for several minutes.

For the most part, these enhanced SBRSs were directed at front seat applications. For the driver position, enhanced SBRSs primarily relied on sensors found in the seat belt buckle and latch assemblies, since the presence of a driver could be assumed. For front seat passengers, some of the more advanced SBRSs relied on the use of existing sensors in the seat, used for one of the advanced air bag compliance options. These could include pressure-sensitive or capacitive sensors in the seat cushions, for example, that were already installed for ensuring the proper deployment or suppression of advanced air bags as required by FMVSS No. 208.

In September 2002, NHTSA also chartered an integrated project team (IPT) to strategically identify innovative solutions and recommend effective strategies in increasing seat belt use. The IPT recommended several strategies for consideration.[16] These included: Continued work on encouraging vehicle manufacturers to voluntarily install enhanced SBRSs, providing consumer information on vehicles equipped with enhanced SBRSs as part of the New Car Assessment Program (NCAP), and continued monitoring and assessment of the effectiveness and acceptability of enhanced SBRSs through research.

In 2004, NHTSA started making enhanced SBRS information available to consumers through the NCAP *http://www.safercar.gov* Web site. The consumer information explained the functionality of enhanced SBRSs and documented the availability of enhanced SBRS for each vehicle model on the *http://www.safercar.gov* Web site. We have continued to collect and disseminate the information in the years since. Currently in the U.S., 479 vehicle models out of 493 were reported by their manufacturers as having a SBRS that went beyond the minimum performance requirements of FMVSS No. 208 according to the model year (MY) 2010 Buying a Safer Car information. Currently the agency requests information about the seating positions that have SBRSs and if the SBRS signal time exceeds that required by FMVSS No. 208. It was reported that 372 of the 493 vehicle models have a SBRS for the right front passenger seat, and 416 of the 493 vehicle models have a SBRS signal (audio/visual/or both) that stays active beyond the FMVSS No. 208 requirement. As Volvo started introducing rear SBRSs in the U.S. in 2009, NHTSA expanded its data collection efforts to include vehicle models with rear SBRS data. In the MY 2010 Buying a Safer Car information, Volvo remains the only vehicle manufacturer that offers rear SBRSs; furthermore, they have become standard equipment in the majority of Volvo's 2010 model year vehicles.[17]

In 2005, the Safe, Accountable, Flexible, and Efficient Transportation Equity Act—Legacy for Users (SAFETEA–LU)[18] legislation required that NHTSA evaluate the effectiveness and acceptability of several different types of enhanced SBRSs being offered by a number of manufacturers. In response, the agency initiated a four-phase research study, which is partially completed.

The first phase included an observational study of actual vehicles in the field in which the front seat belt use rates in vehicles with the enhanced SBRSs were compared to rates in comparable vehicles with only the driver seat belt warning required by FMVSS No. 208. The study looked at 20 different enhanced SBRSs systems as well as baseline systems that did not exceed the FMVSS No. 208 requirements. Nine of the 20 enhanced SBRSs were driver only systems. The enhanced systems studied had a variety of enhanced features; some enhancements were related to the visual feedback, *i.e.,* icons and/or text, and others were related to auditory feedback. Similar systems were combined into groups when determining effectiveness. Combining all the effective estimates for all the enhanced SBRSs studied, it was estimated that these systems were associated with increased front seat belt usage of about 3–4 percentage points

[13] "Buckling Up, Technologies to Increase Seat Belt Use," Special Report 278, Committee for the Safety Belt Technology Study, *http://www.TRB.org,* 2003.

[14] These interpretation letters can be found at *http://www.regulations.gov* (Docket Nos.: NHTSA–2001–9899, NHTSA–2002–13379, NHTSA–2003–14742, NHTSA–2003–15006, and NHTSA–2003–15156). In general, the interpretation letters indicate that if manufacturers want to provide a voluntary signal that goes beyond what is specified in FMVSS No. 208, S7.3, they may do so, but that they must provide a means for differentiating the voluntarily provided signal from the required signal.

[15] See Docket No. NHTSA–2002–13226 at *http://regulations.gov/.*

[16] U.S. Department of Transportation, National Highway Traffic Safety Administration, Initiatives to Address Safety Belt Use, July 2003, *http://www.nhtsa.dot.gov/people/injury/SafetyBelt/OPIPT_FinalRpt_07-17-03.html* (September 30, 2003).

[17] The Volvo models with rear SBRSs included: The XC60, XC70, C30, C70, S40, S80, V50, and V70.

[18] Safe, Accountable, Flexible, Efficient Transportation Equity Act, Public Law No. 109–59, § 10306 (2005).

above front seat belt usage rates for vehicles without enhanced SBRSs.[19]

The second phase examined which seat belt reminder characteristics (*e.g.,* visual, auditory, etc.) most influenced effectiveness and acceptance for drivers. This phase found that all of the enhanced SBRSs were perceived to be more effective in encouraging seat belt use than the driver seat belt warning system required by FMVSS No. 208. The study found a strong positive correlation between subjective effectiveness and annoyance. Systems with more aggressive reminder displays and more frequent repetition patterns were perceived to be the most effective. However, no clear consensus existed regarding which systems or displays were most acceptable and the degree to which annoyance was an important attribute of an effective system.[20]

The third phase of our research study further analyzed the results of the first and second phases, as well as focused on optimizing the effectiveness and acceptance of enhanced SBRSs. The study found that there is good agreement between the two studies on the association of a greater likelihood of seat belt use with enhanced SBRSs and the importance of including an auditory component to the system. Based on the findings of this phase, a set of recommended system characteristics were presented as part of the report, as well as a proposed rating system for enhanced SBRSs.[21]

The final phase, expected to be completed by mid-2010, is focused on the effectiveness and acceptance of enhanced SBRSs in teen drivers and passengers.

B. Seat Belt Reminder Systems in Europe

In April 2008, a seat belt reminder system for the driver's seat was incorporated into ECE R.16, "Uniform provisions concerning the approval of: safety belts, restraint systems, child restraint systems and ISOFIX child restraint systems for occupants of power-driven vehicles and vehicles equipped with safety belts, restraint systems, child restraint systems and ISOFIX child restraint systems." The requirements include two levels of warning signals for seat belt non-use. The first level is a visual warning that is at least 4 seconds long that activates when the driver's seat belt is unbuckled and the ignition switch is engaged. An optional audible signal can be added. The second level is a visual and audible signal that is at least 30 seconds long that activates when a driver operates a vehicle with his or her seat belt unbuckled.

Many passenger vehicles in Europe have enhanced SBRSs beyond the minimum required by the European standards. Since 2002, the consumer crash protection program in Europe, the European New Car Assessment Programme (Euro NCAP), has awarded points to a vehicle if it is voluntarily equipped with enhanced SBRSs that fully comply with their protocol requirements.[22]

In the Euro NCAP SBRS protocol requirements, seat belt use must be identified for all seating positions at the start of a trip. However, it does not require occupant detection sensors to determine whether a passenger is actually occupying the seat. Separate points are given for the driver, front passenger, and rear passenger seating positions.

For front seats, an audiovisual signal must start when a front seat occupant is unbelted and one of the following events takes place: The engine has been running for 60 seconds, the vehicle has been in forward motion for 60 seconds or 500 meters, or the vehicle has reached a forward speed of 25 km/hr. The signal must be at least 90 seconds long.

For rear seats, a visual signal must start within five seconds of the engine starting or the start of forward motion. The visual signal must be at least 30 seconds long and it must indicate the number of rear seat belts that are in use. For rear seats with occupancy detection, they must meet the same signal requirements as those without occupancy detection except that no signal is required if there are no occupants in the rear passenger seats or if all rear seat occupants are belted. The system may allow the driver to acknowledge the signal for rear seats and switch it off.

Furthermore, when a seat belt experiences a change of status (from buckled to unbuckled), an audiovisual signal is required for front and rear seats.

C. Seat Belt Reminder Systems in Japan

Japan's National Agency for Automobile Safety and Victim's Aid and Japan's Ministry of Land, Infrastructure and Transport (JMLIT) has initiated a two phase program as part of Japan's New Car Assessment Program (JNCAP) to promote the introduction of enhanced SBRSs for passenger seats. The first phase will identify which vehicles voluntarily meet their enhanced SBRS requirements and make the information available to consumers through their JNCAP pamphlet and website.

The requirements for enhanced SBRSs are similar to that of Euro NCAP. The front seat occupant enhanced SBRS must have a 30 second audible or visual signal that initiates when a front seat occupant is unbelted and one of the following events takes place: The engine has been running for 60 seconds, the vehicle has been in forward motion for 500 meters, or the vehicle has reached a forward speed between 10–25 km/h.

The rear SBRS must have at least a 30 second audible or visual reminder that is directed toward the driver or the unbuckled passenger. The rear SBRS must also indicate to the driver the number of seat belts that are in use. They do not require the rear SBRS to be equipped with occupant detection technology.

The second phase of the program will establish new enhanced SBRSs requirements for JNCAP based on the findings of a study that is currently underway to evaluate human factors and the effectiveness of different types of visual and audible warning signals.

D. Seat Belt Reminder Systems in Australia

In 1996, Australia's Department of Transport (now the Department of Transport and Regional Services) introduced a new Australian Design Rule (ADR) 69 that required manufacturers to meet certain crash performance criteria in a dynamic full frontal crash. This ADR also adopted a requirement for a driver SBRS that is currently still in place. The driver SBRS comprises of a visual signal that must remain activated for no less than four seconds after the ignition was switched on, or before one of the following events takes place: The engine has been running for 60 seconds, the vehicle has been in forward motion for 500 meters, or the vehicle has reached a forward speed between 25 km/h. The ADR does

[19] Freedman, M., Levi, S., Zador, P., Lopdell, J., and Bergeron, E., "*The effectiveness of enhanced seat belt reminder systems—Observational field data collection methodology and findings,*" Report #: DOT HS 810 844, December 2007.

[20] Lerner, N., Singer, J., Huey, R., and Jenness, J., "*Acceptability and Potential Effectiveness of Enhanced Seat Belt Reminder System Features,*" Report #: DOT HS 810 848, December 2007.

[21] Freedman, M., Lerner, N., Zador, P., Singer, J., and Levi, S. *Effectiveness and Acceptance of Enhanced Seat Belt Reminder Systems: Characteristics of Optimal Reminder Systems.* Report #: DOT HS 811 097, February 2009.

[22] Specifically, the awarded points are applied toward a vehicle's Safety Assist rating, which in turn is used in the overall rating for the vehicle. From February 2009, Euro NCAP will publish a new overall rating for every vehicle that will cover Adult Occupant Protection, Child Occupant Protection, Pedestrian Protection and a new area of assessment: Safety Assist.

not require the system to operate if the driver's seat belt is buckled or is withdrawn more than 10 cm from the retractor. The ADR also states that if the system complies with the U.S. FMVSS No. 208, S7.3 that it is deemed compliant with the ADR requirements.

The Australasian New Car Assessment Program (ANCAP) conducts assessments of seat belt reminders in accordance with the protocol issued by Euro NCAP. ANCAP prepared a questionnaire to assist in the assessment of seat belt reminder systems. Manufacturers may submit a completed questionnaire to obtain a provisional assessment of reminder systems by ANCAP. In addition to the Euro NCAP requirements, ANCAP prefers that if the system does not implement occupant detection that a positive indicator, such as a green light, be displayed for each rear seat belt that is being used and that no display lights be shown for unused seat belts. Furthermore, for systems with occupant detection, ANCAP prefers a negative indicator, such as a red light for any seating position that has an occupant that is unbuckled.[23] ANCAP also began applying Euro NCAP's change of status signal requirements for rear seats after January 2008.

II. Petition

On November 21, 2007, Public Citizen and Advocates for Highway and Auto Safety (henceforth referred to as the petitioner) petitioned NHTSA to amend FMVSS No. 208, to require automobile manufacturers to install a SBRS for rear seats of passenger cars and multipurpose passenger vehicles with a gross vehicle weight rating (GVWR) of 4,536 kg (10,000 lbs.) or less.[24]

The petitioner stated that SBRSs for rear seats would save hundreds of lives each year and that a large percentage of the lives saved would be children. The petitioner suggested that if rear seat belt usage matched the level of front seats, about 289 lives would be saved each year, and 78 of those would be children between 5 and 18-years-old. The petitioner noted that primary enforcement laws typically do not cover rear seat occupants and claimed that studies have proven that SBRSs for rear seats significantly increase rear passenger seat belt use. The petitioner also stated that requiring SBRSs for rear seats is consistent with former NHTSA administrator, Dr. Jeffrey Runge's, statements on enhanced SBRSs as well as NHTSA's study on the effectiveness of enhanced SBRSs for front seats, and the SAFETEA–LU requirements to increase belt use for all passengers. The petitioner further stated that SBRSs for rear seats are technologically feasible and that they would be less costly if they were required in all vehicles. Lastly, the petitioner stated that the American public desires SBRSs for rear seats.

III. Analysis

In analyzing the petition to require SBRSs for rear seats, it became readily apparent that the limiting factor in our benefits estimate is the unknown effectiveness of rear SBRSs. Without this information, the agency cannot make an accurate assessment of how many lives would be saved and injuries reduced by requiring rear SBRSs, and the cost-effectiveness of such systems. In the sections that follow, we preliminarily identify the potential target population, discuss the limitations of our effectiveness estimates, and the potential costs of various rear SBRS technologies. However, as discussed further in this notice, we are seeking comment and information from the public on each aspect of our analysis.

A. Target Population

The agency made some preliminary target population estimates in analyzing the petition using the 2008 calendar year as a baseline. In that year, front seat belt usage was 83 percent and rear seat belt usage was 74 percent.[25] According to the Fatality Analysis Reporting System (FARS) data, there were 2,163 rear seat occupants killed that year in motor vehicle crashes. According to the National Automotive Sampling System (NASS) General Estimates System (GES) data, there were another 266,163 MAIS[26] 1–5 rear seat occupant injuries that resulted.[27] Of those, 1,442 fatalities and 28,075 MAIS 1–5 injuries were to unrestrained rear seat occupants.[28] These unrestrained occupants are the target population any potential rulemaking on rear SBRS would seek to address.

B. Benefits

As previously mentioned, the agency lacks sufficient information on the effectiveness of rear SBRSs. We are not aware of studies that show how effective a warning sent to the driver (and/or front seat passenger) would be in encouraging rear seat occupants to fasten their seat belts. Depending upon the type of rear SBRS implemented, repeated false alarms, for example, could be an annoyance to drivers and consequently reduce its effectiveness. On the other hand, less aggressive systems may not change an occupant's behavior.

In the petitioner's benefits calculations, three hypothetical outcomes were presented that could occur from requiring rear SBRSs:

1. Increased rear seat belt usage to the level of front seat belt usage;
2. Increased rear seat belt usage by 9.1% in light trucks and 12.9% in cars; and
3. Increased rear seat belt usage to 85–90%.

However, for the first outcome to occur, rear seat belt usage would need to increase from 74 to 83 percent to be equivalent to front seat belt usage (based on our 2008 baseline). This would require an increase in rear seat belt usage of 9 percentage points, although front seat enhanced SBRSs are preliminarily estimated to increase front seat belt use by only 3–4 percent.[29] The other two scenarios are more unlikely since they assume higher effectiveness rates for rear SBRSs than are currently achieved for front seat SBRSs. Finally, the petitioner also suggested that benefits would be accrued to front seat occupants if rear seat passengers were buckled up. While we agree, in principle, that front seat occupant risk would be reduced by having rear seat passengers restrained, we have evidence to suggest that these benefits would be small and not a significant proportion of the benefits gained from increases in rear seat belt usage.[30]

[23] ANCAP, Notes on the assessment protocol, Version 4.8, October 29, 2007.

[24] See docket to this notice for a copy of the petition.

[25] Traffic Safety Facts: Seat Belt Use in Rear Seats in 2008. DOT HS 811 133. Washington, DC: National Highway Traffic Safety Administration, May 2009.

[26] The Maximum Abbreviated Injury Score (MAIS) is an anatomical scoring system that provides a way of ranking the severity of injury. The higher the score, the more severe the injury.

[27] MAIS 1–5 injury benefits were further adjusted by a universal exaggeration factor of 1.369 to address the over reporting of safety belt use in injuries. (Fatality Reduction by Safety Belts for Front-Seat occupants of Cars and Light Trucks, December 2000, DOT HS 809 199).

[28] Injuries with unknown restraint usage were distributed proportionately to those with known usage.

[29] We do not have data concerning the effectiveness of a basic front seat belt reminder system. The closest data we have are from the enhanced systems being implemented recently, which are over and above the basic system.

[30] Bean, James D., et al., "Fatalities in frontal crashes despite seat belts and air bags," NHTSA technical report, DOT HS 811 202, September 2009. (This report documents a review of 122 cases where a frontal fatality occurred to a belted driver or right-front passenger in a MY 2000 or newer vehicle in the CDS through calendar year 2007. Of these 122 cases, only one fatality was attributed to what the agency characterized as a "back-seat bullet.")

Generally, we are encouraged by the potential that enhanced SBRSs have in increasing seat belt use, but the agency would like more information prior to deciding whether to undertake a rulemaking action for rear SBRSs. We invite the public to share its information and views on rear SBRSs effectiveness in order to assist the agency in evaluating these systems and their merit.

C. Countermeasure Costs

In deciding whether to pursue a rulemaking action, the agency must also consider the associated costs involved. The petitioner suggested that rear SBRSs provide an effective strategy for saving lives "at a minimal additional cost to manufacturers and consumers." It suggested that the following components would be needed: A seat sensor that detects occupancy, a sensor in the seat belt buckle, and a control unit that features a flashing light and audible sound. No costs for these components were provided.

In the NAS study, it was found that enhanced SBRSs for rear seats are more costly than front-seat systems because the majority of vehicles already have some type of front passenger occupancy sensor and central processing unit installed for advanced air bag system purposes. Occupancy detection technology is not readily-equipped in rear seats, and those passenger vehicles equipped with large numbers of rear seat occupant positions (*e.g.,* 8-passenger sport utility vehicles, minivans, and 15-passenger vans) would have to be equipped with sensors at each rear seating position. The NAS study cited low rear seat occupancy rates as another reason it did not consider the installation of rear seat occupancy sensors to be cost-effective in its findings. NHTSA estimates that rear seat occupants were 11 percent of the passenger vehicle occupants involved in police-reported crashes in 2007.[31]

Furthermore, whether contemplating sophisticated occupancy sensors or simpler belt use sensor technology, there are additional potential practicability concerns that rear seats present over front seats, including compatibility with removable seats (*e.g.,* Stow-n-Go, Flip and Fold). Additionally, occupancy detection complexities, such as inanimate cargo (groceries or heavy objects) or pets that are often transported in the rear seat present additional technical challenges in mitigating false alarms. In consideration of these factors, the agency believes that requiring that each rear seating position be equipped with SBRS technology may be costly. We are therefore seeking comment on this issue.

Specifically, we would like to receive information on the range of technologies, and related costs, that could be used in rear SBRS strategies. For example, one system could include rear seat occupant detection technology, rear seat belt use sensors, and a warning system with visual and audible components. This system would likely provide a high amount of reliability in detecting seat belt non-use and alerting the driver, yet it would likely be the most costly to implement. It also most closely resembles the petitioner's recommended countermeasure. This system could activate an audible and visual signal whenever there is an unbuckled rear seat passenger. Occupant detection sensors would be used to identify the presence of rear passengers and mitigate false alarms when there is no passenger in the seat and the seat belt is unbuckled. While NHTSA is aware of the technology being available for such a system, we are not aware of any such systems in production.

There are also lower cost rear SBRSs that are more comparable to production systems designed to meet Euro NCAP requirements. Such a system could incorporate rear seat belt use sensors and audible/visual alarms, but would not include occupant detection capabilities. Additionally, unlike the previously mentioned system, this enhanced SBRS visually reports the number of belted rear passengers to the driver, rather than notifying the driver of rear seat belt non-use. Hence, this type of system relies on the driver (or the human factor) to know how many rear seat occupants there are, and if that number equals the number of seat belts that are reported by the enhanced SBRS as being buckled. Notification to the driver would be conducted by having a visual display on the console (either displaying a number, or icons of each belted seating position) to alert the driver of the number of rear seat belts in use. It could also provide an audible alarm in the event the status of the seat belt buckle changes during the course of the trip, as required by Euro NCAP. While the main limitation of such a system is its reliance on the driver to know the number of rear seat passengers and compare it to the visual reporting of the rear SBRS, such a system could also be easier to ignore and may not be as effective as an audible warning system that alerts the driver of unbelted passengers at the start of a trip. Therefore, we are seeking comment and information on the effectiveness of such a system.

We also note that both of the aforementioned rear SBRSs lack a means of detecting a child seat attached to a LATCH-equipped seating position. The first system could potentially use the occupant detection sensors to identify the presence of a child seat (*e.g.,* in the same manner that advanced air bag systems detect child seats in the front passenger seat), but it would lack the sophistication of detecting whether that child seat is actually attached to the LATCH anchorages. Some type of LATCH anchorage detection sensor would also be needed. While parents and caregivers could attach the child seat with the seat belt at such seating positions in addition to using the LATCH anchorages to minimize the audible/visual warnings to the driver, some are of the opinion that using both seat belts and LATCH could be considered a misuse condition. Alternatively, the consumer could attach the seat belt and then place the child seat on top of it, attaching the child seat with LATCH, or a seat belt detection system could also encourage them to revert back to not using the LATCH anchorages at all, and only restrain child seats using seat belts. The agency does not consider one method of child seat installation safer than the other; however, we have observed that child seats installed with LATCH are more likely to be installed securely than child seats installed with seat belts.[32]

On the other hand, the second system mentioned above (*e.g.,* the lower cost technology) would simply consider the seating position with the child seat attached by LATCH anchorages to be an unbuckled seating position. A driver using this system would need to take this fact into account when comparing the number of rear seat occupants against the number reported by the rear SBRS. Or, like the first system, parents and caregivers could buckle the seat belt, in addition to using LATCH, to enable the system to count it as a belted seating position. However, again, this could encourage them to revert to not using LATCH at all or could encourage them to keep the belt buckled to mislead the system.

[31] In 2007 there were 13,613,000 passenger vehicle occupants involved in police-reported crashes. The source of this data is both the FARS and the NASS GES. Passenger vehicle occupant involvement in fatal crashes comes from FARS and involvement in injury and property damage only crashes comes from GES.

[32] Decina, L.E.; Lococo, K.H.; and Doyle, C.T. 2006. Child restraint use survey: LATCH use and misuse. Report no. DOT HS–810–679. Washington, DC: National Highway Traffic Safety Administration, Page 26.

Therefore, the agency is additionally seeking comment on how LATCH would interact with a rear SBRSs. Would LATCH detection be a necessary requirement of a rear SBRS so that when LATCH anchorages are used at a LATCH-equipped seating position, the seating position would be displayed as belted?

D. Summary

The agency would like more information about the effectiveness of the rear SBRSs discussed above, systems under development, and other potential alternatives, to assist it in deciding whether to grant or deny the petition. We have concerns that the estimated costs for some technologies could be high and have technical complexities with removable seats to overcome. Other lower cost systems may not be robust enough to attain the benefits that we would hope to attain with such a system.

IV. Solicitation of Comments

To assist the agency in determining whether to grant or deny the petition, NHTSA is soliciting comments and data in this notice. For easy reference, the questions that follow are numbered consecutively. NHTSA encourages commenters to provide specific responses for each question for which they have information or views. In order to facilitate tabulation of the written comments in sequence, please identify the number of each question to which you are responding. NHTSA requests that the rationale for positions taken by commenters be specific and supported by data, including any analysis of safety consequences. We encourage commenters to provide scientific analysis and data relating to system designs, testing, and field experience as well as arguments or views they believe are relevant to this topic.

In providing information in response to the questions, NHTSA invites commenters to address different kinds of potential rear SBRS, including basic ones as well as enhanced systems. However, as noted earlier, there are statutory limitations on the kinds of enhanced systems that the agency could require by regulation. *See* 49 U.S.C. 30124. The petitioner stated that if the agency receives permission from Congress to required enhanced performance reminders, the new enhanced reminder requirement should also apply to the rear seat. While we do not intend to limit commenters from identifying potential regulatory requirements that they believe would be best, we ask that to the extent any commenters recommend requirements that would not be consistent with the existing statutory limitations that they also provide recommendations as to what regulatory actions the agency should take, if any, given those limitations.

Effectiveness

1. What studies have been conducted (or are underway) on the effectiveness of rear SBRSs in increasing rear seat belt use?

2. What are the most important characteristics of a highly effective rear SBRS? And what are the minimum characteristics?

3. The agency's crash data show that a large percentage of unbelted rear seat fatalities were in vehicles with drivers who were belted.[33] What studies have been conducted (or are underway) on the effectiveness of rear SBRSs in influencing *belted* drivers if they are reminded (by a rear SBRS) that their rear passengers (especially child passengers) are being afforded less protection than they are providing for themselves?

4. How effective are visual reminders that provide the driver with the number of belted rear passengers, and rely on the driver to know how many rear seat occupants are in the vehicle, *i.e.,* a system that does not incorporate occupant sensors?

5. How would LATCH interact with a rear SBRS?

6. What studies have been conducted (or are underway) to study how having a LATCH detection sensor would improve the rear SBRS's effectiveness?

Consumer Acceptance

7. What studies have been conducted (or are underway) on the consumer acceptance of rear SBRSs?

8. What characteristics should a rear SBRS have to maintain a high level of effectiveness while maximizing consumer acceptance?

9. What types of comments/complaints have vehicle manufacturers received on their rear SBRSs?

10. What are the "lessons learned" regarding the installation, use, and acceptance of existing rear SBRSs?

11. What are the types of rear SBRSs that are likely to cause some consumers to disarm or purchase vehicles without a rear SBRS?

Technology and Costs

12. What types of rear SBRSs are vehicle manufacturers installing (or planning to install) in the U.S. or in other countries?

13. What technologies would be necessary to overcome the installation obstacles for rear seat occupant detection (*e.g.,* removable seats, folding seats, rotating seats, etc.) and what are their expected per vehicle costs? Are there similar concerns with the installation of rear seat belt use sensors?

Regulation

14. Should rear SBRSs be a mandatory requirement, or only regulated if optionally provided?

If so, what characteristics should they exhibit?

a. Should the system be capable of detecting an occupant?

b. Should the system have a visual-only signal or a visual and audible signal?

c. Should change of belt status be monitored?

15. Are there better approaches to increase rear seat belt use other than requiring or regulating rear SBRSs?

a. Should NHTSA just continue to rely on its education and outreach programs in supporting rear seat belt use laws?

b. Should NHTSA take an approach similar to Euro NCAP and provide ratings for rear SBRSs?

V. Public Participation

How Do I Prepare and Submit Comments?

Your comments must be written and in English. To ensure that your comments are correctly filed in the Docket, please include the docket number of this document in your comments. Your comments must not be more than 15 pages long.[34] We established this limit to encourage you to write your primary comments in a concise fashion. However, you may attach necessary additional documents to your comments. There is no limit on the length of the attachments. If you are submitting comments electronically as a PDF (Adobe) file, we ask that the documents submitted be scanned using the Optical Character Recognition (OCR) process, thus allowing the agency to search and copy certain portions of your submissions.[35] Please note that pursuant to the Data Quality Act, in order for substantive data to be relied upon and used by the agency, it must meet the information quality standards set forth in the OMB and DOT Data Quality Act guidelines.

Accordingly, we encourage you to consult the guidelines in preparing your comments. OMB's guidelines may be

[33] *See* docket to this notice.

[34] *See* 49 CFR 553.21.

[35] Optical Character Recognition (OCR) is the process of converting an image of text, such as a scanned paper document or electronic fax file, into computer-editable text.

accessed at: *http://www.whitehouse.gov/omb/fedreg/reproducible.html*. DOT's guidelines may be accessed at: *http://dmses.dot.gov/submit/DataQualityGuidelines.pdf*.

How Can I Be Sure That My Comments Were Received?

If you submit your comments by mail and wish Docket Management to notify you upon its receipt of your comments, enclose a self-addressed, stamped postcard in the envelope containing your comments. Upon receiving your comments, Docket Management will return the postcard by mail.

How Do I Submit Confidential Business Information?

If you wish to submit any information under a claim of confidentiality, you should submit three copies of your complete submission, including the information you claim to be confidential business information, to the Chief Counsel, NHTSA, at the address given above under **FOR FURTHER INFORMATION CONTACT**. When you send a comment containing information claimed to be confidential business information, you should include a cover letter setting forth the information specified in our confidential business information regulation.[36] In addition, you should submit a copy, from which you have deleted the claimed confidential business information, to the Docket by one of the methods set forth above.

Will the Agency Consider Late Comments?

We will consider all comments received before the close of business on the comment closing date indicated above under **DATES**. To the extent possible, we will also consider comments received after that date.

How Can I Read the Comments Submitted by Other People?

You may read the materials placed in the docket for this document (*e.g.,* the comments submitted in response to this document by other interested persons) at any time by going to *http://www.regulations.gov*. Follow the online instructions for accessing the dockets. You may also read the materials at the Docket Management Facility by going to the street address given above under **ADDRESSES**. The Docket Management Facility is open between 9 am and 5 pm Eastern Time, Monday through Friday, except Federal holidays.

Please note that even after the comment closing date, we will continue to file relevant information on the docket as it becomes available. Further, some people may submit late comments. Accordingly, we recommend that you periodically check the docket for new material.

Authority: 49 U.S.C. 322, 30111, 30115, 30117 and 30166; delegation of authority at 49 CFR 1.50.

Issued on: June 24, 2010.

Nathaniel Beuse,

Director, Office of Crash Avoidance Standards.

[FR Doc. 2010–15773 Filed 6–28–10; 8:45 am]

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[36] *See* 49 CFR 512.

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS-R4-ES-2009-0079]
[MO92210-0-0009-B4]

RIN 1018-AW52

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Vermilion Darter

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; reopening of comment period, availability of draft economic analysis, and amended required determinations.

SUMMARY: We, the U.S. Fish and Wildlife Service, announce the availability of the draft economic analysis (DEA) for the proposed designation of critical habitat for the vermilion darter (*Etheostoma chermocki*) under the Endangered Species Act of 1973, as amended. We also announce the reopening of the comment period and an amended required determinations section of the proposal. The comment period is reopened for an additional 30 days to allow interested parties an opportunity to comment simultaneously on the proposed critical habitat designation, the associated DEA, and the amended required determinations section. Comments previously submitted need not be resubmitted and will be fully considered in preparation of the final rule.

DATES: *Written Comments:* We will consider public comments received or postmarked on or before July 29, 2010. Please note that if you are using the *Federal eRulemaking Portal* (see **ADDRESSES** section, below) the deadline for submitting an electronic comment is 11:59 p.m. Eastern Daylight Savings Time on this date.

ADDRESSES: *Written Comments:* You may submit comments by one of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments to Docket No. **FWS-R4-ES-2009-0079**.
- *U.S. mail or hand-delivery:* Public Comments Processing, **Attn: FWS-R4-ES-2009-0079**; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will post all comments on *http://www.regulations.gov*. This generally means that we will post any personal information you provide us (see the **Public Comments** section below for more information).

FOR FURTHER INFORMATION CONTACT: Stephen Ricks, Field Supervisor, Mississippi Fish and Wildlife Office, 6578 Dogwood View Parkway, Jackson, MS 39213; by telephone (601-321-1122); or by facsimile (601-965-4340). Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800-877-8339.

SUPPLEMENTARY INFORMATION:

Public Comments

We will accept written comments and information during this reopened comment period on the proposed designation of critical habitat for the vermilion darter that was published in the **Federal Register** on December 3, 2009 (74 FR 63366), the draft economic analysis (DEA) of the proposed designation of critical habitat for the vermilion darter, and the amended required determinations provided in this document. We will consider information and recommendations from all interested parties. We are particularly interested in comments concerning:

(1) The reasons why we should or should not designate areas as "critical habitat" under section 4 of the Endangered Species Act (Act) (16 U.S.C. 1531 *et seq.*), including whether there are threats to the vermilion darter from human activity, the degree of which can be expected to increase due to the designation, and whether the benefit of designation would outweigh threats to the species caused by the designation, such that the designation of critical habitat is prudent.

(2) Specific information on:

- The amount and distribution of vermilion darter habitat;
- What areas containing physical and biological features essential to the conservation of the species should be included in the designation and why;

• Special management considerations or protections for the physical and biological features essential to vermilion darter conservation that have been identified in the proposed rule that may be needed, including managing for the potential effects of climate change; and

• What areas not currently occupied by the species are essential to the conservation of the species and why.

(3) Specific information on the vermilion darter and the physical and biological features essential to the conservation of the species.

(4) Any information on the biological or ecological requirements of the species.

(5) Land-use designations and current or planned activities in areas occupied by the species, and their possible impacts on the species and the proposed critical habitat.

(6) Any foreseeable economic, national security, or other potential impacts resulting from the proposed designation and, in particular, any impacts on small entities and the benefits of including or excluding areas that are subject to these impacts.

(7) Whether the benefits of excluding any particular area from critical habitat outweigh the benefits of including that area as critical habitat under section 4(b)(2) of the Act, after considering the potential impacts and benefits of the proposed critical habitat designation.

(8) Whether our approach to designating critical habitat could be improved or modified in any way to provide for greater public participation and understanding, or to assist us in accommodating public concerns and comments.

You may submit your comments and materials concerning this proposed rule or DEA by one of the methods listed in the **ADDRESSES** section.

If you submitted comments or information on the proposed critical habitat rule for the vermilion darter, previously published on December 3, 2009 (74 FR 63366), you do not have to resubmit them. These comments are included in the public record for this rulemaking, and we will fully consider them in the preparation of our final determination.

If you submit a comment via *http://www.regulations.gov*, your entire comment—including your personal identifying information—will be posted on the website. We will post all hardcopy comments on *http://www.regulations.gov* as well. If you submit a hardcopy comment that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. Please include sufficient information with your comments to allow us to verify any scientific or commercial information you include.

Comments and materials we receive, as well as supporting documentation used in preparing the proposed rule and DEA, will be available for public inspection on *http://www.regulations.gov*, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service's Mississippi Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**). You may obtain copies of the proposed rule and the DEA on the Internet at *http://www.regulations.gov* at Docket Number **FWS-R4-ES-2009-0079** or by mail from the Mississippi Field Office (see **FOR FURTHER INFORMATION CONTACT** section).

Background

The vermilion darter (*Etheostoma chermocki*) was listed as endangered under the Act on November 28, 2001 (66 FR 59367). At the time of listing, the Service found that designation of critical habitat was prudent. However, due to budgetary constraints, we did not designate critical habitat at that time. On November 27, 2007, the Center for Biological Diversity filed a lawsuit against the Secretary of the Interior alleging that the Service failed to timely designate critical habitat for the vermilion darter (*Center for Biological Diversity* v. *Kempthore* (07-CV-2928)). In settlement agreement approved by the court on April 25, 2008, the Service agreed to submit to the **Federal Register** a new prudency determination, and if designation was found to be prudent, a proposed designation of critical habitat, by November 30, 2009, and a final designation by November 30, 2010. The Service determined that critical habitat was prudent for the vermilion darter and published a proposed critical habitat designation on December 3, 2009 (74 FR 63366).

The vermilion darter is a narrowly endemic fish species, occurring in sparse, fragmented, and isolated populations. The species is only known in parts of the upper mainstem reach of Turkey Creek and four tributaries in Pinson, Jefferson County, Alabama (Boschung and Mayden 2004, p. 520). Suitable streams have pools of moderate current alternating with riffles of moderately swift current, and low water turbidity.

The primary threats to the species and its habitat are degradation of water quality and substrate components due to sedimentation and other pollutants, and altered flow regimes from activities such as construction and maintenance activities; impoundments (five within the Turkey Creek and Dry Creek system); instream gravel extractions; off-road vehicle usage; road, culvert, bridge, gas, and water easement construction; and stormwater management (Drennen personal observation 1999-2009; Blanco and Mayden 1999, pp. 18-20). These activities lead to water quality degradation and the production of pollutants (sediments, nutrients from sewage, pesticides, fertilizers, and industrial and stormwater effluents), stream channel instability, fragmentation, and reduced connectivity of the habitat by altering the stream banks and bottoms; degrading the riffles, runs, and pools; and producing changes in the water quantity and flow that are necessary for spawning, feeding, resting, and other life history functions of the species.

We propose to designate approximately 21 kilometers (13 miles) of streams in 5 units as critical habitat for the vermilion darter. The proposed critical habitat is located within the Turkey Creek watershed in Jefferson County, Alabama.

Section 3 of the Act defines critical habitat as the specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features essential to the conservation of the species and that may require special management considerations or protection, and specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. If the proposed rule is made final, section 7 of the Act will prohibit destruction or adverse modification of critical habitat by any activity funded, authorized, or carried out by any Federal agency. Federal agencies proposing actions affecting critical habitat are required to consult with us on the effects of their proposed actions, under section 7(a)(2) of the Act.

Possible Exclusions from Critical Habitat and Draft Economic Analysis

Section 4(b)(2) of the Act requires that we designate critical habitat based upon the best scientific data available, after taking into consideration the economic impact, impact on national security, or any other relevant impact of specifying any particular area as critical habitat. We may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area as critical

habitat, provided such exclusion will not result in the extinction of the species. We have not proposed to exclude any areas from critical habitat. However, the final decision on whether to exclude any areas will be based on the best scientific data available at the time of the final designation, including information obtained during the comment period and information about the economic impact of designation. Accordingly, we have prepared a draft economic analysis concerning the proposed critical habitat designation (DEA), which is available for review and comment (see **ADDRESSES** section).

The intent of the DEA is to identify and analyze the potential economic impacts associated with the proposed critical habitat designation for the vermilion darter that we published in the **Federal Register** on December 3, 2009 (74 FR 63366). The DEA describes the economic impacts of all potential conservation efforts for the vermilion darter, some of which will likely be incurred whether or not we designate critical habitat. The economic impact of the proposed critical habitat designation is analyzed by comparing scenarios both "with critical habitat" and "without critical habitat." The "without critical habitat" scenario represents the baseline for the analysis, considering protections already in place for the species (e.g., under the Federal listing and other Federal, State, and local regulations). The baseline, therefore, represents the costs incurred regardless of whether critical habitat is designated. The "with critical habitat" scenario describes the incremental impacts associated specifically with the designation of critical habitat for the species. The incremental conservation efforts and associated impacts are those not expected to occur absent the designation of critical habitat for the species. In other words, the incremental costs are those attributable solely to the designation of critical habitat, above and beyond the baseline costs; these are the costs we may consider in the final designation of critical habitat when evaluating the benefits of excluding particular areas under section 4(b)(2) of the Act. The analysis forecasts both baseline and incremental impacts likely to occur if we finalize the proposed designation of critical habitat.

The DEA describes economic impacts of vermilion darter conservation efforts associated with the following categories of activity: (1) Costs associated with economic activities, including future development, road construction, wastewater treatment, stream alteration, and water withdrawal; and (2) costs associated with conservation activities, including actions associated with the Vermilion Darter Recovery Plan and activities that aid in preservation of the vermilion darter and the Turkey Creek watershed (e.g., preservation of the Turkey Creek Nature Preserve and the establishment of undeveloped greenways buffering the critical habitat and upstream tributaries). The DEA estimates the baseline costs associated with potential future economic activities and conservation activities for the vermilion darter to be $283,209 annually over the next 25 years, assuming a 7 percent discount rate. The proposed critical habitat designation for the vermilion darter will result in minimal incremental costs because any adverse modification decision would likely be coincident to a jeopardy determination for the same action due to the species' narrow range. Therefore, the only incremental costs are those resulting from the additional administrative costs by the Service and action agency to include an adverse modification finding within the Biological Opinion and Biological Assessment as part of a formal consultation. As a result, the total incremental costs associated with this rule are estimated to be $39.24 annually over the next 25 years, assuming a 7 percent discount rate.

The DEA also discusses the potential benefits associated with the designation of critical habitat. The primary intended benefit of critical habitat is to support the conservation of endangered and threatened species, such as the vermilion darter; however, these efforts preserve ecosystems that provide valuable services to the public and may lead to additional social welfare or market-based benefits. Depending on the nature of the effect, benefits are represented within the DEA either qualitatively, quantitatively, or as a monetary value.

Required Determinations—Amended

In our December 3, 2009, proposed rule (74 FR 63366), we indicated that we would defer our determination of compliance with several statutes and Executive Orders until the information concerning potential economic impacts of the designation and potential effects on landowners and stakeholders became available in the DEA. We have now made use of the DEA data in making this determination. In this document, we affirm the information in our proposed rule concerning: E.O. 12866 (*Regulatory Planning and Review*), the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), E.O. 12630 (Takings), Executive Order (E.O.) 13132 (Federalism), E.O. 12988 (Civil Justice Reform), the Paperwork Reduction Act, the National Environmental Policy Act, the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951), and E.O. 13211 (Energy Supply, Distribution, and Use). However, based on the DEA data, we are amending our required determinations concerning the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

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

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions), as described below. However, no regulatory flexibility analysis is required if the head of an agency certifies the rule will not have a significant economic impact on a substantial number of small entities. Based on our DEA of the proposed designation, we provide our analysis for determining whether the proposed rule would result in a significant economic impact on a substantial number of small entities. Based on comments we receive, we may revise this determination as part of a final rulemaking.

According to the Small Business Administration, small entities include small organizations, such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors doing less than $11.5 million in annual business, and agricultural businesses with annual sales less than $750,000. To determine if potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term significant economic

impact is meant to apply to a typical small business firm's business operations.

To determine if the proposed designation of critical habitat for the vermilion darter would affect a substantial number of small entities, we considered the number of small entities affected within particular types of economic activities, such as residential and commercial development, road construction, wastewater treatment, stream alteration, and water withdrawal. In order to determine whether it is appropriate for our agency to certify that this rule would not have a significant economic impact on a substantial number of small entities, we considered each industry or category individually. In estimating the numbers of small entities potentially affected, we also considered whether their activities have any Federal involvement. Critical habitat designation will not affect activities that do not have any Federal involvement; designation of critical habitat only affects activities conducted, funded, permitted, or authorized by Federal agencies.

If we finalize this proposed critical habitat designation, Federal agencies must consult with us under section 7 of the Act if their activities may affect designated critical habitat. In areas where the vermilion darter is present, Federal agencies are already required to consult with us under section 7 of the Act, due to the endangered status of the species. Consultations to avoid the destruction or adverse modification of critical habitat would be incorporated into the same consultation process.

In the DEA, we evaluated the potential economic effects on small entities resulting from implementation of conservation actions related to the proposed designation of critical habitat for the vermilion darter. Since the Service and action agency are the only entity with direct compliance costs associated with the proposed critical habitat designation, this rule will not result in a significant impact on small entities. Please refer to the DEA of the proposed critical habitat designation for a more detailed discussion of potential impacts.

In summary, we have considered whether the proposed designation would result in a significant economic impact on a substantial number of small entities. Information for this analysis was gathered from the Small Business Administration, stakeholders, and the Service. For the reasons discussed above, and based on currently available information, we certify that if promulgated, the proposed designation would not have a significant economic impact on a substantial number of small business entities. Therefore, an initial regulatory flexibility analysis is not required.

Author

The primary author of this document is the staff of the Mississippi Fish and Wildlife Office (see **ADDRESSES** section).

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: June 8, 2010

Thomas L. Strickland,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2010–15452 Filed 6–28–10; 8:45 am]

BILLING CODE 4310–55–S

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS-R6-ES-2010-0038]
[MO 92210-0-0008-B2]

RIN 1018-AX26

Endangered and Threatened Wildlife and Plants; Listing the Mountain Plover as Threatened

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; request for public comments.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), notify the public that we are reinstating that portion of our December 5, 2002, proposed rule that concerns the listing of the mountain plover (*Charadrius montanus*) as threatened under the Endangered Species Act of 1973, as amended (Act). We are not reinstating the portion of that proposed rule that concerned a proposed special rule under section 4(d) of the Act. We invite public comments on the proposed listing and announce the availability of new information relevant to our consideration of the status of the mountain plover. We encourage those who may have commented previously to submit additional comments, if appropriate, in light of this new information.

DATES: To ensure that we are able to consider your comments and information, we request that we receive them no later than August 30, 2010. Please note that we may not be able to address or incorporate information that we receive after the above requested date. We must receive requests for public hearings, in writing, at the address shown in the **FOR FURTHER INFORMATION CONTACT** section by August 13, 2010.

ADDRESSES: You may submit comments by one of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Search for Docket No. **FWS-R6-ES-2010-0038** and then follow the instructions for submitting comments.
- *U.S. mail or hand-delivery*: Public Comments Processing, Attn: **FWS-R6-ES-2010-0038**; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will post all information on *http://www.regulations.gov*. This generally means that we will post any personal information you provide us (see the **Public Comments** section below for more details).

FOR FURTHER INFORMATION CONTACT: Susan Linner, Field Supervisor, Colorado Ecological Services Office; mailing address: P.O. Box 25486, DFC (MS 65412), Denver, CO 80225; telephone: 303-236-4773; office location: 134 Union Boulevard, Suite 670, Lakewood, CO 80228. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800-877-8339.

SUPPLEMENTARY INFORMATION:

Previous Federal Actions

For a detailed description of Federal actions concerning the mountain plover, please refer to the February 16, 1999, proposed rule to list the species (64 FR 7587); the December 5, 2002, proposed rule to list the species with a special rule under section 4(d) of the Act (16 U.S.C. 1531 *et seq.*) (67 FR 72396); and the September 9, 2003, withdrawal of the proposed rule to list the species (68 FR 53083).

The document we published on September 9, 2003 (68 FR 53083), withdrew the entire proposed rule we published on December 5, 2002 (67 FR 72396), including our proposal to list the species as a threatened species and our proposed special 4(d) rule. The September 9, 2003, document also addressed comments we received on both the 1999 and 2002 proposals to list the mountain plover and summarized threat factors affecting the species. The withdrawal of the proposed rule was based on our conclusion that the threats to the mountain plover identified in the proposed rule were not as significant as previously believed and that currently available data did not indicate that threats to the species and its habitat, as

analyzed under the five listing factors described in section 4(a)(1) of the Act, were likely to endanger the species in the foreseeable future throughout all or a significant portion of its range.

On November 16, 2006, Forest Guardians (now WildEarth Guardians) and the Biological Conservation Alliance filed a complaint in the District Court for the Southern District of California challenging the withdrawal of the proposal to list the mountain plover. A settlement agreement between the plaintiffs and the Service was entered by the court on August 28, 2009. As part of the settlement agreement, the Service agreed to reconsider its September 9, 2003, decision to withdraw the proposed listing of the mountain plover (68 FR 53083) and to submit to the **Federal Register** by July 31, 2010, a document reopening the proposal to list the mountain plover that would also request public comment. It was agreed, that upon publication of the document, the 2003 withdrawal of the proposed rule would be vacated. The Service further agreed to submit a final listing determination for the mountain plover to the **Federal Register** no later than May 1, 2011.

This document notifies the public that we are reinstating that portion of our December 5, 2002 (67 FR 72396), proposed rule that concerns the listing of the mountain plover (*Charadrius montanus*) as threatened under the Act. We are not reinstating that portion of the proposed rule regarding a proposed special rule under section 4(d) of the Act. We invite public comments on the proposed listing, new information relevant to our consideration of the status of the mountain plover, and comments and information regarding threats to the species and its habitat.

Background

The mountain plover is a small terrestrial shorebird inhabiting open, flat lands with sparse vegetation. It averages 8 inches (21 centimeters) in length. Mountain plovers are light brown above and white below, but lack the contrasting dark breast band common to most other plovers such as the killdeer (*C. vociferus*). Sexes are similar in appearance. Mountain plovers feed on insects, primarily beetles, crickets, and ants. They forage with a series of short runs and stops, feeding opportunistically as they encounter prey. Mountain plovers are migratory, and form pairs and begin courtship on arrival at their breeding grounds. Nests consist of a simple ground scrape. The female usually splits the clutch, typically six eggs, between two nests. The first nest is incubated by the male, the second by the female. Chicks leave the nest within hours of hatching and obtain their own food. Parents stay with chicks until they fledge, which occurs at about 5 weeks of age.

The mountain plover is found on xeric (extremely dry) shrublands, shortgrass prairie, barren agricultural fields, and other sparsely vegetated areas. On grasslands they often inhabit areas with a history of disturbance by burrowing rodents such as prairie dogs (*Cynomys* spp.), native herbivores, or domestic livestock. Mountain plovers breed in the western Great Plains and Rocky Mountain States from the Canadian border to northern Mexico. Most breeding occurs in Montana, Wyoming, and Colorado. They winter in similar habitat in California, southern Arizona, Texas, and Mexico. While California's Sacramento, San Joaquin, and Imperial Valleys are believed to support the greatest number of wintering mountain plovers, relatively little is known about their winter distribution in other areas. For additional background on the natural history of the mountain plover, see the account of the species in *The Birds of North America* (Knopf and Wunder 2006) and our previous **Federal Register** notices.

The February 16, 1999 (64 FR 7587), proposed rule to list the mountain plover described the life history, ecology, and habitat use of the species; discussed abundance and trend estimates; and provided a description of threats affecting the mountain plover under the five listing factors identified in section 4(a)(1) of the Act. The December 5, 2002 (67 FR 72396), proposal, described as a "supplemental proposal," provided pertinent new information. Both of the proposed rules concluded that the mountain plover was likely to become an endangered species in the foreseeable future unless measures were taken to reverse its decline. Conservation measures to reverse the decline were discussed in both of the proposals.

The proposals addressed elements contributing to the proposed threatened status of the species, including the following:

(1) Historical and ongoing conversion of grassland in the breeding range;

(2) Cultivated areas in the breeding range acting as potential population sinks;

(3) Historical conversion of grasslands and changing agricultural practices in the winter range;

(4) Effects of range management on mountain plover habitat;

(5) Declines in burrowing mammals and the effect on mountain plover habitat;

(6) Oil, gas, and mineral development in mountain plover habitat;

(7) Federal and State protection and management of the mountain plover;

(8) Mountain plover lifespan and breeding site fidelity as related to persistence of local populations;

(9) Influences of annual weather variation on habitat and breeding success;

(10) Human disturbance;

(11) Control of grasshoppers and other insects that provide a food resource; and

(12) Exposure of mountain plover to pesticides.

Since the closure of the last comment period, new information has become available that is relevant to the status of the mountain plover and its proposed listing as a threatened species. To ensure that our review of the species' status is complete and based on the best available scientific and commercial information available, we request comments on the proposal to list the mountain plover as a threatened species, including all information that relates to the species' status and the proposed listing.

New Information Available for Review

Pertinent information received, developed, or analyzed since the public comment period closed on our December 5, 2002, proposed rule (67 FR 72396) is available for review at the following website: *http://www.fws.gov/mountain-prairie/species/birds/mountainplover/*, or by contacting the Field Supervisor, Colorado Ecological Services Office (see **FOR FURTHER INFORMATION CONTACT** above). Information cited below includes scientific publications, graduate theses and dissertations, and selected unpublished reports that are available on the website referenced above. Additional reports, compilations of data, correspondence, and information also are available on the website. See the website *http://www.regulations.gov* (Docket No. FWS-R6-ES-2010-0038) for additional comments and information received during the comment period for this proposal.

Three documents provide extensive reviews of the mountain plover and its conservation status:

(1) Mountain Plover (*Charadrius montanus*): a technical conservation assessment (Dinsmore 2003);

(2) Mountain Plover (*Charadrius montanus*) in *Birds of North America* (Knopf and Wunder 2006); and

(3) Conservation Plan for the Mountain Plover (*Charadrius*

montanus), Version 1.0 (Andres and Stone 2009).

The majority of relevant information that has become available since our 2002 proposal to list the mountain plover has resulted from local or Statewide studies on the mountain plover's breeding range. The new information is summarized below.

Colorado

For Colorado, newly available information includes results from a study that mapped habitat and surveyed breeding adults in a discrete mountain plover population in South Park, Park County (Wunder *et al.* 2003). The density of mountain plover in occupied habitat in South Park was shown to be high compared to other sites, and the population was estimated at 2,310 adults (Wunder *et al.* 2003, p. 661). In another Park County study, vegetation structure and forage available in habitat used by mountain plover were assessed (Schneider *et al.* 2006). Researchers documented differential habitat use between adults with and without broods (Schneider *et al.* 2006, p. 199), and proposed shrub–grassland edge and insect availability as factors that influence habitat use (Schneider *et al.* 2006, pp. 200-202).

A study on the plains of eastern Colorado looked at movements and home range sizes of adult mountain plover with broods across three habitat types (Drietz *et al.* 2005). Results proved similar for black-tailed prairie dog (*C. ludovicianus*) towns, rangeland, and agricultural fields (Drietz *et al.* 2005, pp. 129-131). A study of mountain plover nesting success in eastern Colorado found that hatching success was similar in native grasslands and agricultural fields, although causes of nest mortality differed between the two habitats (Drietz and Knopf 2007, pp. 684-685).

Another eastern Colorado study investigated types of habitat and habitat quality as related to chick survival and brood movements in mountain plover (Drietz 2009). Chick survival over 30 days was found to be higher on shortgrass habitat occupied by black-tailed prairie dogs than on shortgrass without prairie dogs or on agricultural lands (Drietz 2009, p. 875). Also in the Colorado shortgrass prairie ecosystem, mountain plover numbers were estimated in three habitats: black-tailed prairie dog colonies, grasslands without prairie dogs, and dryland agriculture (Tipton *et al.* 2009). Mountain plover densities observed on prairie dog colonies were approximately 5 times higher than those found on agriculture and 10 times higher than those found on grasslands without prairie dogs (Tipton *et al.* 2009, p. 496). The study estimated that there were 8,577 mountain plover in eastern Colorado (Tipton *et al.* 2009, p. 497).

Knopf (2009) provided an overview of mountain plover studies on the Pawnee National Grasslands (PNG), Weld County, from 1986 to 2007. He described annual population surveys, breeding studies, a burning program designed to enhance habitat, a historical account of mountain plover populations on PNG, and discussed the future of mountain plover on the area. Knopf suggested that mountain plover numbers on the PNG had been in decline since the late 1930s and early 1940s, and that the dramatic decline in the mid-1990s was the abrupt end point of a process of deteriorating habitat, exacerbated by other factors such as wet spring weather and the relocation of breeding mountain plovers to better habitats elsewhere (Knopf 2008, p. 61).

Montana

A number of recent breeding studies of mountain plover have been conducted in Montana. Capture–recapture techniques were employed to study the demographics of mountain plover in Phillips County, Montana (Dinsmore *et al.* 2003). Estimated annual survival rate for juveniles was 0.46 to 0.49 and for adults 0.68; estimated mean life span was 1.92 years (Dinsmore *et al.* 2003, pp. 1020-1021). The size of the adult mountain plover population closely tracked annual changes in the area occupied by black-tailed prairie dogs (Dinsmore *et al.* 2003, p. 1024).

A study of the same Phillips County population estimated annual rates of recruitment and population change (Dinsmore *et al.* 2005). Prairie dog numbers declined sharply in the mid-1990s in response to an outbreak of sylvatic plague (Dinsmore *et al.* 2005, pp. 1550-1551). Mountain plover numbers decreased significantly, then increased in concert with increases in prairie dogs (Dinsmore *et al.* 2005, p. 1552).

Childers and Dinsmore (2008) reported results of estimates of density and abundance from 2004 of mountain plover in Phillips and Valley Counties in north-central Montana. The density of mountain plovers was much greater on black-tailed prairie dog colonies than on other habitats. An estimated 1,028 mountain plovers inhabited the region in 2004 (95-percent confidence interval of 903 to 1,153), most on prairie dog colonies (Childers and Dinsmore 2008, p. 706).

A study that included Phillips County, as well as two sites in Colorado, looked at mountain plover nesting in black-tailed prairie dog colonies during recovery from plague and following plague outbreaks (Augustine *et al.* 2008). Findings indicated that nesting habitat closely tracked the area actively occupied by prairie dogs in a given year. Mountain plover nested within 1 or 2 years after areas were colonized by prairie dogs and nest numbers declined rapidly after prairie dog numbers declined on plague-affected colonies (Augustine *et al.* 2008, p.7).

Additional studies in north-central Montana examined the influence of various factors on the annual survival of mountain plovers (Dinsmore 2008). The annual survival rate for a juvenile mountain plover was 0.06 at hatching, but it increased with age and increased body mass (Dinsmore 2008, p. 51). The annual survival rate of adults of both sexes ranged from 0.74 to 0.96 yearly (Dinsmore 2008, p. 50). Annual survival proved higher during periods of drought (Dinsmore 2008, p. 52).

Skrade (2008) examined dispersal of juvenile (natal dispersal) and adult mountain plovers (both within-year and between years) in Phillips County. Mean dispersal of adult mountain plovers in consecutive years was 1.71 miles (2.75 kilometers) in males and 2.88 miles (4.64 kilometers) in females (Skrade 2008, pp. 14-15). Plovers with unsuccessful previous nesting attempts moved further on average than birds where previous nesting was successful (Skrade 2008, p. 18).

Wyoming

A Wyoming study located 55 mountain plover nests in grassland or desert scrub habitat in 6 counties (Plumb *et al.* 2005a). All nest sites were grazed by ungulates and prairie dogs were present at 36 percent of nest sites (Plumb *et al.* 2005a, pp. 226-227). Nest sites had less grass coverage and shorter vegetation height compared to random plots. Half of the nests were located on elevated plateaus.

Another Wyoming study estimated minimum mountain plover population size in 2003 (Plumb *et al.* 2005b). Distance sampling was used to estimate breeding mountain plover density in five areas and results were applied to the minimum occupied range Statewide. The minimum population estimate for mountain plover in Wyoming was 3,393 birds (Plumb *et al.* 2005b, p. 19-20).

Beauvais and Smith (2003) developed a model of mountain plover breeding habitat in shrub–steppe habitat of western Wyoming. They reported that mountain plover presence was negatively related to degree of slope and had a weak positive relationship to

cover type (Beauvais and Smith 2003, pp. 92-94). They related favored patches of breeding habitat to poor soil, low precipitation, and wind scour, features that they speculated would be persistent over time, especially on public lands.

Smith and Keinath (2004) provided a species assessment of mountain plover in Wyoming. They reviewed the species' natural history and discussed conservation measures, threats, and future conservation strategies.

In Carbon County, Wyoming, studies since 1994 have documented mountain plover presence at the Foote Creek Rim wind power facility (Young *et al.* 2007). Mountain plover numbers declined during the 1997 to 2000 period, when 1,333 wind turbines were erected on the area, but have since largely recovered (Young *et al.* 2007, pp. 16-17). It is not known whether the decline was attributable to displacement caused by the construction work. Carcass searches documented no mountain plover mortalities attributed to turbines. The lowest point of rotor sweep on site (57 feet (17 meters)) was above the typical heights flown by mountain plovers during courtship and breeding (Young *et al.* 2007, p. 18). Except in migration, mountain plover flights are of low altitude; in a common courtship display, a male flies to a height of approximately 16 to 33 feet (5 to 10 meters) and calls as he floats downward (Knopf and Wunder 2006, unpaginated, "Behavior" article).

Nebraska

Recent Nebraska studies addressed the mountain plover's nesting ecology, and attempted to identify the extent of breeding distribution and population size in Nebraska (Bly *et al.* 2008). Monitoring over the course of the study yielded a total of 278 nests, all but 6 on agricultural fields (Bly *et al.* 2008, p. 7). Most nests and the bulk of nest distribution were in Kimball County, in extreme southwestern Nebraska. The minimum breeding population was estimated to be 80 adults in 2007, based on nests found, with the range of the population estimate up to 360 birds (Bly *et al.* 2008, pp. 11-12).

Oklahoma

Studies similar to those conducted in Nebraska were designed to determine the breeding distribution and population size in Oklahoma (McConnell *et al.* 2009). Mountain plovers were found in Cimarron and Texas Counties in the Oklahoma panhandle. Randomized point counts were used to derive a Statewide population estimate of 68 to 91 birds (McConnell *et al.* 2009, pp. 32-33). Mapped mountain plover locations were largely in bare agricultural fields (90 percent), with 5 percent associated with prairie dog towns (McConnell *et al.* 2009, pp. 31-32).

Canada and Mexico

A review of breeding records for Canada concluded that the mountain plover is a peripheral species in Canada with no evidence that it was ever a common or regular breeder (Knapton *et al.* 2005, p. 32). The authors recommended additional searches in Alberta and Saskatchewan.

The first breeding record of mountain plover in Mexico was documented in Nuevo Leon (Gonzalez-Rojas 2006), following a history of breeding season observations in Mexican prairie dog (*C. mexicanus*) colonies.

Wintering Range

Relatively few recent studies have addressed the mountain plover on its wintering range. A survey of mountain plover and their use of cultivated fields in the Imperial Valley of California in 2001 found 4,037 birds (Wunder and Knopf 2003, p. 75). Grazed alfalfa fields and burned Bermudagrass fields were heavily utilized by mountain plover. The importance of the Imperial Valley to mountain plover, where the authors suggested half of the continental population of mountain plovers may winter, is linked to losses of wintering habitat in coastal and Central Valley, California (Wunder and Knopf 2003, pp. 77-78). Mountain plovers wintering in the Imperial Valley were surveyed in 2003 and 2004, in an attempt to develop a statistically reliable estimate of numbers (Knopf and Wunder 2004). Flocking behavior, mobility, and weather were among factors limiting the reliability of Imperial Valley surveys as an indicator of population trends.

Hunting and Edson (2008, pp. 180-186) provided a species account of mountain plover in California, where it is considered a bird species of special concern. They surveyed existing information, provided management recommendations for grassland and cultivated habitats, and suggested research into mountain plover use, movements, and survival as related to habitat type (Hunting and Edson 2008, pp. 184-185). Information gained from their suggested research may be particularly important given the dynamic, market-driven nature of agricultural production and the dependence of agricultural activity, especially in California and the arid Southwest, on irrigation water imported from other areas. Moreover, the changes in the availability of irrigation water that might result from the effects of global climate change and changes in the characteristics of agricultural lands as a result of improved or more broadly implemented water conservation techniques, or changes in cultivation practices could further affect the availability and quality of wintering habitat for the species.

Wunder (2007) studied geographic population structure in mountain plover through color-banding and stable isotope concentrations in feathers. He concluded that there is widespread mixing of mountain plover populations in winter and that birds may use alternate wintering sites in different years (Wunder 2007, p. 118). There was evidence that recruitment may be linked to regional patterns of climate, with highest recruitment coming from breeding areas with low precipitation (Wunder 2007, pp. 119-121).

Other Research

A genetic study using nuclear microsatellites concluded that mountain plover across sampled breeding locations in Colorado and Montana comprised a single, relatively homogenous gene pool (Oyler-McCance *et al.* 2008). Results suggested that there was sufficient gene flow among breeding areas to offset genetic effects of small populations and reported adult fidelity to breeding areas (Oyler-McCance *et al.* 2008, 496-497). From a genetic perspective this suggests that no single breeding population requires special conservation or protection.

Special Rule Under Section 4(d) of the Act

The December 5, 2002, proposed rule (67 FR 72396) included a proposal to list the species as threatened and a proposed special rule under section 4(d) of the Act. That proposed special rule was designed to help facilitate recovery of the mountain plover in the event that a final listing rule was enacted. We are not reinstating the proposed special rule now, as explained below.

The special rule proposed to allow the incidental take of mountain plovers during routine farming practices on summer fallow, cropland idle, or cropland harvested between April 1 and June 30 in Colorado, Kansas, Nebraska, Oklahoma, and Laramie and Goshen Counties, Wyoming. In the 2002 proposed rule, we specified the expiration date of the proposed special rule as December 31, 2004 to allow adequate time for research to be conducted regarding conservation of the species on agricultural lands. By the expiration date, we intended to decide whether or not to permanently adopt the

special rule. In the 2002 proposed rule, we suggested that the research results obtained might support continuation of a proposed special rule in the same or a modified form, or support the proposed expiration of the special rule. Since the publication of the 2002 proposed rule, several studies have been conducted; research results are reported in Drietz *et al.* (2005), Drietz and Knopf (2007), Drietz (2009), and Tipton *et al.* (2009). Additional research is ongoing.

The special rule also proposed to allow incidental take of mountain plovers for activities covered under a valid permit issued by the Fish and Wildlife Service for conducting research, educational purposes, scientific purposes, enhancement of or propagation for survival of the mountain plover, zoological exhibition, and other conservation purposes in accordance with 50 CFR 17.32 and under a cooperative agreement with the State under section 6 of the Act, if applicable. At this time, we believe that the regulations at 50 CFR 17.32 adequately address the circumstances described above and the conservation needs of the mountain plover, and that a special rule under section 4(d) of the Act to address these circumstances may not be necessary for this species.

Therefore, we are not reinstating that portion of the December 5, 2002, proposed rule (67 FR 72396) regarding the proposed special rule under section 4(d) of the Act for the mountain plover. However, we invite public comments on whether a special rule under section 4(d) of the Act would be necessary and advisable to provide for the conservation of this species.

For clarity, we are providing a Proposed Regulation Promulgation section in this document to specify the one regulatory change we are proposing: to list the mountain plover as threatened in the Federal List of Endangered and Threatened Wildlife at 50 CFR 17.11.

Public Comments

We intend that any final action resulting from this proposal will be based on the best scientific and commercial data available and will be as accurate and as effective as possible. To ensure our determination is based on the best available scientific and commercial information, we request information on the mountain plover from governmental agencies, Native American Tribes, the scientific community, industry, and any other interested parties. We request comments or suggestions on our proposal to list the mountain plover, on the new information contained in the sources we have made available, and on any other information. We particularly seek comments and information on:

(1) Life history, ecology, and habitat use of the mountain plover;

(2) Range, distribution, population size, and population trends;

(3) Positive and negative effects of current and foreseeable land management practices on the mountain plover, including conservation efforts; and

(4) Current and foreseeable threats to the mountain plover and its habitat in relation to the factors that are the basis for making a listing/delisting/downlisting determination for a species under section 4(a) of the Act, which are:

(a) The present or threatened destruction, modification, or curtailment of its habitat or range;

(b) Overutilization for commercial, recreational, scientific, or educational purposes;

(c) Disease or predation;

(d) The inadequacy of existing regulatory mechanisms; or

(e) Other natural or manmade factors affecting its continued existence.

We are especially interested in obtaining comments and information regarding:

- New information on life span, site fidelity, dispersal, and genetic diversity in the mountain plover;
- New estimates of total mountain plover numbers and their significance to the species' status;
- New information regarding mountain plover breeding in agricultural areas, and whether cultivated fields are beneficial or harmful to mountain plover persistence;
- Current and potential future impacts of oil and gas development, and wind energy development, on the mountain plover and its habitat;
- The significance of current and potential future changes in mountain plover wintering habitat, including those resulting from changes in water use in agriculture and conversion of agriculture to other land uses, especially in California; and
- The potential impacts of future climate change on the mountain plover and its habitat.

As noted earlier, we also invite comments on the merits of enacting a special rule under section 4(d) of the Act should we list the mountain plover as a threatened species under the Act. We specifically request comments on whether, following any final decision to list the mountain plover, a special rule would be necessary and advisable to provide for the conservation of the species and, if so, what form this rule should take and why.

You may submit your comments and information concerning the proposed rule by one of the methods listed in the **ADDRESSES** section. If you submit information via *http://www.regulations.gov*, your entire submission—including any personal identifying information—will be posted on the website. If you submit a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this personal identifying information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on *http://www.regulations.gov*.

Information and materials we receive, as well as supporting documentation we used in preparing this proposal and other listing determinations for the species, will be available for public inspection on *http://www.regulations.gov*, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Colorado Ecological Services Office (see **FOR FURTHER INFORMATION CONTACT**). If you submitted comments or information previously on the proposed rule or during any of the previous open comment periods related to this proposed rule, please do not resubmit them. These comments have been incorporated into the public record and will be fully considered in the preparation of our final determination.

The Service will finalize a new listing determination after we have completed our review of the best available scientific and commercial information, including information and comments submitted during this comment period.

Authors

The primary authors of this notice are staff members of the Colorado Ecological Services Office, U.S. Fish and Wildlife Service (see **FOR FURTHER INFORMATION CONTACT**).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Proposed Regulation Promulgation

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—[AMENDED]

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

Authority: 16 U.S.C. 1361-1407; 16 U.S.C. 1531-1544; 16 U.S.C. 4201-4245; Pub. L. 99-625, 100 Stat. 3500; unless otherwise noted.

2. In § 17.11(h), add an entry for "Plover, mountain" under BIRDS in the List of Endangered and Threatened Wildlife to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
*	*	*	*	*		*	*
BIRDS							
*	*	*	*	*		*	*
Plover, mountain	*Charadrius montanus*	U.S.A. (Western)	Entire	T		NA	NA
*	*	*	*	*		*	*

Dated: June 2, 2010

Daniel M. Ashe,

Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. 2010–15583 Filed 6–28– 10; 8:45 am]

BILLING CODE 4310–55–S

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R8–ES–2009–0069] [92210–0–0009–B4]

RIN 1018–AV89

Endangered and Threatened Wildlife and Plants; Revised Critical Habitat for the Arroyo Toad

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; reopening of comment period.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the reopening of the comment period on our October 13, 2009, proposed revised designation of critical habitat for the arroyo toad (*Anaxyrus californicus*) under the Endangered Species Act of 1973, as amended (Act). We also announce the availability of a draft economic analysis (DEA) of the proposed revised designation of critical habitat for the arroyo toad; revisions to proposed critical habitat; and an amended required determinations section of the proposal. We are reopening the comment period for an additional 30 days to allow all interested parties an opportunity to comment on the items listed above. If you submitted comments previously, you do not need to resubmit them because we have already incorporated them into the public record and will fully consider them in preparation of the final rule.

DATES: We will consider public comments we receive on or before July 29, 2010. Comments must be received by 11:59 p.m. Eastern Time on the closing date. Any comments that we receive after the closing date may not be considered in the final decision on this action.

ADDRESSES: You may submit comments by one of the following methods:

• Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments on Docket No. **FWS–R8–ES–2009–0069**.

• *U.S. mail or hand-delivery:* Public Comments Processing, Attn: **FWS–R8–ES–2009–0069**; Division of Policy and Directives Management; U.S. Fish and Wildlife Service, 4401 N. Fairfax Drive, Suite 222, Arlington, VA 22203.

We will post all comments on *http://www.regulations.gov*. This generally means that we will post any personal information you provide us (see the **Public Comments** section below for more information).

FOR FURTHER INFORMATION CONTACT: Diane K. Noda, Field Supervisor, Ventura Fish and Wildlife Office, 2493 Portola Road, Suite B, Ventura, CA 93003; telephone (805) 644–1766; facsimile (805) 644–3958. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at (800) 877–8339.

SUPPLEMENTARY INFORMATION:

Public Comments

We intend that any final action resulting from the proposed rule will be based on the best scientific data available and will be accurate and as effective as possible. Therefore, we request comments or information from other concerned government agencies, the scientific community, industry, or any other interested party during this reopened comment period on the proposed revised designation of critical habitat for the arroyo toad published in the **Federal Register** on October 13, 2009 (74 FR 52612), including the changes to and considerations regarding proposed revised critical habitat in Unit 15 and Subunits 6b, 11b, 16a, 16d and 19a; the draft economic analysis (DEA) of the proposed revised designation of critical habitat for the arroyo toad; and the amended required determinations provided in this document. We will consider information and recommendations from all interested parties. We are particularly interested in comments concerning:

(1) The reasons why we should or should not revise the designation of habitat as "critical habitat" under section 4 of the Act (16 U.S.C. 1531 *et seq.*), including whether there are threats to the species from human activity, the degree of which can be expected to increase due to the designation, and whether that increase in threat outweighs the benefit of designation such that the designation of critical habitat is not prudent.

(2) Specific information on:

• The amount and distribution of arroyo toad habitat included in the proposed revised rule,

• What areas within the geographical area occupied by the species at the time of listing that contain physical and biological features essential to the conservation of the species we should include in the designation and why, and

• What areas outside the geographical area occupied by the species at the time of listing are essential for the conservation of the species and why.

(3) Land-use designations and current or planned activities in the subject areas and their possible effects on proposed revised critical habitat for the arroyo toad.

(4) Any foreseeable economic, national security, or other relevant impacts of designating any area that may be included in the final designation. We are particularly interested in any impacts on small entities, and the benefits of including or excluding areas that exhibit these impacts.

(5) The likelihood of adverse social reactions to the designation of critical habitat, as discussed in the DEA, and how the consequences of such reactions, if likely to occur, would relate to the conservation and regulatory benefits of the proposed critical habitat designation.

(6) Comments or information that may assist us in identifying or clarifying the primary constituent elements and the resulting physical and biological features essential to the conservation of the arroyo toad.

(7) How the proposed revised critical habitat boundaries could be refined to more closely circumscribe the landscapes identified as essential.

(8) Information regarding Trabuco Creek in Orange County, and any special management considerations or protection that any essential physical or biological features in this area may require.

(9) Information regarding the San Diego River in San Diego County, from just below El Capitan Reservoir downstream to the confluence with San Vicente Creek, and any special management considerations or protection that any essential physical or biological features in this area may require.

(10) Whether our exemption, under section 4(a)(3)(B) of the Act, of the lands on Department of Defense land at Marine Corps Base, Camp Pendleton, in San Diego County; Fallbrook Naval Weapons Station in San Diego County; and Fort Hunter Liggett Military Reservation in San Luis Obispo County is or is not appropriate, and why.

(11) Whether the potential exclusion under section 4(b)(2) of the Act of non-Federal lands covered by the Western Riverside County Multiple Species Habitat Conservation Plan from final revised critical habitat is or is not appropriate and why.

(12) Whether the potential exclusion under section 4(b)(2) of the Act of non-Federal lands covered by the San Diego Multiple Species Conservation Program–City and County of San Diego's Subarea Plans from final revised critical habitat is or is not appropriate and why.

(13) Whether the potential exclusion under section 4(b)(2) of the Act of non-Federal lands covered by the Coachella Valley Multiple Species Habitat Conservation Plan from final revised critical habitat is or is not appropriate and why.

(14) Whether the potential exclusion under section 4(b)(2) of the Act of non-Federal lands covered by the Orange County Central–Coastal Subregional Habitat Conservation Plan/Natural Community Conservation Plan from final revised critical habitat is or is not appropriate and why.

(15) Whether the potential exclusion under section 4(b)(2) of the Act of non-Federal lands covered by the Southern Orange County Natural Community Conservation Plan/Master Streambed Alteration Agreement/Habitat Conservation Plan (Southern Orange HCP) from final revised critical habitat is or is not appropriate and why. Please note that a portion of Subunit 10b was not discussed under our section on the Southern Orange HCP in the October 13, 2009, proposed revised critical habitat rule. This area is covered by the Southern Orange HCP and we are considering the area in Subunit 10b for exclusion (see "Habitat Conservation Plans—Exclusions Under Section 4(b)(2) of the Act" section in the proposed revised critical habitat designation (74 FR 52612)).

(16) Whether the conservation needs of the arroyo toad can be achieved or not by limiting the designation of final revised critical habitat to non-Tribal lands and why.

(17) Whether the potential exclusion, under section 4(b)(2) of the Act, of Tribal lands of the Rincon Band of Luiseño Mission Indians from final revised critical habitat is or is not appropriate and why.

(18) Whether the potential exclusion, under section 4(b)(2) of the Act, of Tribal lands of the Pala Band of Luiseño Mission Indians from final revised critical habitat is or is not appropriate and why.

(19) Whether the potential exclusion, under section 4(b)(2) of the Act, of Tribal lands of the Sycuan Band of the Kumeyaay Nation from final revised critical habitat is or is not appropriate and why.

(20) Whether the potential exclusion, under section 4(b)(2) of the Act, of Tribal lands of the Capitan Grande Band of Diegueno Mission Indians from final revised critical habitat is or is not appropriate and why.

(21) Whether the potential exclusion, under section 4(b)(2) of the Act, of Tribal lands of the Mesa Grande Band of Diegueno Mission Indians from final revised critical habitat is or is not appropriate and why.

(22) Whether the potential exclusion, under section 4(b)(2) of the Act, of Subunit 6b from final revised critical habitat is or is not appropriate and why.

(23) Whether the potential exclusion, under section 4(b)(2) of the Act, of Department of Defense lands at the Remote Training Site Warner Springs and Camp Morena from final revised critical habitat is or is not appropriate and why.

(24) Information on the potential effects of climate change on the arroyo toad and its habitat.

(25) Any foreseeable impacts on energy supplies, distribution, and use resulting from the proposed revised designation and, in particular, any impacts on electricity production, and the benefits of including or excluding any particular areas that exhibit these impacts.

(26) Whether our approach to designating critical habitat could be improved or modified in any way to provide for greater public participation and understanding, or to better accommodate public concerns and comments.

(27) Information on whether the DEA makes appropriate assumptions regarding current practices and any regulatory changes that likely may occur if we designate proposed revised critical habitat for the arroyo toad.

(28) Information on the accuracy of our methodology in the DEA for distinguishing baseline and incremental costs, and the assumptions underlying the methodology.

(29) Information on whether the DEA correctly assesses the effect on regional costs associated with any land use controls that may result from the proposed revised designation of critical habitat for the arroyo toad.

(30) Information on whether the proposed revised designation of critical habitat will result in disproportionate economic impacts to specific areas or small businesses, including small businesses in the land development sector in San Diego County.

(31) Information on whether the DEA identifies all costs that could result from the proposed revised designation of critical habitat for the arroyo toad.

(32) Economic data on the incremental costs of designating a particular area as revised critical habitat.

(33) Whether the benefit of exclusion of any other particular area not specifically identified above outweighs the benefit of inclusion under section 4(b)(2) of the Act.

If you submitted comments or information on the proposed revised rule (74 FR 52612) during the initial comment period from October 13, 2009, to December 14, 2009, please do not resubmit them. We will incorporate them into the public record as part of this comment period, and we will fully consider them in the preparation of our final determination. Our final determination concerning revised critical habitat will take into consideration all written comments and any additional information we receive during both comment periods. On the basis of public comments, we may, during the development of our final determination, find that areas proposed are not essential, are appropriate for exclusion under section 4(b)(2) of the Act, or are not appropriate for exclusion.

You may submit your comments and materials concerning our proposed rule, the revisions to and considerations regarding proposed critical habitat described in this document, the associated DEA, and our amended required determinations by one of the methods listed in the **ADDRESSES** section. We will not consider comments sent by e-mail or fax or to an address not listed in the **ADDRESSES** section.

If you submit a comment via *http://www.regulations.gov*, your entire comment, including any personal identifying information, will be posted on the Web site. If you submit a hard copy comment that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hard copy comments on *http://www.regulations.gov*.

Comments and materials we receive (and have received), as well as supporting documentation we used in preparing this notice, will be available for public inspection on *http://www.regulations.gov* [Docket Number FWS–R8–ES–2009–0069], or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Ventura Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

You may obtain copies of the proposed rule and DEA by mail from the Ventura Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**), by visiting the *Federal eRulemaking Portal* at *http://www.regulations.gov*, or on our Web site at *http://www.fws.gov/ventura*.

Background

It is our intent to discuss only those topics directly relevant to the proposed revised designation of critical habitat for arroyo toad in this document. For more information on previous Federal actions concerning the arroyo toad, refer to the proposed revised designation of critical habitat published in the **Federal Register** on October 13, 2009 (74 FR 52612). Additional information on the arroyo toad may also be found in the final listing rule published in the **Federal Register** on December 16, 1994 (59 FR 64859), the "Recovery Plan for the Arroyo Southwestern Toad" (recovery plan; Service 1999) (the nomenclature for the listed entity has changed to "arroyo toad (*Anaxyrus californicus*)," but this change does not alter the description or distribution of the animals), and the designation of critical habitat for the arroyo toad published in the **Federal Register** on April 13, 2005 (70 FR 19562). These documents are available on the Ventura Fish and Wildlife Office and Carlsbad Fish and Wildlife Office websites at *http://www.fws.gov/ventura* and *http://www.fws.gov/carlsbad*. However, please note that the October 13, 2009 (74 FR 52612) proposed rule incorporates new information on the distribution of arroyo toads that became available since the 2005 final critical habitat designation for this species.

On July 20, 2007 (Service 2007, pp. 1–2), we announced that we would review the April 13, 2005, final rule after questions were raised about the integrity of scientific information used and whether the decision made was consistent with the appropriate legal standards. Based on our review of the previous final critical habitat designation, we determined it was necessary to revise critical habitat; thus, our October 13, 2009, proposed rule (74 FR 52612) and this document collectively propose those revisions. On December 19, 2007, the Center for Biological Diversity filed a complaint in the U.S. District Court for the Southern District of California challenging our designation of critical habitat for the arroyo toad (*Center for Biological Diversity* v. *U.S. Fish and Wildlife Service*, Case No. 07-2380-JM-AJB). On June 5, 2008, the court entered a consent decree requiring a proposed revised critical habitat rule to be submitted to the **Federal Register** by October 1, 2009, and a final revised critical habitat designation to be submitted to the **Federal Register** by October 1, 2010.

Section 3 of the Act defines critical habitat as the specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features essential to the conservation of the species and that may require special management considerations or protection, and specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. If the proposed rule is made final, section 7 of the Act will prohibit destruction or adverse modification of critical habitat by any activity funded, authorized, or carried out by any Federal agency. Federal agencies proposing actions affecting areas designated as critical habitat must consult with us on the effects of their proposed actions, under section 7(a)(2) of the Act.

Under section 4(b)(2) of the Act, we may exclude an area from critical habitat if we determine that the benefits of such exclusion outweigh the benefits of including that particular area as critical habitat, unless failure to designate that specific area as critical habitat will result in the extinction of the species. We may exclude an area from designated critical habitat based on economic impacts, national security, or any other relevant impact, including but not limited to the value and contribution of continued, expanded, or newly forged conservation partnerships.

When considering the benefits of inclusion for an area, we consider the additional regulatory benefits that area would receive from the protection from adverse modification or destruction as a result of actions with a Federal nexus; the educational benefits of mapping areas containing essential features that aid in the recovery of the listed species; and any benefits that may result from designation due to State or Federal laws that may apply to critical habitat.

When considering the benefits of exclusion, we consider, among other things, whether exclusion of a specific area is likely to result in conservation; the continuation, strengthening, or encouragement of partnerships; or implementation of a management plan. In the case of the arroyo toad, the benefits of critical habitat include public awareness of arroyo toad presence and the importance of habitat protection, and, where a Federal nexus exists, increased habitat protection for arroyo toad due to protection from adverse modification or destruction of critical habitat. In practice, situations with a Federal nexus exist primarily on

Federal lands or for projects undertaken by Federal agencies.

When we evaluate the benefits of excluding an area being managed under an existing conservation plan, we consider a variety of factors, including but not limited to whether the plan is finalized; how it provides for the conservation of the essential physical and biological features; whether there is a reasonable expectation that the conservation management strategies and actions contained in a management plan will be implemented into the future; whether the conservation strategies in the plan are likely to be effective; and whether the plan contains a monitoring program or adaptive management to ensure that the conservation measures are effective and can be adapted in the future in response to new information.

After evaluating the benefits of inclusion and the benefits of exclusion, we carefully weigh the two sides to determine whether the benefits of exclusion outweigh those of inclusion. If we determine that they do, we then determine whether the exclusion of the specific area would result in extinction of the species. If exclusion of an area from critical habitat will result in extinction, we cannot exclude it from the designation.

Draft Economic Analysis

Section 4(b)(2) of the Act requires that we designate or revise critical habitat based upon the best scientific and commercial data available, after taking into consideration the economic impact, impact on national security, or any other relevant impact of specifying any particular area as critical habitat. We prepared a DEA of our October 13, 2009 (74 FR 52612), proposed revised designation of critical habitat for the arroyo toad.

The intent of the DEA is to identify and analyze the potential economic impacts associated with the proposed revised designation of critical habitat for the arroyo toad. Additionally, the economic analysis looks retrospectively at costs incurred since the December 16, 1994 (59 FR 64859), listing of the arroyo toad as an endangered species. The DEA quantifies the economic impacts of all potential conservation efforts for the arroyo toad; some of these costs will likely be incurred regardless of whether we designate revised critical habitat. The economic impact of the proposed revised designation of critical habitat for the arroyo toad is analyzed by comparing scenarios both "with critical habitat" and "without critical habitat." The "without critical habitat" scenario represents the baseline for the analysis, considering protections already in place for the species (for example, under the Federal listing and other Federal, State, and local regulations). The baseline, therefore, represents the costs incurred regardless of whether critical habitat is designated and may include costs incurred in the future. The "with critical habitat" scenario describes the incremental impacts associated specifically with the designation of critical habitat for the species. The incremental conservation efforts and associated impacts are those not expected to occur absent the designation of critical habitat for the species. In other words, the incremental costs are those attributable solely to the designation of critical habitat above and beyond the baseline costs; these are the costs we may consider in the final designation of critical habitat. The analysis looks retrospectively at baseline impacts incurred since we listed the species, and forecasts both baseline and incremental impacts likely to occur if we finalize the proposed revised designation of critical habitat for the arroyo toad. For a further description of the methodology of the analysis, see Chapter 1, "Approach to Estimating Economic Effects," of the DEA.

The current DEA estimates the foreseeable economic impacts of the proposed revised designation of critical habitat for the arroyo toad by identifying the potential resulting incremental costs. The DEA describes economic impacts of arroyo toad conservation efforts associated with the following categories: (1) Real estate development; (2) changes in water supply; (3) grazing activities; (4) mining activities; (5) road construction projects; (6) utility and other infrastructure projects; (7) application of the California Environmental Quality Act (CEQA); and (8) uncertainty and delay.

Baseline economic impacts are those impacts that result from listing and other conservation efforts for arroyo toad not attributable to designation of critical habitat and thus are expected to occur regardless of whether we designate critical habitat. Total future baseline impacts over the next 25 years (2010 to 2035) are estimated to be $385 million (approximately $33 million annualized) in present value terms using a 7 percent discount rate. Overall, the real estate industry (real estate development, CEQA, and delay impacts) is estimated to experience the highest cost, followed by water consumers and road construction projects. Of the 22 proposed critical habitat units, 3 are expected to incur more than $50 million each in total baseline economic costs between 2010 and 2035. Critical habitat Unit 16 (Santa Ysabel Creek Basin) in San Diego County has the largest total baseline impacts ($74 million) of the units considered for designation.

The DEA estimates total potential incremental economic impacts in areas proposed as revised critical habitat over the next 25 years (2010 to 2035) to be $789 million ($68 million annualized) in present value terms using a 7 percent discount rate. Overall, the real estate industry (real estate development, CEQA, and delay impacts) is estimated to experience the highest cost, followed by utilities and infrastructure projects. Of the 22 proposed critical habitat units, 4 are expected to incur incremental economic costs greater than $50 million each between 2010 and 2035. Critical habitat Unit 16 (Santa Ysabel Creek Basin) in San Diego County has the largest incremental impacts ($211 million) of the units considered for designation.

We are also including an additional 3,655 ac (1,479 ha) in the proposed revised critical habitat designation compared to the October 13, 2009, proposed revised critical habitat designation, bringing the total to 112,765 ac (45,634 ha) of proposed revised critical habitat for the arroyo toad. The additional area has not been assessed in this DEA; however, an initial evaluation reveals that approximately 70 percent of the additional area would be evaluated under the baseline scenario because it contains an overlapping 100–year flood plain or existing habitat conservation plan (HCP) boundary and is primarily publicly owned or otherwise undevelopable. The remaining 30 percent of the additional area is privately owned and does not contain an overlapping 100–year flood plain or existing HCP boundary, and survey data indicate this area is not within the 1500-meter (m) (4,921-foot (ft)) buffer surrounding known arroyo toad sites. The habitat areas most likely to involve a Federal nexus and section 7 consultation are within riparian areas, and we are using the 100–year flood plain and1500-m (4,921-ft) buffer surrounding known arroyo toad sites to identify those riparian areas. Therefore the inclusion of this area in the proposed revised critical habitat is not anticipated to substantially increase the incremental impacts or alter the ranking of critical habitat units (in terms of total economic impacts per unit). The final economic analysis will reflect the baseline and incremental economic impacts of the additional 3,655 ac (1,479 ha).

The DEA considered both economic efficiency and distributional effects. In

the case of habitat conservation, efficiency effects generally reflect the "opportunity costs" associated with the commitment of resources to comply with habitat protection measures (e.g., lost economic opportunities associated with restrictions on land use). The DEA also addresses how potential economic impacts are likely to be distributed, including an assessment of any local or regional impacts of habitat conservation and the potential effects of conservation activities on government agencies, private businesses, and individuals. The DEA measures lost economic efficiency associated with real estate development, changes in water supply, grazing and mining activities, road construction projects, utility and other infrastructure projects, CEQA, uncertainty, and delay, and the effects of this lost economic efficiency on Federal lands, small entities, and the energy industry. We can use this information to assess whether the effects of the revised designation might unduly burden a particular group or economic sector.

As we stated earlier, we are soliciting data and comments from the public on the DEA, as well as on all aspects of the proposed revised designation of critical habitat, our revisions to proposed critical habitat described in this document, and our amended required determinations. We may revise the proposed rule and/or the economic analysis to incorporate or address information we receive during this public comment period. In particular, we may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area as critical habitat, provided the exclusion will not result in the extinction of the species.

Changes to Proposed Revised Critical Habitat

In this document, we are proposing further revisions to the proposed revised critical habitat in Unit 15 and Subunits 11b, 16a, and 16d, as identified and described in the proposed rule that we published in the **Federal Register** on October 13, 2009 (74 FR 52612). We received new information in the form of survey reports, survey data, and public comments indicating that we should re-evaluate the proposed boundaries of these areas. The purpose of the revisions described below is to better delineate the areas that meet the definition of critical habitat for the arroyo toad and to ensure that all areas proposed are consistent with the criteria outlined in the proposed revised rule (see "Criteria Used To Identify Critical Habitat" section in the proposed revised critical habitat designation (74 FR 52620 - 52622)). All areas added to the proposed units are within the geographical area occupied by the species at the time it was listed and contain the physical and biological features essential to the conservation of the species. Revised maps are included in the **Proposed Regulation Promulgation** section of this document. Below, we briefly describe the changes made for each of these units. As a result of these revisions, the overall area proposed for designation as critical habitat is 112,765 ac (45,634 ha), an increase of 3,655 ac (1,479 ha) from 109,110 ac (44,155 ha) in the October 13, 2009, proposal (74 FR 52612).

We are considering for exclusion all or part of Subunit 6b, and portions of Unit 15 and Subunit 19a from critical habitat under section 4(b)(2) of the Act (see Additional Areas Currently Considered For Exclusion Under Section 4(b)(2) of the Act below).

Changes to Critical Habitat Unit Descriptions

Unit 11: San Mateo Creek Basin; Subunit 11b

We received a comment from the U.S. Forest Service indicating that areas upstream of Subunit 11b along San Mateo Creek contain habitat suitable for arroyo toad. We reevaluated survey data in our files from 1999 and 2004 along San Mateo Creek and within Los Alamos Canyon (Ervin 2000, *in litt.*; ECORP 2004). We added an area to the upstream end of Subunit 11b because it contains the physical and biological features that are essential to the conservation of the species, including aquatic habitat for breeding and nonbreeding activities and upland habitat for foraging and dispersal activities. These additional areas may require the same special management considerations or protection discussed for this Unit in the October 2009 proposed rule. Additionally, adding occupied areas on stream reaches containing suitable breeding and upland habitat is consistent with our criteria used to identify critical habitat, as outlined in the proposed rule (74 FR 52612). The northeastern expansion of the critical habitat designation boundary for Subunit 11b encompasses (1) approximately 8.3 mi (13 km) upstream along San Mateo Creek to Los Alamos Canyon, and (2) approximately 2.4 mi (4 km) of Los Alamos Canyon upstream from the confluence with San Mateo Creek. The revised subunit consists of 844 ac (341 ha) of U.S. Forest Service land, an increase of 810 ac (327 ha) from 34 ac (14 ha) proposed in the October 13, 2009, proposed rule (74 FR 52612). Unit 11 now totals 1,878 ac (758 ha)—an increase from 1,068 ac (432 ha) in the October 13, 2009, proposed rule (74 FR 52612).

Unit 15: Upper San Luis Rey Basin

We received new information in the form of a survey report indicating that areas upstream of Unit 15 along Cañada Aguanga contain habitat occupied by arroyo toad (Tierra Data Inc. 2007, pp. 112–113, 118–119, and 121). We added an area to the upstream end of this unit because it contains the physical and biological features that are essential to the conservation of the species, including aquatic habitat for breeding and nonbreeding activities and upland habitat for foraging and dispersal activities. These additional areas may require the same special management considerations or protection discussed for this Unit in the October 2009 proposed rule. Adding occupied areas on stream reaches containing suitable breeding and upland habitat is consistent with our criteria used to identify critical habitat, as outlined in the proposed revised rule (74 FR 52612). The northern expansion of the critical habitat designation boundary for Unit 15 encompasses approximately 3.5 mi (6 km) along Cañada Aguanga and extends to just below Lake Jean. The revised unit consists of 1,467 ac (594 ha) of U.S. Forest Service land and 11,511 ac (4,658 ha) of private land—an increase of 951 ac (385 ha) from what we proposed in the October 13, 2009, proposed rule (74 FR 52612). Unit 15 now totals 12,977 ac (5,252 ha).

Unit 16: Santa Ysabel Creek Basin

We received information from two sources that resulted in our re-evaluation of Subunit 16a. First, we received survey data indicating that areas upstream of Subunit 16a along Santa Ysabel Creek contain habitat occupied by arroyo toad (Ramirez *in litt.* 2009). We added an area to the upstream end of this subunit because it contains the physical and biological features that are essential to the conservation of the species, including aquatic habitat for breeding and nonbreeding activities and upland habitat for foraging and dispersal activities. These additional areas may require the same special management considerations or protection discussed for this Unit in the October 2009 proposed rule. Adding occupied areas on stream reaches containing suitable breeding and upland habitat is consistent with our criteria used to identify critical habitat, as outlined in the proposed revised rule (74 FR 52612). This northeastern expansion of the critical habitat designation boundary for

Subunit 16a encompasses approximately 1.3 mi (2.1 km) along Santa Ysabel Creek upstream from the confluence with Temescal Creek. Second, we received survey data indicating that areas downstream of Subunit 16a along Santa Ysabel Creek and portions of the San Dieguito River contain habitat occupied by arroyo toad (Haas *in litt.* 2009; U.S. Geological Survey (USGS) 2009, unpublished data). We added an area to the downstream end of this subunit because it contains the physical and biological features that are essential to the conservation of the species, including aquatic habitat for breeding and nonbreeding activities and upland habitat for foraging and dispersal activities. Adding occupied areas on stream reaches containing suitable breeding and upland habitat is consistent with our criteria used to identify critical habitat, as outlined in the proposed revised rule (74 FR 52612). The southwestern expansion of the critical habitat designation boundary for Subunit 16a encompasses: (1) Approximately 3.7 mi (6 km) downstream along Santa Ysabel Creek to the confluence with the San Dieguito River; and (2) approximately 1 mi (2 km) of the San Dieguito River upstream from the confluence with Santa Ysabel Creek. The revised subunit consists of 184 ac (74 ha) of U.S. Forest Service land, 6 ac (2 ha) of Bureau of Land Management land, 182 ac (74 ha) of State land, 143 ac (58 ha) of local government land, and 13,452 ac (5,444 ha) of private land—an increase of 1,831 ac (741 ha) from 12,136 ac (4,911 ha) proposed in the October 13, 2009, proposed rule (74 FR 52612). Subunit 16a now totals 13,967 ac (5,652 ha).

We also received survey data indicating that areas downstream of Subunit 16d along Santa Ysabel Creek contain habitat occupied by arroyo toad (Haas 2009, *in litt.*; USGS 2009, unpublished data). We added an area to the downstream end of this subunit because it contains the physical and biological features that are essential to the conservation of the species, including aquatic habitat for breeding and nonbreeding activities and upland habitat for foraging and dispersal activities. These additional areas may require the same special management considerations or protection discussed for this Unit in the October 2009 proposed rule. Adding occupied areas on stream reaches containing suitable breeding and upland habitat is consistent with our criteria used to identify critical habitat, as outlined in the proposed revised rule (74 FR 52612). The western expansion of the critical habitat designation boundary for Subunit 16d encompasses approximately 1.1 mi (2 km) downstream along Santa Ysabel Creek to Sutherland Reservoir. The revised subunit consists of 1,504 ac (609 ha) of private land and 23 ac (9 ha) of Tribal land—an increase of 96 ac (39 ha) from 1,431 ac (579 ha) proposed in the October 13, 2009, proposed rule (74 FR 52612). Subunit 16d now totals 1,527 ac (618 ha).

In summary, Unit 16 now totals 15,494 ac (6,270 ha)—an increase of 1,927 ac (780 ha) from 13,567 ac (5,490 ha) in the October 13, 2009, proposed rule (74 FR 52612).

Additional Areas Currently Considered For Exclusion Under Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary must designate and revise critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making that determination, the legislative history is clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor.

Under section 4(b)(2) of the Act, we consider all relevant impacts, including economic impacts. During the development of the final revised designation, we will consider economic impacts, public comments, and other new information, and areas (including those identified for potential exclusion in the October 13, 2009, proposed rule and new areas identified in this document) may be excluded from the final critical habitat designation under section 4(b)(2) of the Act and our implementing regulations at 50 CFR 424.19.

We consider a number of factors, in addition to economic impacts, in a section 4(b)(2) analysis. For example, we consider whether there are lands owned by the Department of Defense where a national security impact might exist. We also consider whether landowners have developed any habitat conservation plans (HCPs) or other management plans for the area, or whether there are conservation partnerships that would be encouraged or discouraged by designation of, or exclusion from, critical habitat in an area. Additionally, we look at the presence of Tribal lands or Tribal trust resources that might be affected, and consider the government-to-government relationship of the United States with the Tribal entities. We also consider any significant social impacts that might occur because of the designation.

In our October 13, 2009, proposed revised critical habitat designation (74 FR 52612), we identified lands in Subunit 6b, Unit 15, and Subunit 19a as meeting the definition of critical habitat for the arroyo toad. Based on comments submitted during the initial public comment period from October 13, 2009, to December 14, 2009, we are considering the following areas for exclusion from critical habitat under section 4(b)(2) of the Act: All of Subunit 6b, the portion of Unit 15 within Remote Training Site Warner Springs, and the portion of Subunit 19a within Camp Morena.

Unit 6: Upper Santa Clara River Basin; Subunit 6b

In the October 13, 2009, proposed revised critical habitat designation (74 FR 52612), we erroneously reported that Subunit 6b consists of 159 ac (65 ha) of Federal land and 1,995 ac (807 ha) of private land. In actuality, Subunit 6b consists entirely of private land owned by the Newhall Land and Farming Company (Newhall LFC). Newhall LFC developed the Natural River Management Plan ("NRMP") (Valencia Company 1998) for the long-term conservation and management of the biological resources within their lands, including the arroyo toad and its habitat; the NRMP was approved by the U.S. Army Corps of Engineers and California Department of Fish and Game (CDFG) in 1998. The NRMP provides management measures designed to protect, restore, monitor, manage, and enhance habitat for multiple species, including the arroyo toad, that occur along the Santa Clara River (River), Castaic Creek, and San Francisquito Creek within Subunit 6b. Of particular importance to the conservation of the arroyo toad and its habitat within Subunit 6b was the inclusion in the NRMP of substantial conservation easements, which when fully implemented, will protect almost all of the arroyo toad's breeding habitat and riparian river corridor within Subunit 6b. At the present time, approximately 1,011 ac (409 ha) of conservation easements on Newhall LFC lands near the City of Santa Clarita in Los Angeles County within Subunit 6b have been

conveyed to the CDFG and additional easements totaling approximately 28 ac (11 ha) are awaiting approval by CDFG. The conservation easements that have been conveyed to the California Department of Fish and Game over the Santa Clara River corridor, San Francisquito Creek, and Castaic Creek will ensure that habitat within the easements will remain in a natural condition in perpetuity. Use of the property covered by the easements is confined to the preservation and enhancement of native species and their habitats, including the arroyo toad and its habitat. These conservation easements provide greater protection of crucial arroyo toad breeding and foraging habitat in this area than could be gained through the designation of critical habitat. Additionally, we have already completed section 7 consultation on the effects of the NRMP on the arroyo toad and found that it would not jeopardize the continued existence of the species.

Newhall LFC has committed to implement other protective measures for arroyo toad habitat in the NRMP, including: (1) The creation of new riverbed areas, including planting wetland mitigation sites; (2) revegetation of riparian areas; (3) removal of invasive plants such as arundo (*Arundo donax*) and tamarisk (*Tamarix* sp.); (4) protecting wetlands from urban runoff by establishing a revegetated upland buffer between developed areas and the River; (5) implementing a Drainage Quality Management Plan with Best Management Practices to ensure water quality within the River corridor; and (6) implementing the biological mitigation measures for the Newhall Ranch Specific Plan that include restricting pets and off-road vehicles from the area and restricting access to the River corridor by limiting hiking and biking to the River trail system.

Based on the many conservation measures included in the NRMP that protect the arroyo toad and its habitat on Newhall Ranch lands in Subunit 6b, the conservation easement lands that have already been conveyed to CDFG and are planned in the future in this subunit, and because of the valuable conservation partnership we have developed over the years with Newhall Ranch, we are considering the entire Subunit 6b for exclusion under section 4(b)(2) of the Act.

Unit 15 and Subunit 19a

In our October 13, 2009, proposed revised critical habitat designation (74 FR 52612), we identified lands in Unit 15 and Subunit 19a as meeting the definition of critical habitat for the arroyo toad. Based on comments submitted by the U.S. Navy during the initial public comment period from October 13, 2009, to December 14, 2009, we are considering for exclusion the portion of Unit 15 within Remote Training Site Warner Springs and the portion of Subunit 19a within Camp Morena from critical habitat under section 4(b)(2) of the Act.

Remote Training Site Warner Springs

The U.S. Navy conducts training activities within the Remote Training Site Warner Springs complex, which is comprised of 6,158 ac (2,486 ha) of lands owned by, and leased from, the Vista Irrigation District and the Cleveland National Forest. Additionally, the U.S. Navy is proposing to expand its training activities onto another 6,326 ac (2,554 ha) of lands owned by the Bureau of Land Management, Cleveland National Forest, and the Vista Irrigation District, expanding the total training area to approximately 12,484 ac (5,040 ha).

The Remote Training Site Warner Springs serves as the principal venue for SERE (Survival, Evasion, Resistance, and Escape) training on the west coast. It also supports training activities for Naval Special Warfare, 1st Marine Special Operations Battalion, Naval Construction Force Amphibious Construction Battalion One Seabees, 1st Marine Expeditionary Force Training and Experimentation Group/Tactical Exercise Group, and other nonroutine training.

The U.S. Navy is currently revising the 2002 Naval Base Coronado Integrated Natural Resources Management Plan (INRMP), which we received a draft of in September 2009, to address management of the arroyo toad and its habitat at the Remote Training Site Warner Springs. Additionally, the U.S. Navy is currently implementing measures to avoid or minimize impacts to the arroyo toad, as identified in a biological opinion we issued on October 30, 2009, on the proposed expansion and realignment of training areas at Remote Training Site Warner Springs (Service 2009). These measures include, but are not limited to: (1) Avoid and minimize impacts to the on-site population of the arroyo toad within an "Arroyo Toad Management Area"; (2) permanently close two stream crossings on the San Luis Rey River; (3) educate personnel on how to avoid adverse impacts to the species; (4) prioritize nonnative, invasive plant species searches and spot treatment control efforts in riparian zones and areas of higher levels of training activity; and (5) conduct surveys for arroyo toads at least every 3 years to determine status and location.

We received a public comment from the U.S. Navy expressing concern that designation of these lands would cause mission-critical activities to be delayed if they were required to conduct consultation due to a critical habitat designation. Mission-critical activities not previously analyzed that would likely be delayed by section 7 consultation and that directly affect national security include training activities and supporting facility construction. Delays in construction and training schedules could disrupt the ability to acquire and perform unique, tactical, special warfare skills required for personnel readiness. We will consider several factors, including impacts to national security associated with a critical habitat designation as described by the U.S. Navy, existing consultations, and conservation measures in place at this facility that benefit the arroyo toad. Of the 12,977 ac (5,252 ha) in Unit 15 proposed as critical habitat, 4,609 ac (1,865 ha) are part of the existing and proposed Remote Training Site Warner Springs that we are considering for exclusion under section 4(b)(2) of the Act.

Camp Morena

Camp Morena is a small parcel of approximately 71 ac (29 ha) used by the U.S. Navy under a year-to-year license with the City of San Diego that serves as a support facility for the nearby Camp Michael Monsoor (formerly called La Posta Mountain Warfare Training Facility). In support of Camp Michael Monsoor, the U.S. Navy requires significant base operations and logistical support at Camp Morena, including administration activities, classrooms, conference rooms, mission planning capabilities, and berthing space. Future planned use of Camp Morena includes increased training functions with more frequent training and possible construction of new facilities.

The U.S. Navy is currently revising the 2002 Naval Base Coronado INRMP, which will address management of the arroyo toad and its habitat at Camp Morena.

We received a public comment from the U.S. Navy expressing concern that designation of these lands would cause mission-critical activities to be delayed if they were required to conduct consultation due to a critical habitat designation. The U.S. Navy asserted that delays in construction and training schedules could disrupt the ability to acquire and perform unique, tactical, special warfare skills required for

personnel readiness. We will consider several factors, including impacts to national security associated with a critical habitat designation as described by the U.S. Navy, existing consultations, and conservation measures in place at this facility that benefit the arroyo toad. Of the 5,847 ac (2,366 ha) in Subunit 19a proposed as critical habitat, 31 ac (13 ha) are part of Camp Morena that are we considering for exclusion under section 4(b)(2) of the Act.

The following table presents all of the areas we are considering for exclusion under section 4(b)(2) of the Act from the revised critical habitat designation:

Unit/Subunit	Area Considered for Exclusion Under Section 4(b)(2) of the Act
Subunit 6b. [Upper Santa Clara River Basin]	1,995 ac (807 ha)
Western Riverside County MSHCP	
Unit 9. [San Jacinto River Basin]	1,153 ac (466 ha)
Unit 13. [Upper Santa Margarita River Basin]	5,233 ac (2,117 ha)
Subtotal Western Riverside County MSHCP	6,386 *ac (*2,583 *ha)*
City of San Diego Subarea Plan under the MSCP	
Subunit 16a. [Santa Ysabel Creek Basin]	4,486 ac (1,815 ha)
Subunit 17d. [San Diego River Basin/San Vicente Creek]	106 ac (43 ha)
Subunit 19b. [Cottonwood Creek Basin]	858 ac (347 ha)
Subtotal County of San Diego Subarea Plan under the MSCP	5,450 ac (2,205 ha)
County of San Diego Subarea Plan under the MSCP	
Subunit 16a. [Santa Ysabel Creek Basin]	1,081 ac (437 ha)
Subunit 17b. [San Diego River Basin/San Vicente Creek]	1,070 ac (433 ha)
Subunit 17d. [San Diego River Basin/San Vicente Creek]	825 ac (334 ha)
Subunit 18a. [Sweetwater River Basin]	545 ac (221 ha)
Subunit 19b. [Cottonwood Creek Basin]	368 ac (149 ha)
Subtotal for County of San Diego Subarea Plan under the MSCP	3,889 ac (1,574 ha)
Orange County Central-Coastal NCCP/HCP	
Unit 8. [Lower Santa Ana River Basin]	647 ac (262 ha)
Subtotal for Orange County Central-Coastal NCCP/HCP	647 ac (262 ha)
Orange County Southern Subregion HCP	
Subunit 10a. [San Juan Creek Basin]	3,405 ac (1,378 ha)
Subunit 10b. [San Juan Creek Basin]	509 ac (206 ha)
Subunit 11a. [San Mateo Creek Basin]	1,002 ac (405 ha)
Subtotal for Orange County Southern Subregion HCP	4,916 ac (1,989 ha)
Tribal Lands	
Unit 14. [Lower and Middle San Luis Rey Basin], Rincon Reservation, Pala Reservation	2,572 ac (1,041 ha)
Subunit 16. [Santa Ysabel Creek Basin], Mesa Grande Reservation	23 ac (9 ha)
Subunit 17. [San Diego River Basin/San Vicente Creek], Capitan Grande Reservation	92 ac (37 ha)
Subunit 18. [Sweetwater River Basin], Sycuan Reservation	22 ac (9 ha)
Subtotal for Tribes	2,709 ac (1,096 ha)
Military Lands	
Unit 15. [Upper San Luis Rey River Basin], Remote Training Site Warner Springs	4,609 ac (1,865 ha)
Subunit 19a. [Cottonwood Creek Basin], Camp Morena	31 ac (13 ha)

Unit/Subunit	Area Considered for Exclusion Under Section 4(b)(2) of the Act
Subtotal for Military Lands	4,640 ac (1,878 ha)
Total	30,632 ac (12,396 ha)*

* Values in this table may not sum due to rounding.

Required Determinations——Amended

In our proposed rule dated October 13, 2009 (74 FR 52612), we indicated that we would defer our determination of compliance with several statues and Executive Orders until the information concerning potential economic impacts of the designation and potential effects on landowners and stakeholders became available in the DEA. We have now made use of the DEA to make these determinations. In this document, we affirm the information in our proposed rule concerning Executive Order (E.O.) 12866 (*Regulatory Planning and Review*), E.O. 13132 (Federalism), E.O. 12988 (Civil Justice Reform), the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), and the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951). However, based on the DEA data, we are amending our required determinations concerning the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), E.O. 13211 (Energy, Supply, Distribution, and Use), E.O. 12630 (Takings), and the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*).

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

Under the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 802(2)), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies the rule will not have a significant economic impact on a substantial number of small entities. Based on our DEA of the proposed revised designation, we provide our analysis for determining whether the proposed rule would result in a significant economic impact on a substantial number of small entities. Based on comments we receive, we may revise this determination as part of a final rulemaking.

According to the Small Business Administration, small entities include small organizations, such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors doing less than $11.5 million in annual business, and agricultural businesses with annual sales less than $750,000. To determine if potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term significant economic impact is meant to apply to a typical small business firm's business operations.

To determine if the proposed revised designation of critical habitat for arroyo toad would affect a substantial number of small entities, we considered the number of small entities affected within particular types of economic activities, such as residential and commercial development. In order to determine whether it is appropriate for our agency to certify that this rule would not have a significant economic impact on a substantial number of small entities, we considered each industry or category individually. In estimating the numbers of small entities potentially affected, we also considered whether their activities have any Federal involvement. Critical habitat designation will not affect activities that do not have any Federal involvement; designation of critical habitat only affects activities conducted, funded, permitted, or authorized by Federal agencies. Some kinds of activities are unlikely to have any Federal involvement and so will not be affected by critical habitat designation. In areas where the species is present, Federal agencies already are required to consult with us under section 7 of the Act on activities they fund, permit, or implement that may affect the arroyo toad. Federal agencies also must consult with us if their activities may affect critical habitat.

In the DEA of the proposed revised designation of critical habitat, we evaluated the potential economic effects resulting from implementation of conservation actions related to the proposed revised designation of critical habitat. The DEA identified the estimated incremental impacts associated with the proposed revised designation of critical habitat as described in sections 2 through 6, and evaluated the potential for economic impacts related to activity categories including real estate development, changes in water supply, grazing and mining activities, road construction projects, utility and other infrastructure projects, CEQA, uncertainty, and delay. The DEA concluded that the incremental impacts resulting from this rulemaking that may be borne by small businesses will be associated with land development, cattle ranching, and farming. Incremental impacts are either not expected for the other types of activities considered, or, if expected, will not be borne by small entities.

As discussed in Appendix A of the DEA, the potential impacts of the proposed revised designation of critical habitat on land developers over the next 25 years would result from lost land value, project modification costs, CEQA costs, delay costs, and administrative costs. Small land developers with projects in the proposed revised critical habitat designation are expected to bear an annual incremental impact per project of between roughly $800 and $857,000. The number of small business in the land development industry affected annually ranges from zero to approximately 1.0 percent per county. Of those small land developers that are affected, the average annualized cost per project ranges from less than 0.1 percent to 40.5 percent of the typical annual sales. However, the annualized cost per project for affected small land developers in each county other than San Diego County is less than 1.6

percent of the typical annual sales (see Table A-1 in the DEA).

As discussed in Appendix A of the DEA, the potential impacts of the proposed revised designation of critical habitat on cattle ranchers and farmers would result from future project modifications, such as fencing, water source development, and availability of water for irrigation and groundwater recharge. Small cattle ranching businesses and farms operating in the proposed revised critical habitat designation are expected to bear an incremental impact per project of between roughly $6,000 and $13,700. The number of small cattle ranching operations and farms affected annually ranges from about 0.2 percent to approximately 2.0 percent of the cattle ranching businesses and farms in each county. For those small cattle ranching businesses and farms that are impacted, the average cost per project (i.e., grazing allotment) ranges from less than 1.0 percent to approximately 2.0 percent of the typical annual sales for a small business in the sector.

In summary, we have considered whether the proposed revised designation of critical habitat would result in a significant economic impact on a substantial number of small entities. We have identified small businesses that may be affected within the ranching and farming sectors. However, we have determined that the proposed revised designation of critical habitat for the arroyo toad would not have a significant economic impact on a substantial number of small business entities in the ranching and farming sectors. While we recognize that the impacts to small businesses in the land development sector in San Diego County may be significant, we believe that the overall number of small businesses affected by the designation is not substantial.

For the above reasons and based on currently available information, we certify that, if promulgated, the proposed revised designation of critical habitat for the arroyo toad would not have a significant economic impact on a substantial number of small business entities. Therefore, a regulatory flexibility analysis is not required. However, we do seek specific comment on the effects to small businesses in the land development sector, in particular those in San Diego County.

Executive Order 13211 – Energy Supply, Distribution, and Use

On May 18, 2001, the President issued E.O. 13211 on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires an agency to prepare a Statement of Energy Effects when undertaking certain actions. OMB's guidance for implementing this Executive Order outlines nine outcomes that may constitute "a significant adverse effect" when compared to no regulatory action. As discussed in Appendix A of the DEA, two criteria are relevant to this analysis: (1) Reductions in electricity production in excess of 1 billion kilowatt-hours per year or in excess of 500 megawatts of installed capacity, and (2) increases in the cost of energy production in excess of 1 percent. The DEA finds that this proposed revised critical habitat designation is expected to have minimal impacts on the energy industry.

Executive Order 12630 – Takings

In accordance with E.O. 12630 ("Government Actions and Interference with Constitutionally Protected Private Property Rights"), we have analyzed the potential takings implications of proposing revised critical habitat for the arroyo toad in a takings implications assessment. Critical habitat designation does not affect landowner actions that do not require Federal funding or permits, nor does it preclude development of habitat conservation programs or issuance of incidental take permits to permit actions that do require Federal funding or permits to go forward. In conclusion, the proposed revision to critical habitat for the arroyo toad does not pose significant takings implications.

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

In accordance with the Unfunded Mandates Reform Act, the Service makes the following findings:

(a) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or Tribal governments, or the private sector, and includes both "Federal intergovernmental mandates" and "Federal private sector mandates." These terms are defined in 2 U.S.C. 658(5)-(7). "Federal intergovernmental mandate" includes a regulation that "would impose an enforceable duty upon State, local or Tribal governments," with two exceptions. It excludes "a condition of Federal assistance." It also excludes "a duty arising from participation in a voluntary Federal program," unless the regulation "relates to a then-existing Federal program under which $500,000,000 or more is provided annually to state, local and Tribal governments under entitlement authority," if the provision would "increase the stringency of conditions of assistance" or "place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding," and the State, local, or Tribal governments "lack authority" to adjust accordingly. "Federal private sector mandate" includes a regulation that "would impose an enforceable duty upon the private sector, except (i) as a condition of Federal assistance; or (ii) a duty arising from participation in a voluntary Federal program."

Critical habitat designation does not impose a legally binding duty on non-Federal government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. Designation of critical habitat may indirectly impact non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action that may be indirectly impacted by the designation of critical habitat. However, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above on to State governments.

(b) As discussed in the DEA of the proposed designation of critical habitat for arroyo toad, we do not believe that this rule would significantly or uniquely affect small governments because it would not produce a Federal mandate of $100 million or greater in any year; that is, it is not a "significant regulatory action" under the Unfunded Mandates Reform Act. The DEA concludes that incremental impacts may occur due to project modifications and administrative actions that may need to be made for activities, including: Real estate development (comprising land value loss, other project modifications, CEQA compliance, and delay); grazing; mining; utilities and infrastructure; and administrative costs associated with future formal and informal consultations on real estate development, water, roads, grazing, mining, infrastructure, and other projects. However, these activities are not expected to affect small governments. Consequently, we do not believe that the revised critical habitat

designation would significantly or uniquely affect small government entities. As such, a Small Government Agency Plan is not required.

References Cited

A complete list of all references we cited in the proposed rule and in this document is available on the internet at *http://www.regulations.gov* or from the Ventura Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT** section).

Authors

The primary authors of this rulemaking are the staff members of the Ventura Fish and Wildlife Office and the Carlsbad Fish and Wildlife Office.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Proposed Regulation Promulgation

Accordingly, we propose to further amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as proposed to be amended at 74 FR 52612, October 13, 2009, as follows:

PART 17—[AMENDED]

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

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

2. Critical habitat for the arroyo toad in § 17.95(d), which was proposed to be revised on October 13, 2009, at 74 FR 52612, is proposed to be further amended by revising:

a. Paragraph (d)(11)(ii), and the map for Units 8,10, and 11; and

b. Paragraph (d)(13)(ii), and the map for Units 12, 13, 14, 15, 16, and 17, as set forth below.

§ 17.95 Critical habitat—fish and wildlife.

* * * * *

(d) *Amphibians.*

* * * * *

Arroyo Toad (*Anaxyrus californicus*)

* * * * *

(11) * * *

(ii) *Note*: Map of Critical Habitat for Arroyo Toad (*Anaxyrus californicus*), Units 8, 10, and 11, Orange, Riverside, and San Diego Counties, California, follows:

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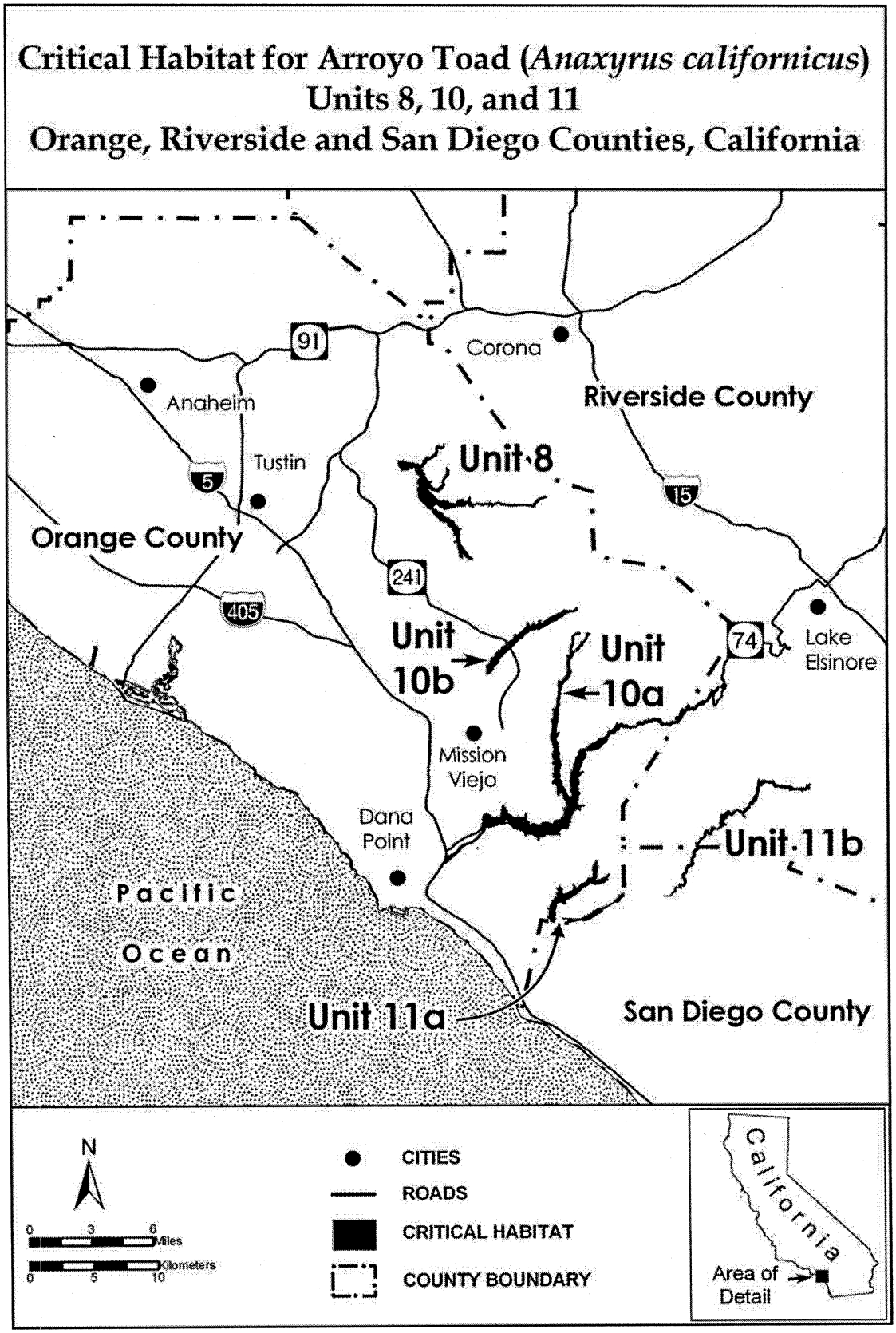
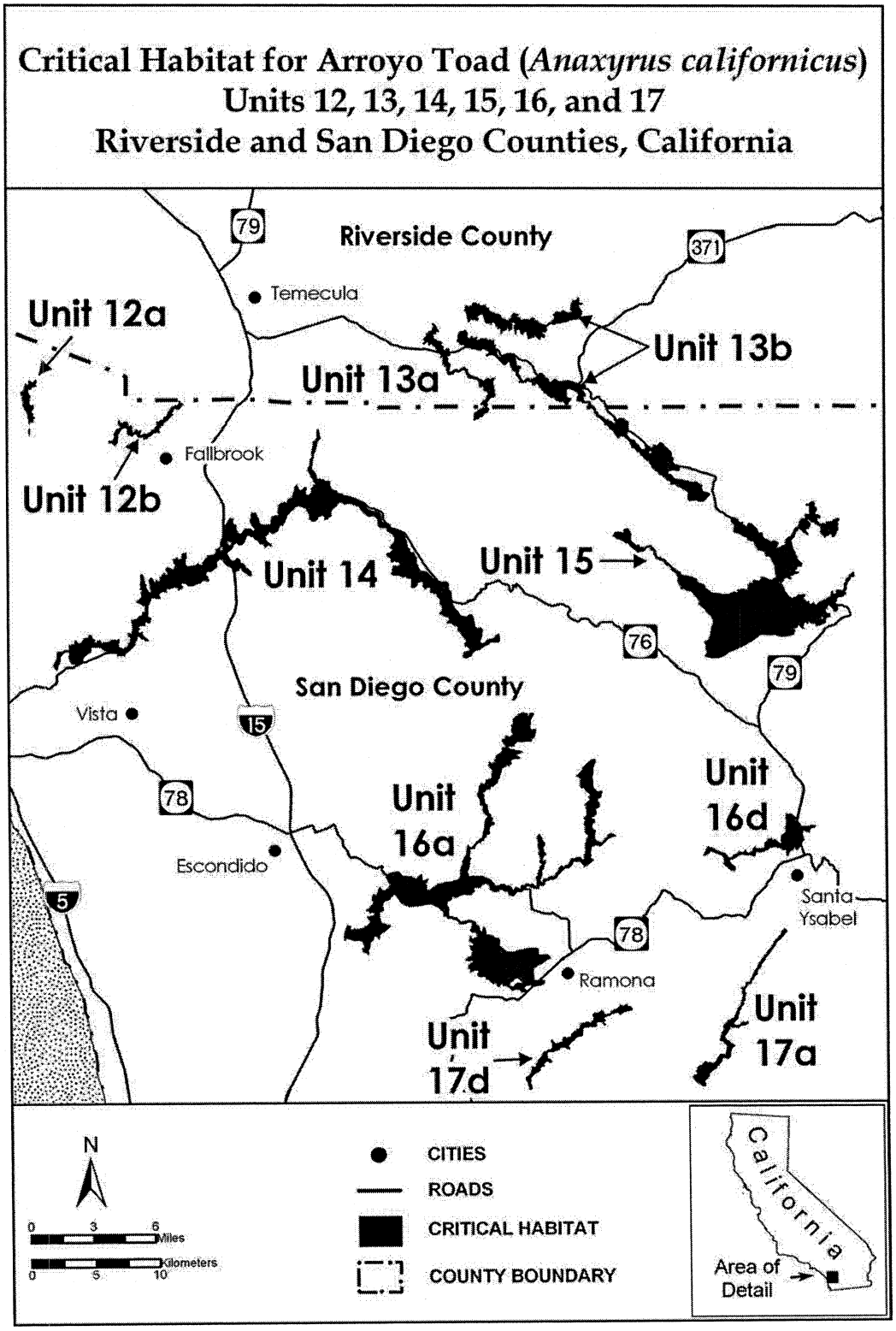


(13) * * *

(ii) *Note*: Map of Critical Habitat for Arroyo Toad (*Anaxyrus californicus*), Units 12, 13, 14, 15, 16, and 17, Riverside and San Diego Counties, California, follows:



Dated: June 15, 2010

Thomas L. Strickland,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2010–15399 Filed 6–28–10; 8:45 am]

BILLING CODE 4310–55–C

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

RIN 0648–AY34

Fisheries of the Exclusive Economic Zone Off Alaska; Fisheries of the Bering Sea Subarea

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

ACTION: Availability of a fishery management amendment; request for comments.

SUMMARY: The North Pacific Fishery Management Council has submitted Amendment 94 to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP). Amendment 94, if approved, would require the use of modified nonpelagic trawl gear to directed fish for flatfish in the Bering Sea subarea and would change the boundaries of the Northern Bering Sea Research Area to establish the Modified Gear Trawl Zone and to expand the Saint Matthew Island Habitat Conservation Area. The amendment also would make several minor technical changes to the FMP. This action is necessary to reduce the potential adverse effects of nonpelagic trawl gear on benthic habitat, to protect additional blue king crab habitat near St. Matthew Island, to provide for efficient flatfish harvest under changing ocean conditions, and to revise the FMP by removing errors and ensuring program descriptions are consistent with the Magnuson-Stevens Fishery Conservation and Management Act. This action is intended to promote the goals and objectives of the Magnuson-Stevens Fishery Conservation and Management Act, the FMP, and other applicable laws. Comments from the public are encouraged.

DATES: Written comments on the amendment must be received by 1700 hours, A.D.T., on August 30, 2010.

ADDRESSES: Send comments to Sue Salveson, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region, NMFS, Attn: Ellen Sebastian. You may submit comments, identified for this action by RIN 0648–AY34 (NOA), by any one of the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal eRulemaking Portal: *http://www.regulations.gov*.
- Mail: P.O. Box 21668, Juneau, AK 99802.
- Hand delivery to the Federal Building: 709 West 9th Street, Room 420A, Juneau, AK.
- Fax: 907–586–7557.

No comments will be posted for public viewing until after the comment period has closed. All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All Personal Identifying Information (e.g., name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

NMFS will accept anonymous comments (enter N/A in the required fields, if you wish to remain anonymous). You may submit attachments to electronic comments in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

Electronic copies of Amendment 94, maps of the action area, and the Environmental Assessment/Regulatory Impact Review/Initial Regulatory Flexibility Analysis (EA/RIR/IRFA) prepared for this action may be obtained from *http://www.regulations.gov* or from the Alaska Region website at *http://alaskafisheries.noaa.gov*.

FOR FURTHER INFORMATION CONTACT: Melanie Brown, 907–586–7228.

SUPPLEMENTARY INFORMATION: The Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) requires that the North Pacific Fishery Management Council (Council) submit any FMP amendment it prepares to the Secretary of Commerce (Secretary) for review and approval, disapproval, or partial approval. The Magnuson-Stevens Act also requires that the Secretary, upon receiving an FMP amendment, immediately publish a notice in the **Federal Register** that the FMP amendment is available for public review and comment. The responsibilities of the Secretary under the Magnuson-Stevens Act have been delegated to NMFS.

If approved, Amendment 94 would require modified nonpelagic trawl gear for directed fishing for flatfish in the Bering Sea subarea and would change the boundaries of the Northern Bering Sea Research Area (NBSRA) to establish the Modified Gear Trawl Zone (MGTZ) and to expand the Saint Matthew Island Habitat Conservation Area (SMIHCA). The amendment also would make several minor technical changes to the FMP.

In October 2009, the Council unanimously recommended Amendment 94. The consideration of modified nonpelagic trawl gear was initiated with the Council's development of Amendment 89 to the FMP (73 FR 43362, July 25, 2008). Amendment 89 established the Bering Sea Habitat Conservation Measures, closing portions of the Bering Sea subarea to nonpelagic trawling, and established the NBSRA and SMIHCA. The Council adopted Amendment 89 in June 2007, but pursued the development of modified nonpelagic trawl gear through subsequent coordination with NMFS and the nonpelagic trawl fishing industry. Based on research by the Alaska Fisheries Science Center (AFSC), nonpelagic trawl gear can be modified to raise the sweeps off the bottom to reduce potential adverse effects on benthic habitat and maintain effective catch rates for flatfish target species. The gear would be modified by adding elevating devices to the trawl sweeps, which contribute up to 90 percent of the trawl gear contact with the bottom. AFSC studies have shown the use of modified nonpelagic trawl gear reduces mortality and disturbance of sea whips, basket stars, sponges, and crab species. The modified nonpelagic trawl gear did not significantly reduce catch rates of flatfish species. In 2008 and 2009, the AFSC and NOAA Office of Law Enforcement worked with the fishing industry to test the modified nonpelagic trawl gear under normal fishing conditions and determined that this gear can be safely and effectively used.

Amendment 94 would reduce the NBSRA to establish the MGTZ and to increase the SMIHCA (Figure 1). The NBSRA and the SMIHCA are currently closed to fishing with nonpelagic trawl gear. The NBSRA was established to provide a location with very little to no nonpelagic trawling for the purpose of studying the effects of nonpelagic trawling on bottom habitat. The SMIHCA was established to provide protection to blue king crab habitat from the impacts from nonpelagic trawl gear. Figure 1 shows the current southern boundary of the NBSRA and how this boundary would change with the proposed revision to the SMIHCA eastern border and with establishing the MGTZ.

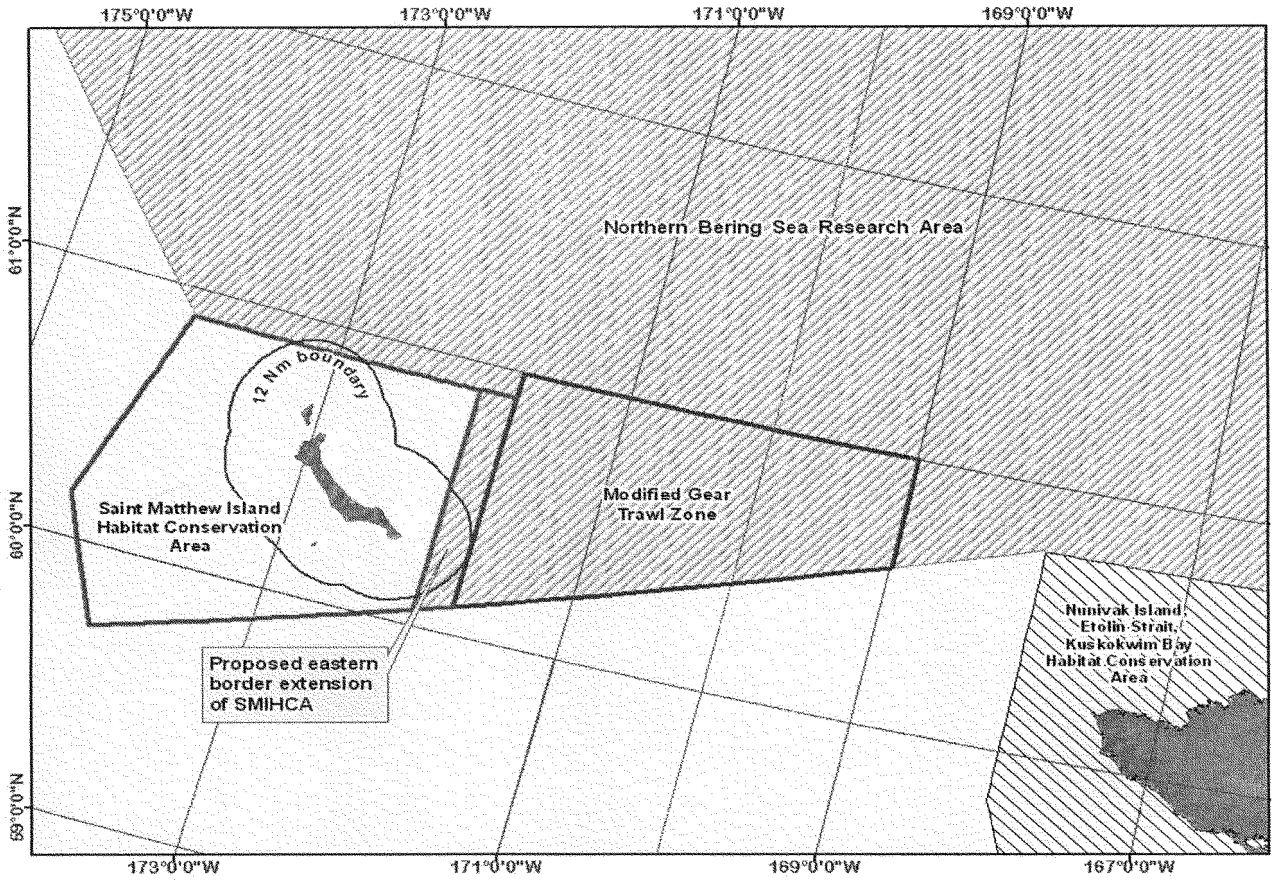


Figure 1. The Northern Bering Sea Research Area (NBSRA), Proposed Expansion of the Saint Matthew Island Habitat Conservation Area (SMIHCA) and the Proposed Modified Gear Trawl Zone (MGTZ). The current boundary of the NBSRA is shown by the area filled with the right-slanting lines.

The Council recommended moving the eastern boundary of the SMIHCA to the eastern edge of the 12–nautical mile (nm) Territorial Sea surrounding Saint Matthew Island. NMFS trawl annual surveys in 2007 through 2009 have found blue king crab in the area east of the SMIHCA out to the edge of the 12 nm Territorial Sea. Based on this information, the Council's Crab Plan Team recommended moving the eastern boundary of the SMIHCA to the eastern extent of the 12 nm Territorial Sea. Expanding the SMIHCA based on the best available information would ensure the SMIHCA meets the Council's intent to protect blue king crab habitat near Saint Matthew Island. The Council recommended that the eastern border of the SMIHCA meet the western border of the MGTZ so that no portion of the NBSRA would lie between these areas, simplifying management. This common boundary also would lie along a division in habitat types, with the habitat in the western side of the proposed MGTZ being more favorable to flatfish species and the habitat in the eastern side of the proposed SMIHCA being more favorable to crab species. More detailed information regarding the NMFS resource surveys and bottom habitats of the SMIHCA and the proposed MGTZ are in the EA/RIR/IRFA for this action (see **ADDRESSES**).

The northern boundary of the MGTZ follows a whole number latitude to facilitate mapping and management in the area. Based on public testimony in October 2009, the Council recommended the proposed eastern boundary of the MGTZ to allow for a buffer between an area of fishing and the Nunivak Island, Etolin Strait, and Kuskokwim Bay Habitat Conservation Area, an area important for subsistence activities. The AFSC surveys in the western portion of the MGTZ show primarily flatfish species with little Pacific halibut occurrence.

Nonpelagic trawling within the MGTZ would require the use of modified nonpelagic trawl gear, regardless of the target species. This requirement would reduce the potential adverse effects on bottom habitat from nonpelagic trawl gear used for flatfish and the Pacific cod fishing in the MGTZ. The opening of this area to fishing with modified nonpelagic trawl gear was an incentive to the fishing industry to continue the development of modified nonpelagic trawl gear after the Council's recommendation of Amendment 89.

The Council also recommended four minor technical changes to the FMP. The first would remove the description of the Crab and Halibut Protection Area, which was effectively superseded by the Nearshore Bristol Bay Trawl Closure at § 679.22(a)(9). The second change would renumber figures and correct cross-references to these figures in Section 3 of the FMP, which became confused with the adoption of figures under Amendment 89. The third change would revise the northern boundary of the NBSRA to match the southern

boundary of Statistical Area 400 at the Bering Strait. Area 514 of the Bering Sea subarea extends north to the southern boundary of Area 400 (Figure 2). The current northern boundary of the NBSRA leaves an area open to nonpelagic trawling near the Bering Strait due to the wrong coordinates being used for this boundary. The Council intended for the entire northern portion of the Bering Sea subarea to be part of the NBSRA, and this minor technical amendment would close this area of water currently open to nonpelagic trawling.

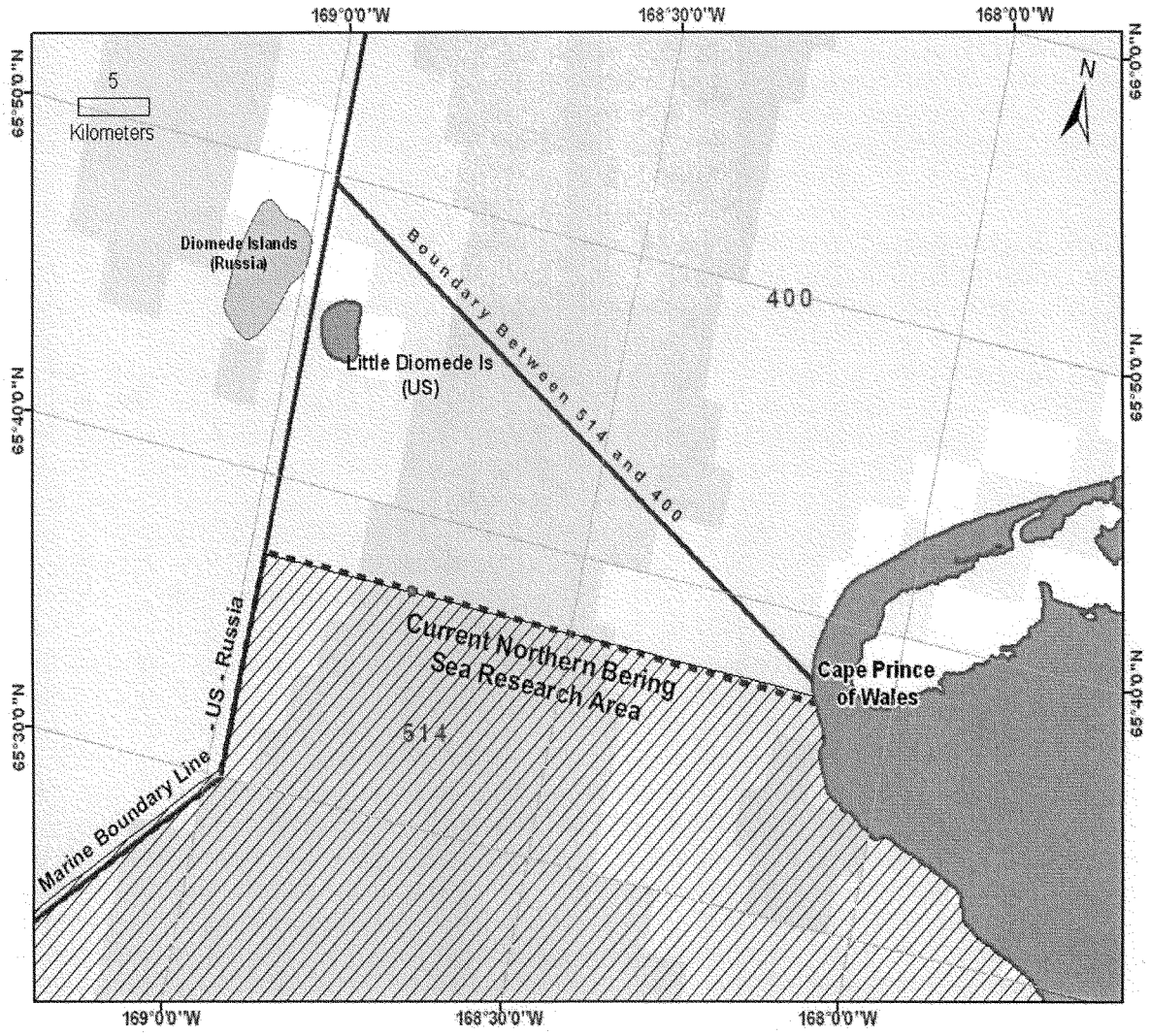


Figure 2. Northern boundary of the Northern Bering Sea Research Area and boundary between Statistical Areas 514 and 400. The area between the NBSRA boundary and Statistical Areas 514 and 400 boundaries is currently open to nonpelagic trawl fishing, but would be closed with Amendment 94.

The fourth minor technical amendment would replace outdated language describing the structure of the Community Development Quota Program (CDQ), as stated in the reauthorized Magnuson-Stevens Act of 2006 (see section 305(i) of the Magnuson-Stevens Act). The 2006 amendments to the Magnuson-Stevens Act included changes in the way allocations to the CDQ groups are established and adjusted, listed the eligible communities and the groups through which they can participate in the CDQ program, and increased many of the groundfish allocations to the CDQ Program to 10.7 percent of the total allowable catch for each species. Amendment 94 would ensure that the FMP accurately describes these CDQ program changes from the Magnuson-Stevens Act.

Public Comments

NMFS is soliciting public comments on the proposed FMP amendment through August 30, 2010. A proposed rule that would implement Amendment 94 will be published in the **Federal Register** for public comment at a later date, following NMFS' evaluation pursuant to the Magnuson-Stevens Act. Public comments on the proposed rule must be received by the end of the comment period on Amendment 94 in

order to be considered in the approval/disapproval decision on the amendment. All comments received on the amendment by the end of the comment period, whether specifically directed to the amendment or to the proposed rule, will be considered in the approval/disapproval decision. Comments received after that date will not be considered in the approval/disapproval decision on the amendment. To be considered, comments must be received-not just postmarked or otherwise transmitted-by 1700 hours, A.D.T., on the last day of the comment period (See DATES and ADDRESSES).

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

Dated: June 23, 2010.

Carrie Selberg,

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

[FR Doc. 2010–15767 Filed 6–28–10; 8:45 am]

BILLING CODE 3510–22–S

Notices

Federal Register

Vol. 75, No. 124

Tuesday, June 29, 2010

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

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

June 23, 2010.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for *AgBeverly_OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8958.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

National Institute of Food and Agriculture

Title: NIFA Current Research Information System (CRIS).

OMB Control Number: 0524–0042.

Summary of Collection: The United States Department of Agriculture (USDA), National Institute of Food and Agriculture (NIFA) administers several competitive, peer-reviewed research, education and extension programs, under which awards of a high-priority are made. These programs are authorized pursuant to the authorities contained in the National Agricultural Research, Extension, and Teaching Policy Act of 1977, as amended (7 U.S.C. 3101); the Smith-Lever Act; and other legislative authorities. The Current Research Information System (CRIS) is USDA's documentation and reporting system for ongoing research and education activities in agriculture, food science, human nutrition, and forestry. CRIS operates administratively under NIFA, but is a cooperative endeavor whereby information is collected on a project-by-project basis from many participant organizations, both federal and non-federal. Information is received from USDA agencies, State Agricultural Experiment Stations, the state land-grant colleges and universities, the institutions of 1890, state schools of forestry, cooperating schools of veterinary medicine, USDA grant recipients, and other cooperating institutions. The information is collected primarily via the Internet using CRIS Web forms.

Need and Use of the Information: The collected information is necessary in order to provide descriptive information regarding individual research activities and integrated activities, to document expenditures and staff support for the activities, and to monitor the progress and impact of such activities. The information obtained through the collection process for CRIS furnishes unique data that is not available from any other source. Interruption in the collection process, or failure to collect this information, would severely compromise one of NIFA' primary functions stated in the agency's strategic plan of "providing program leadership to identify, develop, and manage programs to support university-based and other institutional research."

Description of Respondents: State, Local or Tribal Government; Business or other for-profit; Not-for profit institutions; Federal Government.

Number of Respondents: 15,199.

Frequency of Responses: Reporting: Other (Varies by form).

Total Burden Hours: 74,097.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2010–15690 Filed 6–28–10; 8:45 am]

BILLING CODE 3410–09–P

DEPARTMENT OF AGRICULTURE

Rural Housing Service

Notice of Request for Extension of a Currently Approved Information Collection

AGENCY: Rural Housing Service (RHS).

ACTION: Proposed collection; comments requested.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Rural Housing Service's intention to request an extension for a currently approved information collection in support of the Rural Community Development Initiative (RCDI) grant program.

DATES: Comments on this notice must be received by August 30, 2010 to be assured of consideration.

FOR FURTHER INFORMATION CONTACT: Susan Woolard, Loan Specialist, Community Programs Guaranteed Loan and Processing and Servicing Division, RHS, USDA, 1400 Independence Ave., SW., Mail Stop 0787, Washington, DC 20250–0787, telephone (202) 720–1506, e-mail *susan.woolard@wdc.usda.gov.*

SUPPLEMENTARY INFORMATION:

Title: Notice of Funds Availability (NOFA) Inviting Applications for the Rural Community Development Initiative.

OMB Number: 0575–0180.

Expiration Date of Approval: November 30, 2010.

Type of Request: Extension of a currently approved information collection.

Abstract: RHS, an Agency within the USDA Rural Development mission area, will administer the RCDI grant program through their Community Facilities Division. The intent of the RCDI grant program is to develop the capacity and ability of rural area recipients to

undertake projects through a program of technical assistance provided by qualified intermediary organizations. The eligible recipients are nonprofit organizations, low-income rural communities, or federally recognized Indian tribes. The intermediary may be a qualified private, nonprofit, or public (including tribal) organization. The intermediary is the applicant. The intermediary must have been organized a minimum of 3 years at the time of application. The intermediary will be required to provide matching funds, in the form of cash or committed funding, in an amount at least equal to the RCDI grant.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 1.24 hours per response.

Respondents: Intermediaries and recipients.

Estimated Number of Respondents: 1,260.

Estimated Number of Responses per Respondent: 2.67.

Estimated Number of Responses: 3,360.

Estimated Total Annual Burden on Respondents: 4,170.

Copies of this information collection can be obtained from Jeanne Jacobs, Regulations and Paperwork Management Branch, at (202) 692–0040.

Comments

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

Comments may be sent to Jeanne Jacobs, Regulations and Paperwork Management Branch, U.S. Department of Agriculture, Rural Development, STOP 0742, 1400 Independence Ave., SW., Washington, DC 20250. All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Tammye H. Treviño,

Administrator, Rural Housing Service.

[FR Doc. 2010–15684 Filed 6–28–10; 8:45 am]

BILLING CODE P

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

[Docket No. FSIS–2010–0015]

Notice of Request for Revision of a Currently Approved Information Collection (Pathogen Reduction/HACCP)

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 and the Office of Management and Budget (OMB) regulations, this notice announces the Food Safety and Inspection Service's (FSIS) intention to request a revision of an approved information collection regarding pathogen reduction and Hazard Analysis and Critical Control Point (HACCP) Systems requirements because OMB approval will expire on December 31, 2010, and to include information on the use of video recordkeeping.

DATES: Comments on this notice must be received on or before August 30, 2010.

ADDRESSES: FSIS invites interested persons to submit comments on this notice. Comments may be submitted by either of the following methods:

- *Federal eRulemaking Portal:* This Web site provides the ability to type short comments directly into the comment field on this Web page or attach a file for lengthier comments. Go to *http://www.regulations.gov.* Follow the on-line instructions at that site for submitting comments.
- *Mail, including floppy disks or CD–ROMs, and hand- or courier-delivered items:* Send to Docket Clerk, U.S. Department of Agriculture, Food Safety and Inspection Service, Room 2–2175 George Washington Carver Center, 5601 Sunnyside Avenue, Beltsville, MD 20705.

Instructions: All items submitted by mail or electronic mail must include the Agency name and docket number FSIS–2010–0015. Comments received in response to this docket will be made available for public inspection and posted without change, including any personal information, to *http://www.regulations.gov.*

Docket: For access to background documents or comments received, go to the FSIS Docket Room at the address listed above between 8:30 a.m. and 4:30 p.m., Monday through Friday.

For Additional Information: Contact John O'Connell, Paperwork Reduction Act Coordinator, Food Safety and Inspection Service, USDA, 1400 Independence Avenue, SW., Room 6065 South Building, Washington, DC 20250, (202) 720–0345.

SUPPLEMENTARY INFORMATION:

Title: Pathogen Reduction/HACCP Systems.

OMB Number: 0583–0103.

Expiration Date of Approval: 12/31/2010.

Type of Request: Revision of a currently approved information collection.

Abstract: FSIS has been delegated the authority to exercise the functions of the Secretary as specified in the Federal Meat Inspection Act (FMIA) (21 U.S.C. 601, *et seq.*) and the Poultry Products Inspection Act (PPIA) (21 U.S.C. 451, *et seq.*). These statutes provide that FSIS is to protect the public by verifying that meat and poultry products are safe, wholesome, not adulterated, and properly labeled and packaged.

FSIS is planning to request a revision of an approved information collection addressing paperwork and recordkeeping requirements regarding Pathogen Reduction and HACCP Systems because OMB approval will expire on December 31, 2010, and to include the use of video recordkeeping. The Agency is revising the Pathogen Reduction/HACCP systems information collection based on its most recent establishment data. In addition, FSIS is adding information concerning the use of video recordkeeping for HACCP records and Sanitation Standard Operating Systems (SOPs) records. Approximately one percent of meat and poultry establishments are using video records, which accounts for about one percent of the burden hours in this information collection.

FSIS has established requirements applicable to meat and poultry establishments designed to reduce the occurrence and numbers of pathogenic microorganisms on meat and poultry products, reduce the incidence of foodborne illness associated with the consumption of those products, and provide a framework for modernization of the meat and poultry inspection system. The regulations (1) Require that each establishment develop, implement, and revise, as needed, written Sanitation Standard Operating Procedures (Sanitation SOPs) (9 CFR

Part 416); (2) require regular microbial testing for generic *E. coli* by slaughter establishments to verify the adequacy of the establishment's process controls for the prevention and removal of fecal contamination and associated bacteria (9 CFR 310.25(a) and 381.94(a)); and (3) require that all meat and poultry establishments develop and implement a system of preventive controls designed to improve the safety of their products, known as HACCP (9 CFR part 417).

Establishments may have programs that are prerequisite to HACCP that are designed to provide the basic environmental and operating conditions necessary for the production of safe, wholesome food. Because of its prerequisite programs an establishment may decide that a food safety hazard is not reasonably likely to occur in its operations. The establishment would need to document this determination in its Hazard Analysis and include the procedures it employs to ensure that the program is working and that the hazard is not likely to occur (9 CFR 417.5(a)(1)).

FSIS has made the estimates below based upon an information collection assessment. As noted above, approximately one percent of meat and poultry establishments are using video records, which accounts for about one percent of the burden hours below.

Estimate of Burden: FSIS estimates that it will take respondents an average of 858 hours per annum to comply with the Pathogen Reduction and HACCP Systems information collection.

Respondents: Meat and poultry establishments.

Estimated No. of Respondents: 7,298.

Estimated No. of Annual Responses per Respondent: 7,139.

Estimated Total Annual Burden on Respondents: 6,261,327 hours.

Copies of this information collection assessment can be obtained from John O'Connell, Paperwork Reduction Act Coordinator, Food Safety and Inspection Service, USDA, 1400 Independence, SW., Room 6065, South Building, Washington, DC 20250, (202)720–0345.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of FSIS's functions, including whether the information will have practical utility; (b) the accuracy of FSIS's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques, or other forms of information technology. Comments may be sent to both FSIS, at the addresses provided above, and the Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20253.

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

USDA Nondiscrimination Statement

The U.S. Department of Agriculture (USDA) prohibits discrimination in all its programs and activities on the basis of race, color, national origin, gender, religion, age, disability, political beliefs, sexual orientation, and marital or family status. (Not all prohibited bases apply to all programs.) Persons with disabilities who require alternative means for communication of program information (Braille, large print, audiotape, etc.) should contact USDA's Target Center at 202–720–2600 (voice and TTY).

To file a written complaint of discrimination, write USDA, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue, SW., Washington, DC 20250–9410 or call 202–720–5964 (voice and TTY). USDA is an equal opportunity provider and employer.

Additional Public Notification

Public awareness of all segments of rulemaking and policy development is important. Consequently, in an effort to ensure that the public and in particular minorities, women, and persons with disabilities, are aware of this notice, FSIS will announce it on-line through the FSIS Web page located at *http://www.fsis.usda.gov/regulations/2010_Notices_Index/index.asp.*

FSIS also will make copies of this **Federal Register** publication available through the *FSIS Constituent Update,* which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, and other types of information that could affect or would be of interest to our constituents and stakeholders. The *Update* is communicated via Listserv, a free e-mail subscription service consisting of industry, trade, and farm groups, consumer interest groups, allied health professionals, scientific professionals, and other individuals who have requested to be included. The *Update* also is available on the FSIS Web page. Through Listserv and the Web page, FSIS is able to provide information to a much broader, more diverse audience.

In addition, FSIS offers an e-mail subscription service which provides automatic and customized access to selected food safety news and information. This service is available at *http://www.fsis.usda.gov/news_and_events/email_subscription/.* Options range from recalls to export information to regulations, directives and notices. Customers can add or delete subscriptions themselves, and have the option to password protect their accounts.

Done at Washington, DC, on June 23, 2010.

Alfred V. Almanza,

Administrator.

[FR Doc. 2010–15743 Filed 6–28–10; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS-2010-0054]

Notice of Revision and Request for Extension of Approval of an Information Collection; Animal Disease Traceability; Tribal Nations Using Systems for Location Identification

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Revision and extension of approval of an information collection; comment request.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to revise an information collection for Tribal Nations using systems for location identification for the animal disease traceability framework and to request extension of approval of the information collection.

DATES: We will consider all comments that we receive on or before August 30, 2010.

ADDRESSES: You may submit comments by either of the following methods:

- Federal eRulemaking Portal: Go to (*http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2010-0054*) to submit or view comments and to view supporting and related materials available electronically.
- Postal Mail/Commercial Delivery: Please send one copy of your comment to Docket No. APHIS-2010-0054, Regulatory Analysis and Development, PPD, APHIS, Station 3A-03.8, 4700 River Road Unit 118, Riverdale, MD 20737-1238. Please state that your

comment refers to Docket No. APHIS-2010-0054.

Reading Room: You may read any comments that we receive on this docket in our reading room. The reading room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690-2817 before coming.

Other Information: Additional information about APHIS and its programs is available on the Internet at (*http://www.aphis.usda.gov*).

FOR FURTHER INFORMATION CONTACT: For information on Tribal Nations using location identification systems for the animal disease traceability framework, contact Mr. Vince Chapman, Program Analyst, Traceability Team, VS, APHIS, 4700 River Road Unit 200, Riverdale, MD 20737; (301) 734-0739. For copies of more detailed information on the information collection, contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851-2908.

SUPPLEMENTARY INFORMATION:

Title: Animal Disease Traceability; Tribal Nations Using Systems for Location Identification.

OMB Number: 0579-0327.

Type of Request: Revision and extension of approval of an information collection.

Abstract: As part of its ongoing efforts to safeguard animal health, the U.S. Department of Agriculture (USDA) is developing a coordinated framework for animal disease traceability in the United States. Traceability will help document the movement history of an animal throughout its life, including during an emergency response or for ongoing animal disease programs. Under this new direction, States and Tribal Nations will help establish the ability to trace animals moving interstate back to their State of origin.

The Animal and Plant Health Inspection Service, USDA, has made systems for animal disease traceability available to Tribal Nations for managing the issuance of unique location identification numbers, including the Standardized Premises Location System and a Tribal Premises Location System. Participating Tribal Nations can designate the premises location system they prefer to use by completing and submitting Veterinary Services Form 1-63, Tribal Location Identification System Implementation Request, to APHIS for access to their system of choice.

We are asking the Office of Management and Budget (OMB) to approve our use of this information collection activity for an additional 3 years.

We are revising the title of the current information collection approved under OMB number 0579-0327 from "National Animal Identification System; Tribal Participants in Premises Registration" to "Animal Disease Traceability; Tribal Nations Using Systems for Location Identification."

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; e.g., permitting electronic submission of responses.

Estimate of burden: The public reporting burden for this collection of information is estimated to average 0.62 hours per response.

Respondents: Tribal organizations that participate or will participate in location identification for animal disease traceability.

Estimated annual number of respondents: 25.

Estimated annual number of responses per respondent: 2.

Estimated annual number of responses: 50.

Estimated total annual burden on respondents: 31 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

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

Done in Washington, DC, this 23rd day of June 2010.

Kevin Shea

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2010–15731 Filed 6–28ndash;10; 7:16 am]

BILLING CODE 3410–34–S

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

[Docket No. 2010–0011]

Exemption for Retail Store Operations

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Notice of adjusted dollar limitations.

SUMMARY: The Food Safety and Inspection Service (FSIS) is announcing the dollar limitations on the amount of meat and meat food products, poultry and poultry products that a retail store can sell to hotels, restaurants, and similar institutions without disqualifying itself for exemption from Federal inspection requirements. In accordance with FSIS's regulations, for calendar year 2010, the dollar limitation for meat and meat food products remains at $60,200 but for poultry products is being increased from $49,400 to $50,200. FSIS is retaining or changing the dollar limitations from calendar year 2009 based on price changes for these products evidenced by the Consumer Price Index.

DATES: *Effective Date:* This notice is effective June 29, 2010.

FOR FURTHER INFORMATION CONTACT: Contact John O'Connell, Policy Issuances Division, Office of Policy and Program Development, FSIS, U.S. Department of Agriculture, Room 6083 South Building, 1400 Independence Avenue, SW., Washington, DC 20250–3700; telephone (202) 720–0345.

SUPPLEMENTARY INFORMATION:

Background

The Federal Meat Inspection Act (21 U.S.C. 601 *et seq.*) and the Poultry Products Inspection Act (21 U.S.C. 451 *et seq.*) provide a comprehensive statutory framework to ensure that meat, meat food products, poultry, and poultry products prepared for commerce are wholesome, are not adulterated, and are properly labeled and packaged. Statutory provisions requiring inspection of the preparation or processing of meat, meat food, poultry, and poultry products do not apply to the types of operations traditionally and usually conducted at retail stores and

restaurants when those operations are conducted at any retail store or restaurant or similar retail-type establishment for sale in normal retail quantities (21 U.S.C. 661(c)(2) and 454(c)(2)). FSIS's regulations (9 CFR 303.1(d) and 381.10(d)) elaborate on the conditions under which requirements for inspection do not apply to retail operations involving the preparation or processing of meat, meat food, poultry, and poultry products.

Sales to Hotels, Restaurants, and Similar Institutions

Under these regulations, sales to hotels, restaurants, and similar institutions (other than household consumers) disqualify a store for exemption if the product sales exceed either of two maximum limits: 25 percent of the dollar value of total product sales or the calendar year dollar limitation set by the Administrator. The dollar limitation is adjusted automatically during the first quarter of the year if the Consumer Price Index (CPI), published by the Bureau of Labor Statistics, shows an increase or decrease of more than $500 in the price of the same volume of product for the previous year. FSIS publishes a notice of the adjusted dollar limitations in the **Federal Register**. (*See* 9 CFR 303.1(d)(2)(iii)(*b*) and 381.10(d)(2)(iii)(*b*)).

The CPI for 2009 reveals an annual average price decrease for meat and meat food products at 0.6 percent and an annual average price increase for poultry products at 1.7 percent. When rounded to the nearest $100, the price for meat and meat food products decreased by $400 and the price for poultry products increased by $800. Because the price of meat and meat food products did not decrease by more than $500, and because the price of poultry products increased by more than $500, FSIS is retaining the dollar limitation on sales to hotels, restaurants, and similar institutions at $60,200 for meat and meat food products and is increasing it to $49,400 for poultry products for calendar year 2010, in accordance with 9 CFR 303.1(d)(2)(iii)(*b*) and 381.10 (d)(2)(iii)(*b*).

USDA Nondiscrimination Statement

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Additional Public Notification

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Done at Washington, DC, on June 23, 2010.

Alfred V. Almanza,

Administrator.

[FR Doc. 2010–15742 Filed 6–28–10; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF AGRICULTURE

Forest Service

Rogue-Umpqua Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Rogue-Umpqua Resource Advisory Committee will meet in Roseburg, Oregon. The committee is meeting as authorized under the Secure Rural Schools and Community Self-Determination Act (Pub. L. 110–343) and in compliance with the Federal Advisory Committee Act. The purpose of the meeting is review and recommend projects for funding in fiscal year 2011.

DATES: The meeting will be held Tuesday, July 13, 2011, 9:30 a.m. to 5 p.m., and on Wednesday, July 14, 2011, 8 a.m. to 3:45 p.m.

ADDRESSES: The meeting will be held at 2900 NW Stewart Parkway, Roseburg, OR, in the Umpqua National Forest Supervisor's Office. Written comments should be sent to 2900 NW. Stewart Parkway, Roseburg, OR 97471. Comments may also be sent via e-mail to *ccaplan@fs.fed.us,* or via facsimile to 541–957–3405.

All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at the Umpqua National Forest Supervisor's Office. Visitors are encouraged to call ahead to 541–672–6601 to facilitate entry into the building.

FOR FURTHER INFORMATION CONTACT: Cheryl Caplan, Public Affairs Officer, Umpqua National Forest, 541–957–3270, *ccaplan@fs.fed.us.* Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The meeting is open to the public. On Tuesday, the following business will be conducted: 9:45 a.m.—Election of RAC Chair, 10:15 a.m.—Status Update on FY09 and FY10 Title II Projects, 11 a.m.—Public Forum, 11:30 a.m.—Review of Douglas County Projects, 4 p.m.—Voting on Douglas County Projects, and 5 p.m.—Adjourn.

On Wednesday, the following business will be conducted: 8 a.m.—Meeting Opens, 8:10 a.m.—Public Forum, 8:40 a.m.—Review of Lane County Projects, 9:40 a.m.—Voting on Lane County Projects, 10:45 a.m.—

Review of Klamath County Projects, 11:35 a.m.—Voting on Klamath County Projects, 1 p.m.—Review of Jackson County Projects, 2:45 p.m.—Voting on Jackson County Projects, 3:15—Critique and Monitoring Discussion, 3:45 p.m.—Adjourn.

Persons who wish to bring related matters to the attention of the Committee may file written statements with the Committee staff before or after the meeting. Public input sessions will be provided and individuals who made written requests by July 13, 2010, will have the opportunity to address the Committee at those sessions.

Dated: June 21, 2010.

Clifford J. Dils,

Umpqua National Forest Supervisor.

[FR Doc. 2010–15611 Filed 6–28–10; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF COMMERCE

Patent and Trademark Office

Trademark Trial and Appeal Board (TTAB) Actions

ACTION: Proposed collection; comment request.

SUMMARY: The United States Patent and Trademark Office (USPTO), as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on the revision of a currently approved collection, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

DATES: Written comments must be submitted on or before August 30, 2010.

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

- *E-mail: InformationCollection@uspto.gov.* Include "0651–0040 Trademark Trial and Appeal Board (TTAB) Actions comment" in the subject line of the message.
- *Fax:* 571–273–0112, marked to the attention of Susan K. Fawcett.
- *Mail:* Susan K. Fawcett, Records Officer, Office of the Chief Information Officer, U.S. Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450.
- *Federal e-Rulemaking Portal: http://www.regulations.gov*

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to the attention of LaToya Brown, Technical Quality Review Analyst, Trademark Trial and Appeal Board, U.S. Patent and Trademark Office (USPTO), P.O. Box 1450, Alexandria, VA 22313–1450; by telephone 571–272–4283; or by e-mail at *LaToya.Brown@uspto.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This collection of information is required by the Trademark Act Sections 13, 14, and 20, 15 U.S.C. 1063, 1064, and 1070, respectively. Under the Trademark Act, any individual or entity that adopts a trademark or service mark to identify its goods or services may apply to federally register its mark. Section 14 of the Trademark Act allows individuals and entities to file a petition to cancel a registration of a mark, while Section 13 allows individuals and entities who believe that they would be damaged by the registration of a mark to file an opposition, or an extension of time to file an opposition, to the registration of a mark. Section 20 of the Trademark Act allows individuals and entities to file an appeal from any final decision of the Trademark Examining Attorney assigned to review an application for registration of a mark.

The USPTO administers the Trademark Act pursuant to 37 CFR part 2, which contains the various rules that govern the filing of petitions to cancel the registrations of marks, notices of opposition to the registration of a mark, extensions of time to file an opposition, appeals, and other papers filed in connection with inter partes and ex partes proceedings. These petitions, notices, extensions, and additional papers are filed with the Trademark Trial and Appeal Board (TTAB), an administrative tribunal empowered to determine the right to register and subsequently determine the validity of a trademark.

The information in this collection can be submitted in paper format or electronically through the Electronic System for Trademark Trials and Appeals (ESTTA). There are no paper forms associated with this collection. However, the TTAB has suggested formats for the Petition to Cancel and the Notice of Opposition that individuals and entities can use when submitting these petitions and notices to the TTAB. These are not forms and, as such, do not have form numbers. If applicants or entities wish to submit the petitions, notices, extensions, and additional papers in inter partes and ex parte cases electronically, they must use the forms provided through ESTTA. Oppositions to extension of protection under the Madrid Protocol, as well as requests for extensions to oppose, must be filed electronically through ESTTA. This collection contains two suggested formats and six electronic forms.

The additional papers filed in inter partes and ex parte proceedings can be filed in paper or electronically. Although the number of paper filings is decreasing in favor of electronic filings, there still are a small percentage of paper submissions.

The information in this collection is a matter of public record, and is used by the public for a variety of private business purposes related to establishing and enforcing trademark rights. This information is important to the public, as both common law trademark owners and federal trademark registrants must actively protect their own rights.

II. Method of Collection

By mail, hand delivery, or electronically through ESTTA when a party files a petition to cancel a trademark registration, an opposition to the registration of a trademark, a request to extend the time to file an opposition, a notice of appeals, or additional papers for inter partes and ex parte proceedings with the USPTO. However, notices of opposition and extensions of time to file notices of opposition against the extensions of protection under the Madrid Protocol must be filed electronically through ESTTA. Only notices of appeal for ex parte appeals can be submitted by facsimile, in accordance with 37 CFR 2.195(d)(3).

III. Data

OMB Number: 0651–0040.

Form Number(s): PTO 2120, 2151, 2153, 2188, 2189, and 2190.

Type of Review: Revision of a currently approved collection.

Affected Public: Business or other for profit; not-for-profit institutions.

Estimated Number of Respondents: 80,025 responses per year.

Estimated Time per Response: The USPTO estimates that it takes the public approximately 10 to 45 minutes (0.17 to 0.75 hours) to complete this information, depending on the request. This includes the time to gather the necessary information, prepare the petitions, notices, extensions, or additional papers, and submit the completed request to the USPTO. The USPTO believes that it will take the same amount of time (and possibly less time) to gather the necessary information, prepare the submission, and submit it electronically to the TTAB as it does to submit it in paper form.

Estimated Total Annual Respondent Burden Hours: 17,815 hours per year.

Estimated Total Annual Respondent Cost Burden: $3,794,595. The USPTO

estimates that it will take a 50/50 level of effort by attorneys and paraprofessional/paralegals to complete the requirements in this collection. The professional hourly rate for attorneys in private firms is $325, while the hourly rate for paraprofessional/paralegals in private firms is $100. After calculating the average of these rates, the USPTO believes that the hourly rate for completing the petitions, notices, requests, and other papers will be $213. Using this hourly rate, the USPTO estimates that the total respondent cost burden for this collection is $3,794,595 per year.

Item	Estimated time for response	Estimated annual responses	Estimated annual burden hours
Petition to Cancel	45 minutes	125	94
Electronic Petition to Cancel	45 minutes	1,300	975
Notice of Opposition	45 minutes	350	263
Electronic Notice of Opposition	45 minutes	5,000	3,750
Extension of Time to File an Opposition	10 minutes	150	26
Electronic Request for Extension of Time to File an Opposition	10 minutes	17,000	2,890
Papers in Inter Partes Cases	10 minutes	6,000	1,020
• Answers			
• Amendments to Pleadings			
• Amendment of Application or Registration During Proceeding			
• Motions (such as consent motions, motions to extend, motions to suspend, etc.)			
• Evidence			
• Briefs			
• Surrender of Registration			
• Abandonment of Application			
• Documents Related to Concurrent Use Applications			
• Notice of Intent to Appeal a TTAB decision			
Electronic Papers in Inter Partes Cases	10 minutes	39,500	6,715
• Answers			
• Amendments to Pleadings			
• Amendment of Application or Registration During Proceeding			
• Motions (such as consent motions, motions to extend, motions to suspend, etc.)			
• Evidence			
• Briefs			
• Surrender of Registration			
• Abandonment of Application			
• Documents Related to Concurrent Use Applications			
• Notice of Intent to Appeal a TTAB decision			
Notice of Appeal	15 minutes	500	125
Electronic Notice of Appeal	15 minutes	3,000	750
Miscellaneous Ex Parte Papers	10 minutes	4,700	799
Electronic Miscellaneous Ex Parte Papers	10 minutes	2,400	408
Totals		80,025	17,815

Estimated Total Annual Non-Hour Respondent Cost Burden: $2,417,326.

There are no capital start-up or maintenance costs associated with this information collection. There are, however, postage and recordkeeping costs, as well as filing fees, associated with this information collection.

The petitions to cancel, the notices of opposition and appeal, the extensions of time to file an opposition, and the additional papers filed in inter partes and ex partes cases may be submitted to the USPTO or served on other parties by Express or first-class mail through the United States Postal Service. These papers can also be hand delivered to the TTAB. The USPTO estimates that 6% of the petitions, notices, extensions, and additional inter partes and ex parte papers that are filed in paper will be submitted using Express Mail. The USPTO estimates that the average submission will weigh 2 ounces and that the respondent will be mailing the original to the TTAB and serving copies on the other parties involved in the proceedings. The USPTO estimates that it costs an average of $18.54 to send the petitions, notices, extensions, appeals, and additional papers by Express Mail to the TTAB. To account for the service of papers on other parties, the USPTO is adding an additional 20% of the postage rate ($3.71) for an estimated cost of $22.25. The USPTO estimates that up to 710 submissions per year may be mailed to the USPTO and other parties by Express Mail, for a postage cost of $15,798.

The USPTO believes the remaining petitions to cancel, the notices of opposition and appeal, the extensions of time to file an opposition, and the additional papers filed in inter partes and ex parte proceedings that are filed in paper (roughly 94%) will be sent by first-class mail. The USPTO estimates that the average submission will weigh 2 ounces and that the respondent will mail the original to the TTAB and serve copies on the other parties involved in the proceedings. The USPTO estimates that it costs 61 cents to mail the petitions, notices, extensions, appeals, and additional papers to the TTAB. To account for the service of papers on other parties, the USPTO is adding an additional 80% of the postage rate (49 cents) for an estimated cost of $1.10. The USPTO estimates that up to 11,116 submissions per year may be mailed to the USPTO and other parties by first-class mail, for a postage cost of $12,228.

Therefore, the USPTO estimates that the total postage cost for this collection is $28,026 per year.

In addition, the USPTO also strongly advises applicants who file their

petitions to cancel, notices of opposition, appeals, extensions of time to file an opposition, and additional papers for ex parte and inter partes cases electronically to keep a copy of the acknowledgment receipt as clear evidence that the file was received by the USPTO on the date noted. The USPTO estimates that it takes 5 seconds (0.001 hours) to print the acknowledgment receipt and that 68,200 petitions, notices, extensions, and other papers will be submitted electronically, for a burden of 68 hours. Using the paraprofessional rate of $100 per hour, the USPTO estimates that the total recordkeeping cost for this collection will be $6,800 per year.

There is also annual nonhour cost burden in the way of filing fees associated with this collection. The petitions to cancel and the notices of opposition and appeal have filing fees. There are no filing fees for the extensions of time to file an opposition. The additional papers that are filed in ex parte and inter partes proceedings do not have their own specific fees, so they do not add new fees to the collection. The filing fees for the petitions to cancel, notices of opposition, and notices of appeal are per class of goods and services in the subject application or registration; therefore the total filing fees can vary depending on the number of classes. The total filing fees of $2,382,500 shown here are the minimum fees associated with this information collection.

Item	Responses (a)	Filing fee ($) (b)	Total non-hour cost burden (a × b) (c)
Petition to Cancel	125	$300.00	$37,500.00
Electronic Petition to Cancel	1,300	300.00	390,000.00
Notice of Opposition	350	300.00	105,000.00
Electronic Notice of Opposition	5,000	300.00	1,500,000.00
Extension of Time to File an Opposition	150	0.00	0.00
Electronic Request for Extension of Time to File an Opposition	17,000	0.00	0.00
Papers in Inter Partes Cases	6,000	0.00	0.00
• Answers			
• Amendments to Pleadings			
• Amendment of Application or Registration During Proceeding			
• Motions (such as consent motions, motions to extend, motions to suspend, etc.)			
• Evidence			
• Briefs			
• Surrender of Registration			
• Abandonment of Application			
• Documents Related to Concurrent Use Applications			
• Notice of Intent to Appeal a TTAB decision			
Electronic Papers in Inter Partes Cases	39,500	0.00	0.00
• Answers			
• Amendments to Pleadings			
• Amendment of Application or Registration During Proceeding			
• Motions (such as consent motions, motions to extend, motions to suspend, etc.)			
• Evidence			
• Briefs			
• Surrender of Registration			
• Abandonment of Application			
• Documents Related to Concurrent Use Applications			
• Notice of Intent to Appeal a TTAB Decision			
Notice of Appeal (Ex parte)	500	100.00	50,000.00
Electronic Notice of Appeal (Ex parte)	3,000	100.00	300,000.00
Miscellaneous Ex Parte Papers	4,700	0.00	0.00
Electronic Miscellaneous Ex Parte Papers	2,400	0.00	0.00
Totals	80,025	.....	2,382,500.00

The USPTO estimates that the total non-hour respondent cost burden for this collection, in the form of postage and recordkeeping costs, in addition to the filing fees, is $2,417,326 per year.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, *e.g.,* the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized or included in the request for OMB approval of this information collection; they will also become a matter of public record.

Susan K. Fawcett,

Records Officer, USPTO, Office of the Chief Information Officer.

[FR Doc. 2010–15772 Filed 6–28–10; 8:45 am]

BILLING CODE 3510–16–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–945]

Notice of Antidumping Duty Order: Prestressed Concrete Steel Wire Strand from the People's Republic of China

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

SUMMARY: Based on affirmative final determinations by the Department of Commerce (the "Department") and the International Trade Commission ("ITC"), the Department is issuing an

antidumping duty order on prestressed concrete steel wire strand ("PC strand") from the People's Republic of China ("PRC"). On June 22, 2010, the ITC notified the Department of its affirmative determination of material injury to a U.S. industry. *See Prestressed Concrete Steel Wire Strand from China* (Investigation Nos. 701–TA–464 and 731–TA–1160 (Final), USITC Publication 4162, June 2010).

DATES: *Effective Date:* June 29, 2010.

FOR FURTHER INFORMATION CONTACT: Alexis Polovina or Alan Ray, AD/CVD Operations, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC, 20230; *telephone:* (202) 482–3927 or (202) 482–5403, respectively.

SUPPLEMENTARY INFORMATION:

Background

In accordance with sections 735(d) and 777(i)(1) of the Tariff Act of 1930, as amended (the "Act"), the Department published the final determination of sales at less than fair value ("LTFV") in the antidumping investigation of PC strand from the PRC. *See Prestressed Concrete Steel Wire Strand From the People's Republic of China: Final Determination of Sales at Less Than Fair Value,* 75 FR 28560 (May 21, 2010) ("*Final Determination*").

Scope of the Order

The scope of this investigation consists of PC strand, produced from wire of non-stainless, non-galvanized steel, which is suitable for use in prestressed concrete (both pretensioned and post-tensioned) applications. The product definition encompasses covered and uncovered strand and all types, grades, and diameters of PC strand. PC strand is normally sold in the United States in sizes ranging from 0.25 inches to 0.70 inches in diameter. PC strand made from galvanized wire is only excluded from the scope if the zinc and/or zinc oxide coating meets or exceeds the 0.40 oz./ft^2 standard set forth in ASTM–A–475. The PC strand subject to this investigation is currently classifiable under subheadings 7312.10.3010 and 7312.10.3012 of the Harmonized Tariff Schedule of the United States ("HTSUS"). Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this investigation is dispositive.

Continuation of Suspension of Liquidation

In accordance with section 735(c)(1)(B) of the Act, we will instruct U.S. Customs and Border Protection ("CBP") to suspend liquidation on all entries of subject merchandise from the PRC. We will also instruct CBP to require cash deposits equal to the estimated amount by which the normal value exceeds the U.S. price as indicated in the chart below. These instructions suspending liquidation will remain in effect until further notice.

Additionally, in the *Final Determination,* the Department noted that it has continued to find in *Pre-Stressed Concrete Steel Wire Strand from the People's Republic of China: Final Affirmative Countervailing Duty Determination,* 75 FR 28557 (May 21, 2010) ("*CVD Final*"), that the products under investigation, exported and produced by Xinhua Metal Products Co., Ltd. ("Xinhua Metal"), benefitted from an export subsidy. *See Final Determination,* 75 FR at 28563. Therefore, we will instruct CBP to require a cash deposit or posting of a bond equal to the weighted-average amount by which normal value exceeds U.S. price for Xinhua Metal, as indicated below, minus the amount determined to constitute an export subsidy.

With respect to Wuxi Jinyang Metal Products Co., Ltd. ("WJMP"), the voluntary respondent in this proceeding, the Department did not individually examine its exports of merchandise under investigation in the final determination for the companion CVD investigation. As a result, WJMP is captured under the "All Others" rate, which is an average of the companies examined in the *CVD Final.* Therefore, we will instruct CBP to require a cash deposit or posting of a bond equal to the weighted-average amount by which normal value exceeds U.S. price for WJMP, as indicated below, minus the amount determined to constitute an export subsidy in the "All Others" rate.

With respect to Fasten Group Import & Export Co. Ltd. ("Fasten I&E"), the separate rate company, we note that the rate applied in this proceeding as a separate rate is derived from the calculated rate received by Xinhua Metal. Although Xinhua Metal received export subsidies in the *CVD Final,* because its export subsidy rate is higher than the export subsidy rate calculated for Fasten I&E in the *CVD Final,* we will instruct CBP to require a cash deposit or posting of a bond equal to the weighted-average amount by which normal value exceeds U.S. price for Xinhua Metal, as indicated below, minus the amount determined to constitute an export subsidy for Fasten I&E.

Antidumping Duty Order

Antidumping Duty Order

On June 22, 2010, in accordance with section 735(d) of the Act, the ITC notified the Department of its final determination, pursuant to section 735(b)(1)(A)(i) of the Act, that an industry in the United States is materially injured by reason of less-than-fair-value imports of subject merchandise from the PRC. Therefore, in accordance with section 736(a)(1) of the Act, the Department will direct U.S. Customs and Border Protection ("CBP") to assess, upon further instruction by the Department, antidumping duties equal to the amount by which the normal value of the merchandise exceeds the export price (or constructed export price) of the merchandise for all relevant entries of PC strand from the PRC. These antidumping duties will be assessed on unliquidated entries of PC strand from the PRC entered, or withdrawn from the warehouse, for consumption on or after December 23, 2009, the date on which the Department published its *Preliminary Determination. See Prestressed Concrete Steel Wire Strand From the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value,* 74 FR 68232 (December 23, 2009) ("*Preliminary Determination*").

Effective on the date of publication of the ITC's final affirmative injury determination, CBP will require, at the same time as importers would normally deposit estimated duties on this merchandise, a cash deposit equal to the estimated weighted-average antidumping duty margins as listed below minus the amounts of export subsidies determined in the companion CVD investigation, as described above. *See* section 735(c)(3) of the Act. The "PRC-wide" rate applies to all exporters of subject merchandise not specifically listed. The weighted-average dumping margins are as follows:

Exporter	Producer	Weighted-Average Margin
WJMP	WJMP	42.97
Xinhua Metal	Xinhua Metal	175.94

Exporter	Producer	Weighted-Average Margin
Fasten I&E	Jiangyin Fasten Steel Products Co., Ltd., Jiangyin Walsin Steel Cable Co., Ltd., Jiangyin Hongyu Metal Products Co., Ltd.	175.94
PRC-wide Entity [1]		193.55

[1] The PRC-wide rate also applies to Tianjin Shengte, Silvery Dragon PC Steel Products Group Co., Ltd., and Liaonin TongDa Building Material Industry Co., Ltd.

This notice constitutes the antidumping duty order with respect to PC strand from the PRC pursuant to section 736(a) of the Act. Interested parties may contact the Department's Central Records Unit, Room 1117 of the main Commerce building, for copies of an updated list of antidumping duty orders currently in effect.

This order is published in accordance with section 736(a) of the Act and 19 CFR 351.211.

Dated: June 24, 2010.

Paul Piquado,

Acting Deputy Assistant Secretary for Import Administration.

[FR Doc. 2010–15912 Filed 6–28–10; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Application(s) for Duty-Free Entry of Scientific Instruments

Pursuant to Section 6(c) of the Educational, Scientific and Cultural Materials Importation Act of 1966 (Pub. L. 89–651, as amended by Pub. L. 106–36; 80 Stat. 897; 15 CFR part 301), we invite comments on the question of whether instruments of equivalent scientific value, for the purposes for which the instruments shown below are intended to be used, are being manufactured in the United States.

Comments must comply with 15 CFR 301.5(a)(3) and (4) of the regulations and be postmarked on or before July 19, 2010. Address written comments to Statutory Import Programs Staff, Room 3720, U.S. Department of Commerce, Washington, DC 20230. Applications may be examined between 8:30 a.m. and 5 p.m. at the U.S. Department of Commerce in Room 3720.

Docket Number: 10–015. Applicant: National Center for Toxicological Research, U.S. Food & Drug Administration, Department of Health and Human Services, 3900 NCTR Road, Jefferson, Arkansas 72079. Instrument: Electron Microscope. Manufacturer: JEOL, Ltd., Japan. Intended Use: The instrument will be used to identify and image nanoscale materials that are being tested at this FDA laboratory, and to detect these materials in biological samples including tissue culture and organs from animals. Justification for Duty-Free Entry: There are no instruments of the same general category being produced in the United States. Application accepted by Commissioner of Customs: June 16, 2010.

Docket Number: 10–023. Applicant: University of Virginia, P.O. Box 800886, 480 Ray C Hunt Drive, Charlottesville, VA 22903. Instrument: Electron Microscope. Manufacturer: FEI Company, the Netherlands. Intended Use: The instrument will be used to study proteins, macromolecular complexes, and viruses. The primary goal of the research is to obtain structural information for biological specimens at as high a resolution as possible. Justification for Duty-Free Entry: There are no instruments of the same general category being produced in the United States. Application accepted by Commissioner of Customs: June 15, 2010.

Docket Number: 10–029. Applicant: Argonne National Laboratory, 9700 South Cass Avenue, Lemont, IL 60439. Instrument: Electron Microscope. Manufacturer: JEOL, Ltd., Japan. Intended Use: This instrument will be used to characterize different types of nanosized materials. A key aspect of the research focuses on understanding different aspects of physical and chemical behavior of individual metallic, semiconducting and magnetic nanosized materials and their assembled structures. Justification for Duty-Free Entry: There are no instruments of the same general category being produced in the United States. Application accepted by Commissioner of Customs: June 11, 2010.

Docket Number: 10–030. Applicant: University of California, Davis, One Shields Ave., Davis, CA 95616. Instrument: Electron Microscope. Manufacturer: Elionix Co., Ltd., Japan. Intended Use: This instrument will be used to measure and quantify the structural integrity, geometry, chemical composition, and accuracy of nano machining tools and machined workpieces. The micro tools that will be observed are made of poly-crystalline diamond (PCD) or nano-crystalline diamond (NCD) and the grain structure before and after machining must be carefully observed with extremely high magnification. Justification for Duty-Free Entry: There are no instruments of the same general category being produced in the United States. Application accepted by Commissioner of Customs: June 11, 2010.

Docket Number: 10–031. Applicant: National Institutes of Health, 9000 Rockville Pike, Bethesda, MD 20892. Instrument: Electron Microscope. Manufacturer: JEOL, Ltd., Japan. Intended Use: This instrument will be used to study subcellular, supramolecular or macromolecular structures at a resolution approximately 1000-fold greater than that achieved with the light microscope. Justification for Duty-Free Entry: There are no instruments of the same general category being produced in the United States. Application accepted by Commissioner of Customs: June 10, 2010.

Docket Number: 10–032. Applicant: Battelle Memorial Institute, 3335 Q Avenue, Richland, WA 99354. Instrument: Electron Microscope. Manufacturer: FEI Company, the Netherlands. Intended Use: The instrument will be used to study both structural and chemical composition information at the atomic scale. Justification for Duty-Free Entry: There are no instruments of the same general category being produced in the United States. Application accepted by Commissioner of Customs: June 9, 2010.

Docket Number: 10–033. Applicant: Massachusetts General Hospital, 114 16th St., Charlestown, MA 02120. Instrument: Electron Microscope. Manufacturer: JEOL, Ltd., Japan. Intended Use: This instrument will be used for the study of materials such as cultured cells (Hela, n2a, clonal striatal cells, primary neurons), mouse brain, isolated autophagosomes from cultured cells, and exosomes from human brain. The goals are to understand how prenatal cocaine exposure alters dopamine receptor signaling and GABA neuron development in the mouse telencephalon. Justification for Duty-Free Entry: There are no instruments of the same general category being produced in the United States.

Application accepted by Commissioner of Customs: June 9, 2010.

Docket Number: 10–035. Applicant: University of Maine System, 16 Central St., Bangor, ME 04401. Instrument: Electron Microscope. Manufacturer: Tescan, Czech Republic. Intended Use: This instrument will be used for the study of primarily geological (wet and dry sediment, rocks, fossils) but also some archaeological and biological materials. The objective is to obtain a better understanding of the mechanical and chemical structure of the Earth's crust, fluid flow in the crust, mechanisms for magma flow, and more. Justification for Duty-Free Entry: There are no instruments of the same general category being produced in the United States. Application accepted by Commissioner of Customs: June 9, 2010.

Docket Number: 10–036. Applicant: University of Kansas Medical Center, 3901 Rainbow Blvd., MSN 1039, Kansas City, KS 66160. Instrument: Electron Microscope. Manufacturer: JEOL, Ltd., Japan. Intended Use: This instrument will be used to study the morphology and ultrastructure of biological cells and tissues, and potentially infectious agents, such as bacteria and viruses. Most of the experiments will be carried out on biological material that has been chemically preserved so that its structure can be determined by transmission electron microscope at ultrahigh magnification to obtain the greatest detail and highest resolution achievable. Justification for Duty-Free Entry: There are no instruments of the same general category being produced in the United States. Application accepted by Commissioner of Customs: June 11, 2010.

Docket Number: 10–037. Applicant: University of South Dakota, 414 East Clark St., Vermillion, SD 57069. Instrument: Electron Microscope. Manufacturer: FEI Company, Czech Republic. Intended Use: This instrument will be used to study inorganic nanostructured materials. The objective is to record data on the morphology of the nanostructured materials. The transmission electron microscope is essential to researchers' understanding of how the concentration and identity of capping ligands affect the size and morphology of the nanoparticles. Justification for Duty-Free Entry: There are no instruments of the same general category being produced in the United States. Application accepted by Commissioner of Customs: June 15, 2010.

Docket Number: 10–039. Applicant: Northwestern University, 2205 Tech Drive, Hogan 2–100, Evanston, IL 60201. Instrument: Electron Microscope. Manufacturer: JEOL, Ltd., Japan. Intended Use: This instrument will be used to study the structure of biological macromolecules, and to aid the development of novel methods that will facilitate the study of biological materials by electron microscopy. The objective is to visualize the 3-dimensional structure of biological macromolecular assemblies. Justification for Duty-Free Entry: There are no instruments of the same general category being produced in the United States. Application accepted by Commissioner of Customs: June 15, 2010.

Docket Number: 10–040. Applicant: Illinois State University, School of Biological Sciences, Loading Dock, Science Lab Building, 125 South Fell Avenue, Normal, IL 61790–4120. Instrument: Electron Microscope. Manufacturer: FEI Company, Czech Republic. Intended Use: This instrument will be used to study the structure of plants, algae, fruit flies, bacterial biofilms, and host/bacterium interaction. The objective is to determine whether antibiotics are effective in changing the structure of biofilms, including structure of tiny channels through which fluid and nutrients reach innermost cells of the biofilm. Justification for Duty-Free Entry: There are no instruments of the same general category being produced in the United States. Application accepted by Commissioner of Customs: June 14, 2010.

Docket Number: 10–041. Applicant: Temple University, 1901 N. 13th Street, Department of Chemistry, Philadelphia, PA 19122. Instrument: Electron Microscope. Manufacturer: JEOL, Ltd., Japan. Intended Use: This instrument will be used in materials research and biological fields to examine the structure and properties of these materials under high resolution. Examples of research activities include the study of phase transformation of nanoparticulates in soil and aquatic systems; nanostructures that make up polymer electrolyte membrane (PEM) fuel cells; functionalized nanoparticles for optical applications; and more. Justification for Duty-Free Entry: There are no instruments of the same general category being produced in the United States. Application accepted by Commissioner of Customs: June 15, 2010.

Docket Number: 10–042. Applicant: University of Arkansas for Medical Sciences, 4301 W. Markham, Slot 505, Little Rock, AR 72205. Instrument: Electron Microscope. Manufacturer: FEI, the Netherlands. Intended Use: This instrument will be used for research concerning cellular organelles and protein complexes. The objective is to extend the level of resolution in research from the 200 nm level of light microscopy to the 1 nm or better level of electron microscopy. This will help researchers understand how cellular receptors function, how a specific cellular organelle, the Golgi apparatus, functions, and how protein complex involved in viral replication functions. Justification for Duty-Free Entry: There are no instruments of the same general category being produced in the United States. Application accepted by Commissioner of Customs: June 16, 2010.

Dated: June 23, 2010.

Christopher Cassel,

Director, IA Subsidies Enforcement Office.

[FR Doc. 2010–15764 Filed 6–28–10; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XU50

Endangered and Threatened Species; Initiation of a 5–Year Review of the Eastern Distinct Population Segment of the Steller Sea Lion

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

ACTION: Notice of initiation of 5–year review; request for information.

SUMMARY: NMFS announces a 5–year review of the eastern Distinct Population Segment (DPS) of the Steller Sea Lion (*Eumetopias jubatus*) under the Endangered Species Act of 1973, as amended (ESA). A 5–year review is a periodic process conducted to ensure that the listing classification of a species is accurate and it is based on the best scientific and commercial data available at the time of the review; therefore, we are requesting submission of any such information on the eastern DPS of the Steller Sea Lion that has become available since their last status review in 1995. Based on the results of this 5–year review, we will make the requisite finding under the ESA.

DATES: To allow us adequate time to conduct this review, we must receive your information no later than August 30, 2010. However, we will continue to accept new information about any listed species at any time.

ADDRESSES: You may submit information by any of the following methods:

- Mail: Kaja Brix, National Marine Fisheries Service, Alaska Region, Protected Resources Division, P.O. Box 21668, 709 West 9th Street, Juneau, AK 99802. .
- E-mail: *kaja.brix@noaa.gov*. Include the following identifier in the subject line of the e-mail: "Comments on the 5–year review for the eastern DPS of Steller sea lion."
- Fax: 907–586–7012, attention: Kaja Brix

Information received in response to this notice and review will be available for public inspection (by appointment, during normal business hours) at the above address.

FOR FURTHER INFORMATION CONTACT: Dr. Lisa Rotterman (907–271–1692), *lisa.rotterman@noaa.gov*.

SUPPLEMENTARY INFORMATION:

Background

Under the ESA, a list of endangered and threatened wildlife and plant species (list) must be maintained. The list is published at 50 CFR 17.11 (for animals) and 17.12 (for plants). Section 4(c)(2)(A) of the ESA requires that we conduct a review of listed species at least once every 5 years. On the basis of such reviews under section 4(c)(2)(B), we determine whether or not any species should be removed from the list (delisted), or reclassified from endangered to threatened or from threatened to endangered. Delisting a species must be supported by the best scientific and commercial data available and only considered if such data substantiates that the species is neither endangered nor threatened for one or more of the following reasons: (1) the species is considered extinct; (2) the species is considered to be recovered; and/or (3) the original data available when the species was listed, or the interpretation of such data, were in error. Any change in federal classification would require a separate rulemaking process. The regulations (50 CFR 424.21) require that we publish a notice in the **Federal Register** announcing those species currently under active review. This notice announces our active review of the eastern DPS of the Steller Sea Lion (*Eumetopias jubatus*) currently listed as threatened.

Public Solicitation of New Information

To ensure that the 5–year review is complete and based on the best available scientific and commercial information, we are soliciting new information from the public, concerned governmental agencies, tribes, the scientific community, industry, environmental entities, and any other interested parties concerning the status of the eastern DPS of the Steller Sea Lion (*Eumetopias jubatus*).

Five-year reviews consider the best scientific and commercial data and all new information that has become available since the listing determination or most recent status review. Categories of requested information include the following: (A) species biology, including, but not limited to, population trends, distribution, abundance, demographics, and genetics; (B) habitat conditions, including, but not limited to, amount, distribution, and suitability; (C) conservation measures that have been implemented that benefit the species; (D) status and trends of threats; and (E) other new information, data, or corrections, including, but not limited to, taxonomic or nomenclatural changes, identification of erroneous information contained in the list, and improved analytical methods.

The eastern DPS of the Steller Sea Lion is listed as a Distinct Population Segment of a vertebrate taxon. We will also be considering application of the DPS policy for vertebrate taxa. DPS is defined in the February 7, 1996, Policy Regarding the Recognition of Distinct Vertebrate in Population Segments (61 FR 4722). For a population to be listed under the ESA as a DPS, three elements are considered: (1) the discreteness of the population segment in relation to the remainder of the species to which it belongs; (2) the significance of the population segment to the species to which it belongs; and (3) the DPS's conservation status in relation to the ESA's standards for listing (i.e., is the population segment endangered or threatened?). DPSs of vertebrate species, as well as subspecies of all listed species, may be proposed for separate reclassification or for removal from the list.

If you wish to provide information for this 5–year review, you may submit your information and materials to Kaja Brix (see **ADDRESSES**). Our practice is to make submissions of information, including names and home addresses of respondents, available for public review during regular business hours. Respondents may request that we withhold a respondent's identity, as allowable by law. If you wish us to withhold your name or address, you must state this request clearly at the beginning of your submission. We will not, however, consider anonymous submissions. To the extent consistent with applicable law, we will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety. Information and materials received will be available for public inspection, by appointment, during normal business hours (see **ADDRESSES**).Authority: 16 U.S.C. 1531 *et seq.*

Dated: June 23, 2010.

Angela Somma,

Chief, Endangered Species Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2010–15774 Filed 6–28–10; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

International Trade Administration

[C–475–819]

Certain Pasta from Italy: Final Results of the 13th (2008) Countervailing Duty Administrative Review

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

SUMMARY: The Department of Commerce ("the Department") has completed its administrative review of the countervailing duty ("CVD") order on certain pasta from Italy for the period January 1, 2008, through December 31, 2008. On April 13, 2010, we published the Preliminary Results of this review. *See Certain Pasta From Italy: Preliminary Results of the 13th (2008) Countervailing Duty Administrative Review*, 75 FR 18806 (April 13, 2010) ("*Preliminary Results*"). We did not receive any comments on the Preliminary Results and have made no revisions. We find that Pastificio Lucio Garofalo S.p.A. ("Garofalo") received countervailable subsidies and that F.lli De Cecco di Filippo Fara San Martino S.p.A. ("De Cecco Pastificio")/Molino e Pastificio De Cecco S.p.A. ("De Cecco Pescara"), members of the De Cecco group of companies, received *de minimis* countervailable subsidies. The final net subsidy rates for Garofalo and De Cecco Pastificio/De Cecco Pescara are listed below in the section entitled "Final Results of Review."

DATES: *Effective Date:* June 29, 2010.

FOR FURTHER INFORMATION CONTACT: Anna Flaaten or Brandon Farlander, AD/CVD Operations, Office 1, Import Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230;

telephone (202) 482–5156 and (202) 482–0182, respectively.

SUPPLEMENTARY INFORMATION:

Background

In the *Preliminary Results*, we invited interested parties to submit briefs. No briefs were received.

Period of Review

The period of review ("POR") for which we are measuring subsidies is January 1, 2008, through December 31, 2008.

Scope of the Order

Imports covered by the order are shipments of certain non–egg dry pasta in packages of five pounds four ounces or less, whether or not enriched or fortified or containing milk or other optional ingredients such as chopped vegetables, vegetable purees, milk, gluten, diastasis, vitamins, coloring and flavorings, and up to two percent egg white. The pasta covered by the scope of the order is typically sold in the retail market, in fiberboard or cardboard cartons, or polyethylene or polypropylene bags of varying dimensions.

Excluded from the scope of the order are refrigerated, frozen, or canned pastas, as well as all forms of egg pasta, with the exception of non–egg dry pasta containing up to two percent egg white. Also excluded are imports of organic pasta from Italy that are accompanied by the appropriate certificate issued by the Instituto Mediterraneo Di Certificazione, Bioagricoop S.r.l., QC&I International Services, Ecocert Italia, Consorzio per il Controllo dei Prodotti Biologici, Associazione Italiana per l'Agricoltura Biologica, or Codex S.r.l. In addition, based on publicly available information, the Department has determined that, as of August 4, 2004, imports of organic pasta from Italy that are accompanied by the appropriate certificate issued by Bioagricert S.r.l. are also excluded from the order. *See* Memorandum from Eric B. Greynolds to Melissa G. Skinner, dated August 4, 2004, which is on file in the Department's Central Records Unit ("CRU") in Room 1117 of the main Department building. In addition, based on publicly available information, the Department has determined that, as of March 13, 2003, imports of organic pasta from Italy that are accompanied by the appropriate certificate issued by Instituto per la Certificazione Etica e Ambientale are also excluded from the order. *See* Memorandum from Audrey Twyman to Susan Kuhbach, dated February 28, 2006, entitled "Recognition of Instituto per la Certificazione Etica e Ambientale (ICEA) as a Public Authority for Certifying Organic Pasta from Italy" which is on file in the Department's CRU.

The merchandise subject to review is currently classifiable under items 1901.90.90.95 and 1902.19.20 of the *Harmonized Tariff Schedule of the United States* ("HTSUS"). Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise subject to the order is dispositive.

Scope Rulings

The Department has issued the following scope rulings to date:

(1) On August 25, 1997, the Department issued a scope ruling finding that multicolored pasta, imported in kitchen display bottles of decorative glass that are sealed with cork or paraffin and bound with raffia, is excluded from the scope of the antidumping ("AD") and CVD orders. *See* Memorandum from Edward Easton to Richard Moreland, dated August 25, 1997, which is on file in the CRU.

(2) On July 30, 1998, the Department issued a scope ruling finding that multipacks consisting of six one–pound packages of pasta that are shrink–wrapped into a single package are within the scope of the AD and CVD orders. *See* Letter from Susan H. Kuhbach to Barbara P. Sidari, dated July 30, 1998, which is on file in the CRU.

(3) On October 26, 1998, the Department self–initiated a scope inquiry to determine whether a package weighing over five pounds as a result of allowable industry tolerances is within the scope of the AD and CVD orders. On May 24, 1999, we issued a final scope ruling finding that, effective October 26, 1998, pasta in packages weighing or labeled up to (and including) five pounds four ounces is within the scope of the AD and CVD orders. *See* Memorandum from John Brinkmann to Richard Moreland, dated May 24, 1999, which is on file in the CRU.

(4) On April 27, 2000, the Department self–initiated an anti–circumvention inquiry to determine whether Pastificio Fratelli Pagani S.p.A.'s importation of pasta in bulk and subsequent repackaging in the United States into packages of five pounds or less constitutes circumvention with respect to the AD and CVD orders on pasta from Italy pursuant to section 781(a) of the Tariff Act of 1930, as amended ("the Act"), and 19 CFR 351.225(b). *See Certain Pasta From Italy: Notice of Initiation of Anti–Circumvention Inquiry on the Antidumping and Countervailing Duty Orders*, 65 FR 26179 (May 5, 2000). On September 19, 2003, we published an affirmative finding in the anti–circumvention inquiry. *See Anti–Circumvention Inquiry of the Antidumping and Countervailing Duty Orders on Certain Pasta from Italy: Affirmative Final Determinations of Circumvention of Antidumping and Countervailing Duty Orders*, 68 FR 54888 (September 19, 2003).

Final Results of Review

In accordance with 19 CFR 351.221(b)(5), we calculated individual subsidy rates for the mandatory respondents, De Cecco Pastificio/De Cecco Pescara and Garofalo.

For the non–selected respondents, we have followed the Department's practice to base the margin on an average of the margins calculated for those companies selected for individual review, excluding zero or de minimis rates or rates based entirely on adverse facts available ("AFA"). *See Notice of Final Determination of Sales at Less Than Fair Value: Light–Walled Rectangular Pipe and Tube from Mexico*, 73 FR 35649, 35651 (June 24, 2008); *see also Certain Frozen Warmwater Shrimp From India: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 73 FR 40492, 40495–98 (July 15, 2008), and *Lightweight Thermal Paper From the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 73 FR 57323, 57325–26 (October 2, 2008). Therefore, we have assigned to the non–selected respondents in this review the rate calculated for Garofalo, which is the only rate in this review that is neither *de minimis* nor based entirely on AFA.

For the period January 1, 2008, through December 31, 2008, we find the net subsidy rates for the producers/exporters under review to be that specified in the chart below:

Producer/Exporter	Net Subsidy Rate
F.lli De Cecco di Filippo Fara San Martino S.p.A./ Molino e Pastificio De Cecco S.p.A.	0.44% (de minimis)
Pastificio Lucio Garofalo S.p.A.	0.62%
De Matteis Agroalimentare S.p.A.	0.62%
Agritalia S.r.L.	0.62%
F. Divella S.p.A.	0.62%
All–Others Rate	3.85%

Listed below are the programs we examined in the review and our findings with respect to each of these programs. For a complete analysis of the programs found to be countervailable, not countervailable and terminated, *see Preliminary Results*.

I. Programs Determined to be Countervailable

A. Industrial Development Grants Under Law 64/86
B. Industrial Development Grants Under Law 488/92
C. Interest Contributions Under Law 488/92

II. Programs Determined to be Countervailable for Which There is No Measurable Benefit

A. Social Security Reductions and Exemptions - Sgravi
1) Law 407/90

III. Programs Determined to Not be Used

A. Industrial Development Loans Under Law 64/86
B. Grant Received Pursuant to the Community Initiative Concerning the Preparation of Enterprises for the Single Market ("PRISMA")
C. European Regional Development Fund ("ERDF") Programma Operativo Plurifondo ("P.O.P.") Grant
D. European Regional Development Fund ("ERDF") Programma Operativo Multiregionale ("P.O.M.") Grant
E. Certain Social Security Reductions and Exemptions Sgravi (including Law 223/91, Article 8, Paragraph 4 and Article 25, Paragraph 9; and Law 196/97)
F. Law 236/93 Training Grants
G. Law 1329/65 Interest Contributions ("Sabatini Law") (Formerly Lump–Sum Interest Payment Under the Sabatini Law for Companies in Southern Italy)
H. Development Grants Under Law 30 of 1984
I. Law 908/55 Fondo di Rotazione Iniziative Economiche (Revolving Fund for Economic Initiatives) Loans
J. Law 317/91 Benefits for Innovative Investments
K. Brescia Chamber of Commerce Training Grants
L. Ministerial Decree 87/02
M. Law 10/91 Grants to Fund Energy Conservation
N. Export Restitution Payments
O. Export Credits Under Law 227/77
P. Capital Grants Under Law 675/77
Q. Retraining Grants Under Law 675/77
R. Interest Contributions on Bank Loans Under Law 675/77
S. Preferential Financing for Export Promotion Under Law 394/81
T. Urban Redevelopment Under Law 181
U. Industrial Development Grants Under Law 183/76
V. Interest Subsidies Under Law 598/94
W. Duty–Free Import Rights
X. European Social Fund Grants
Y. Law 113/86 Training Grants
Z. European Agricultural Guidance and Guarantee Fund
AA. Law 341/95 Interest Contributions on Debt Consolidation Loans (Formerly Debt Consolidation Law 341/95)
BB. Interest Grants Financed by IRI Bonds
CC. Article 44 of Law 448/01
DD. Law 289/02
1) Article 62 - Investments in Disadvantaged Areas
2) Article 63 - Increase in Employment
EE. Law 662/96 - Patti Territoriali
FF. Law 662/96 - Contratto di Programma

IV. Terminated Programs

A. Social Security Reductions and Exemptions - Sgravi
1) Law 196/97

V. Previously Terminated Programs

A. Regional Tax Exemptions Under IRAP
B. VAT Reductions Under Laws 64/86 and 675/55
C. Corporate Income Tax ("IRPEG")
D. Remission of Taxes on Export Credit Insurance Under Article 33 of Law 227/77
E. Export Marketing Grants Under Law 304/90
F. Tremonti Law 383/01
G. Social Security Reductions and Exemptions - Sgravi
1) Article 44 of Law 448/01
2) Law 337/90
3) Law 863/84

Assessment Rates

Because the CVD rate for De Cecco Pastificio/De Cecco Pescara is less than 0.5 percent and, thus, *de minimis*, the Department will instruct U.S. Customs and Border Protection ("CBP") to liquidate shipments of certain pasta by De Cecco Pastificio/De Cecco Pescara from January 1, 2008, through December 31, 2008, without regard to CVDs. For all entries by Garofalo, De Matteis Agroalimentare S.p.A., Agritalia S.r.L., and F. Divella S.p.A., we will instruct CBP to assess CVDs on all shipments at the net subsidy rates listed above.

For all other companies that were not reviewed (except Barilla G. e R. F.lli S.p.A., and Gruppo Agricoltura Sana S.r.l., which are excluded from the order, and Pasta Lensi S.r.l., which was revoked from the order), the Department has directed CBP to assess CVDs on all entries between January 1, 2008, and December 31, 2008, at the rates in effect at the time of entry.

The Department intends to issue appropriate assessment instructions directly to CBP 15 days after publication of these final results of review.

Cash Deposit Instructions

The Department also intends to instruct CBP to collect cash deposits of estimated CVDs in the amounts shown above with the exception of De Cecco Pastificio/De Cecco Pescara. For De Cecco Pastificio/De Cecco Pescara, no cash deposits of estimated duties are required because their rate is *de minimis*. For all non–reviewed firms (except Barilla G. e R. F.lli S.p.A. and Gruppo Agricoltura Sana S.r.l., which are excluded from the order, and Pasta Lensi S.r.l. which was revoked from the order), we will instruct CBP to collect cash deposits of estimated CVDs at the most recent company–specific or all–others rate applicable to the company. These rates shall apply to all non–reviewed companies until a review of a company assigned these rates is requested. These cash deposit requirements, when imposed, shall remain in effect until further notice.

This notice serves as a reminder to parties subject to administrative protective order ("APO") of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

We are issuing and publishing these results in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: June 21, 2010.

Paul Piquado,

Acting Deputy Assistant Secretary for Import Administration.

[FR Doc. 2010–15762 Filed 6–28–10; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XR61

Marine Mammals; File No. 14535

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

ACTION: Notice; receipt of application for permit amendment.

SUMMARY: Notice is hereby given that Colleen Reichmuth, Ph.D., University of California at Santa Cruz, Long Marine Laboratory, 100 Shaffer Road, Santa Cruz, CA, has applied in due form for

an amendment to scientific research Permit No. 14535.

DATES: Written, telefaxed, or e-mail comments must be received on or before July 29, 2010.

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 home page, *https://apps.nmfs.noaa.gov*, and then selecting File No. 14535 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;

Alaska Region, NMFS, P.O. Box 21668, Juneau, AK 99802–1668; phone (907)586–7221; fax (907)586–7249; 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 on this application should be submitted to the Chief, Permits, Conservation and Education Division, at the address listed above. Comments may also be submitted by facsimile to (301)713–0376, or by email to *NMFS.Pr1Comments@noaa.gov*. Please include the File No. in the subject line of the email comment.

Those individuals requesting a public hearing should submit a written request to the Chief, Permits, Conservation and Education Division at the address listed above. The request should set forth the specific reasons why a hearing on this application would be appropriate.

FOR FURTHER INFORMATION CONTACT: Amy Sloan or Jennifer Skidmore, (301)713–2289.

SUPPLEMENTARY INFORMATION: The subject amendment to Permit No.14535 is requested under the authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), and the regulations governing the taking and importing of marine mammals (50 CFR part 216).

Permit No. 14535, issued on December 7, 2009 (74 FR 65748), authorizes psychological and physiological research annually on up to two captive harbor seals (*Phoca vitulina*), two California sea lions (*Zalophus californianus*), and two northern elephant seals (*Mirounga angustirostris*) at Long Marine Laboratory, which are trained to voluntarily participate in studies designed to evaluate their perceptual and cognitive capabilities. The permit expires on December 31, 2014.

The permit holder requests an amendment to add two non-releasable animals of each of the following species to the captive research program: ringed seal (*Phoca hispida*), bearded seal (*Erignathus barbatus*), and spotted seal (*Phoca largha*). The purpose is to expand the comparative understanding of basic perceptual and cognitive function among pinnipeds and to assess potential impacts of human noise on marine mammals. The proposed amendment is for the duration of the permit.

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: June 23, 2010.

Tammy C. Adams,

Acting Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2010–15769 Filed 6–28–10; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XX08

Marine Mammals; File Nos. 14628 and 15471

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

ACTION: Notice; receipt of applications.

SUMMARY: Notice is hereby given that the following two entities have applied in due form for permits to import marine mammal parts for scientific research purposes:National Museum of Natural History, Smithsonian Institution (Charles W. Potter, Responsible Party), PO Box 37012, Washington, DC 20013 (File No. 14628) andMichael Adkesson, D.V.M., Chicago Zoological Society, 3300 Golf Rd., Brookfield, Illinois 60527 (File No. 15471).

DATES: Written, telefaxed, or e-mail comments must be received on or before July 29, 2010.

ADDRESSES: The applications and related documents are available for review upon written request or by appointment in the following office(s):

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301)713–2289; fax (301)713–0376; and

Northeast Region, NMFS, 55 Great Republic Drive, Gloucester, MA 01930; phone (978)281–9328; fax (978) 281–9394.

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. 14628 or File No. 15471.

FOR FURTHER INFORMATION CONTACT: Laura Morse or Jennifer Skidmore, (301)713–2289.

SUPPLEMENTARY INFORMATION: The subject permits are requested under the authority of the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 *et seq.*), the regulations governing the taking and importing of marine mammals (50 CFR part 216), the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR 222–226), and the Fur Seal Act of 1966, as amended (16 U.S.C. 1151 *et seq.*).

File No.14628: The National Museum of Natural History (NMNH) is requesting authorization to collect, import, export, possess, archive, and conduct analyses of marine mammal and endangered species parts. The applicant is requesting parts of all marine mammal under NMFS jursidiction to be included in this permit. Please refer to the following website for the list of species: *http://www.nmfs.noaa.gov/pr/species/mammals/*. No live animal takes are being requested and no incidental

harassment of animals would occur. Parts would be archived by the NMNH and used to support research studies and incidental education. A five-year permit is requested.

File No. 15471: Michael Adkesson, D.V.M. is requesting authorization to import biological samples (blood, swabs, feces, blubber, biopsies and milk) taken from both live and dead South American fur seals (*Arctocephalus australis*), during ongoing health assessment studies in Punta San Juan, Peru. Samples may be archived, transported, and analyzed by researchers in order to optimize the amount of biological information gained from each animal. There will be no non-target species taken incidentally under this permit because the permit would only cover import and possession of samples from animals taken legally under other permits. A five-year permit is requested.

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 activities proposed are 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: June 24, 2010.

Tammy C. Adams,

Acting Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2010–15771 Filed 6–28–10; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XX12

Caribbean Fishery Management Council; Public Hearings

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

ACTION: Notice of public hearings.

SUMMARY: The Caribbean Fishery Management Council will hold public hearings to obtain input from fishers, the general public, and the local agencies representatives on the Public Hearing Draft Document for Amendment 2 to the Fishery Management Plan for the Queen Conch Fishery of Puerto Rico and the U.S. Virgin Islands and Amendment 5 to the Reef Fish Fishery Management Plan of Puerto Rico and the U.S. Virgin Islands (with Draft Environmental Impact Statement).

DATES AND ADDRESSES: The public hearings will be held on the following dates and locations:

In Puerto Rico

July 19, 2010, DoubleTree by Hilton San Juan Hotel, De Diego Avenue, San Juan, Puerto Rico.

July 20, 2010, Centro de Usos Múltiples de Fajardo, Apartado 865, Municipio de Fajardo, Fajardo, Puerto Rico.

July 21, 2010, Ponce Holiday Inn and Tropical Casino. 3315 Ponce By Pass, Ponce, Puerto Rico.

July 22, 2010, Rincon of the Seas Grand Caribbean Hotel, Rd. 115, Km. 12.2, Rincón, Puerto Rico.

In U.S. Virgin Islands

July 20, 2010, The Buccaneer Hotel, Estate Shoys, Christiansted, St. Croix, U.S. Virgin Islands.

July 21, 2010, Windward Passage Holiday Inn Hotel, 3400 Veterans Drive, St. Thomas, U.S. Virgin Islands.

All meetings will be held from 7 p.m. to 10 p.m.

FOR FURTHER INFORMATION CONTACT: Caribbean Fishery Management Council, 268 Muñoz Rivera Avenue, Suite 1108, San Juan, Puerto Rico 00918–1920, telephone (787) 766–5926.

SUPPLEMENTARY INFORMATION: The Caribbean Fishery Management Council will hold public hearings to receive public input on the following management alternatives:

4.0 Management Alternatives

The Council at its 134th Regular Meeting held April 7–8, 2010, in St. Thomas selected the preferred alternatives for most actions in this amendment. These are marked as (PREFERRED) for those cases when a preferred alternative was identified. This does not mean that this is the final decision by the Council. Instead, the alternatives including the designated preferred alternatives will be vetted at public hearings and then further discussed at the Council's 135th Regular meeting to be held after public hearings.

4.1 Action 1: Amend the Stock Complexes in the Reef Fish Fishery Management Units (FMU)

4.1.1 Action 1(a) Grouper Complex

Alternative 1. No action. Do not change the species groupings within the grouper complex.

Alternative 2. (PREFERRED) Separate Grouper Unit 4 into Grouper Unit 4 (yellowfin, red, tiger plus black grouper) and Grouper Unit 5 (yellowedge and misty grouper). Move creole-fish from Grouper Unit 3 into the 'data collection only' unit.

Discussion: Action 1(a) proposes several changes to the grouper Fishery Management Units for the U.S. Caribbean, including the removal of creole-fish (*Paranthias furcifer*) from Unit 3, addition of black grouper (*Mycteroperca bonaci)* to Unit 4, and movement of yellowedge grouper (*Epinephelus flavolimbatus*) and misty grouper (*E. mystacinus)* into a Unit of their own (Table 4.1.1).

4.1.2 Action 1(b) Snapper complex

Alternative 1. No action. Do not change the species groupings within the snapper complex.

Alternative 2. (PREFERRED) Modify the snapper FMUs by adding cardinal snapper (*Pristipomoides macrophthalmus)* to SU2 and moving wenchman (*Pristipomoides aquilonaris*) into SU1.

Discussion: The wenchman, *Pristipomoides aquilonaris,* is currently included in SU2 along with the queen snapper (*Etelis oculatus).* However, the species commonly captured in the commercial fishery apparently is locally known (particularly in Puerto Rico) as the wenchman although it actually appears to be *Pristipomoides macrophthalmus.* The latter is commonly referred to as the cardinal snapper. The cardinal snapper clusters strongly with queen snapper based upon analyses of landings records and habitat utilization patterns by depth (SEDAR 2009). In contrast, P. *aquilonaris* is most closely associated with those species comprising SU1, again based upon similarities in habitat utilization by depth.

TABLE 4.1.1—CURRENT AND PROPOSED FMUS FOR VARIOUS SPECIES OF CARIBBEAN REEF FISH

Reef Fish Complex	Current	Proposed
Grouper Unit 3	Red hind	Rock hind.

TABLE 4.1.1—CURRENT AND PROPOSED FMUS FOR VARIOUS SPECIES OF CARIBBEAN REEF FISH—Continued

Reef Fish Complex	Current	Proposed
	Coney	Coney.
	Rock hind	Rock hind.
	Graysby	Graysby.
	Creole-fish.	
Grouper Unit 4	Yellowfin	Yellowfin.
	Red	Red.
	Tiger	Tiger.
	Yellowedge	Black.
	Misty.	
Grouper Unit 5		Yellowedge.
		Misty.
Snapper Unit 1	Silk	Silk.
	Black	Black.
	Blackfin	Blackfin.
	Vermilion	Vermilion.
		Wenchman (*Pristipomoides aquilonaris*).
Snapper Unit 2	Queen	Queen.
	Wenchman (*Pristipomoides aquilonaris*)	Cardinal (*Pristipomoides macrophthalmus*).

4.2 Action 2: Management Reference Points

The MSA requires that FMPs specify a number of reference points for managed fish stocks, including:

- Maximum Sustainable Yield (MSY)—The greatest amount or yield that can be sustainably harvested under prevailing environmental conditions.
- Overfishing Threshold—The maximum rate of fishing a stock can withstand (MFMT) or maximum yield a stock can produce (OFL), annually, while still providing MSY on a continuing basis.
- Overfished Threshold (MSST)—The biomass level below which a stock would not be capable of producing MSY.
- Annual Catch Limit (ACL)—The annual level to which catch is limited in order to prevent overfishing from occurring.
- Optimum Yield (OY)—The amount or yield that provides the greatest overall benefit to the Nation, taking into account food production, recreational opportunities and the protection of marine ecosystems.

Together, these parameters are intended to provide the means to measure the status and performance of fisheries relative to established goals. Available data in the U.S. Caribbean are not sufficient to support direct estimation of MSY and other key parameters. In such cases, the National Standard 1 (NS1) guidelines direct regional fishery management councils to adopt other measures of productive capacity, including long-term average catch, which can serve as reasonable proxies.

This section describes current reference points or proxies for species/species groups comprising the snapper, grouper, parrotfish and queen conch complexes, as well as alternative MSY proxies, overfishing thresholds, and ACL and OY definitions, considered by the Council to better comply with new mandates added to the MSA through the 2006 MSRA. None of the parameter estimates considered here represents empirical estimates derived from a comprehensive stock assessment; rather, all are calculated based on landings data averaged over alternative time series. The overfished threshold (MSST) of these species/species groups is currently defined based on the default proxy recommended by Restrepo *et al.* (1998) and is not being revisited here. That default proxy effectively defines a more conservative threshold for less productive species, such as snapper, grouper, and conch, which are not capable of recovering to B_{MSY} as quickly as other, more productive species.

The Council at its 133rd meeting reviewed the alternatives taken to scoping meetings (*see* Appendix 4 for Scoping Meeting information and Appendix 5 for Alternatives Considered and Rejected) and the comments received. Additional information regarding the need to redefine status determination criteria or management reference points (or their proxies) and to evaluate the data on recent catch were presented at the 133rd Council meeting and incorporated into this public hearing draft.

All the reference points considered here are closely interrelated, and the MSA places several key constraints on what can be considered a reasonable suite of alternatives. OY must be less than or equal to MSY. ACL must be less than or equal to the acceptable biological catch (ABC) level recommended by a Council's Scientific and Statistical Committee (SSC) or other established peer-review process. And the ABC recommendation must be less than or equal to the overfishing threshold.

4.2.1 Action 2(a) Snapper, Grouper and Parrotfish Complexes

Action 2(a) proposes to redefine management reference points or proxies for species/species groups within the snapper, grouper, and parrotfish complexes. The composition and classification of these species/species groups in NMFS' report to Congress on the status of U.S. marine fisheries is described in Table 2.2.1. Snapper Unit 1, Grouper Units 1 and 4, and the Parrotfish Unit are classified as undergoing overfishing; however, the status of these species groups has not been assessed since the Council and NMFS implemented measures to address overfishing through the Comprehensive SFA Amendment (CFMC 2005). Grouper Units 1, 2 and 4 are classified as overfished and are entering the sixth year of rebuilding plans designed to rebuild those species/species groups by 2029, 2034 and 2014, respectively.

Alternative 1. No action. Retain current management reference points or proxies for species/species groups within the snapper, grouper and/or parrotfish complexes.

Discussion: This alternative would retain the present MSY proxy, OY, and overfishing threshold definitions specified in the Comprehensive SFA Amendment for species/species groups within the snapper, grouper, and/or parrotfish complexes. These definitions are detailed in Table 4.2.1.

TABLE 4.2.1—CURRENT MSY PROXY, OY AND OVERFISHING THRESHOLD DEFINITIONS FOR SPECIES/SPECIES GROUPS WITHIN THE SNAPPER, GROUPER AND PARROTFISH COMPLEXES

Reference point	Status quo definition
Maximum Sustainable Yield	MSY proxy = $C/[(F_{curr}/F_{MSY}) \times (B_{curr}/B_{msy})]$; where C is calculated based on commercial landings for the years 1997–2001 for Puerto Rico and 1994–2002 for the USVI, and on recreational landings for the years 2000–2001.
Overfishing Threshold	MFMT = F_{msy}
Optimum Yield	OY = average yield associated with fishing on a continuing basis at F_{oy}; where $F_{oy} = 0.75F_{msy}$.

The current MSY proxy is based on average catch (C) and on estimates of where stock biomass and fishing mortality rates are in relation to MSY levels during the period over which catches are averaged. The overfishing threshold (MFMT) is defined as a rate of fishing which exceeds that which would produce MSY. And OY is defined as the amount of fish produced by fishing at a rate equal to 75% of that which would produce MSY. The numerical values associated with these parameters are provided in Table 4.2.2 under the columns titled, "Alternative 1."

The Comprehensive SFA Amendment in which these reference points were established pre-dated the MSRA provisions requiring FMPs to specify ACLs; consequently, the Comprehensive SFA Amendment did not explicitly specify this parameter for managed species/species groups. However, the ABC estimates derived from the Council's MSY control rule could be considered to represent the ACLs of snapper, grouper, and parrotfish species if no additional action were taken to revise management reference points in this amendment.

The average catch estimate used to calculate the Caribbean-wide MSY proxy for each species/species group was derived from commercial landings data recorded during 1997–2001 for Puerto Rico and during 1994–2002 for the USVI, and recreational landings data recorded during 2000–2001. These time series were considered to represent the longest time periods of consistently reliable data at the time the Comprehensive SFA Amendment was approved. Commercial catch data were derived from trip ticket reports collected by the state governments. Recreational data for Puerto Rico were derived from MRFSS. Recreational data for the USVI were derived by assuming the same commercial-recreational relationship and species composition reported by MRFSS for Puerto Rico. Those data indicated recreational catches averaged about 44% of commercial catch levels during 2000–2001.

TABLE 4.2.2—EXTANT AND ALTERNATIVE U.S. CARIBBEAN REFERENCE POINTS OR PROXIES CALCULATED BASED ON THE ALTERNATIVE TIME SERIES DESCRIBED IN SECTION 4.2.1. ALSO INCLUDED ARE THE AVERAGE LANDINGS FOR THE TWO YEARS (2006–2007) FOLLOWING ENACTMENT OF THE COMPREHENSIVE SFA AMENDMENT

Unit	Maximum Sustainable Yield (MSY) Proxy				Overfishing Threshold			
	Alternative 1	Alternative 2	Alternative 3	Alternative 4	Alternative 1 (MFMT)	Alternative 2 (OFL)	Alternative 3 (OFL)	Alternative 4 (OFL)
Queen Conch	452,000	512,718	488,073	525,152	Undefined	512,718	488,073	525,152
Snapper	1,551,000	2,004,003	1,861,538	1,725,798	Undefined	2,004,003	1,861,538	1,725,798
Unit 1	493,000							
Unit 2	151,000							
Unit 3	542,000							
Unit 4	365,000							
Grouper	257,000–289,000	396,483	354,853	337,178	Undefined	396,483	354,853	337,178
Unit 1	2,000–25,000							
Unit 2	2,000–11,000							
Unit 3	158,000							
Unit 4	95,000							
Parrotfish	304,000	507,059	496,656	512,201	Undefined	507,059	496,656	512,201

Unit	Optimum Yield (OY)/Annual Catch Limit (ACL)									
	Alt. 1 (OY/ABC)	Alt. 2(c)	Alt. 2(d)	Alt. 2(e)	Alt. 2(f)	Alt. 2(g)	Alt. 2(h)	Alt. 3(c)	Alt. 3(d)	Alt. 3(e)
Queen Conch.	424,000/—	107,720	91,562	80,790	53,860	50,000	0	116,899	99,364	87,674
Snapper	1,455,000/1,428,000.	2,004,003	1,703,403	1,503,002	1,002,002		N/A	1,861,538	1,582,307	1,396,154
Unit 1	463,000/370,000.									
Unit 2	142,000/151,000.									
Unit 3	508,000/542,000.									
Unit 4	342,000/365,000.									
Grouper	237,000/229,000.	396,483	337,011	297,362	198,242		N/A	354,853	301,625	266,140
Unit 1	1,880–23,440/—.						0			
Unit 2	1,880–10,310/—.						0			

Unit	Optimum Yield (OY)/Annual Catch Limit (ACL)									
	Alt. 1 (OY/ABC)	Alt. 2(c)	Alt. 2(d)	Alt. 2(e)	Alt. 2(f)	Alt. 2(g)	Alt. 2(h)	Alt. 3(c)	Alt. 3(d)	Alt. 3(e)
Unit 3	148,000/158,000.									
Unit 4	89,000/71,000.									
Parrotfish	285,000/228,000.	507,059	431,000	380,294	253,530	430,000	N/A	496,656	422,158	372,492
Unit	Alt 3(f)	Alt 3(g)	Alt 3(h)	Alt 4(c)	Alt 4(d)	Alt 4(e)	Alt 4(f)	Alt 4(g)	Alt 4(h)	06–07 Avg.
Queen Conch.	58,450	50,000	0	138,587	117,799	103,940	69,294	50,000	0	401,705
Snapper	930,769	——	N/A	1,725,798	1,466,928	1,294,349	862,899		N/A	1,360,996
Unit 1										
Unit 2										
Unit 3										
Unit 4										
Grouper	177,427		N/A	337,178	286,601	252,884	168,589		N/A	214,118
Unit 1			0						0	
Unit 2			0						0	
Unit 3										
Unit 4										
Parrotfish	248,328	430,000	N/A	512,201	435,371	384,151	256,101	430,000	N/A	464,819

Because data are insufficient to estimate biomass and fishing mortality rates in the U.S. Caribbean, the remaining information needed to calculate MSY proxies was derived from the informed judgment of the SFA Working Group regarding whether each species/species group was at risk of overfishing and/or overfished during the time period when catches were averaged.[1] This approach followed guidance provided by Restrepo *et al.* (1998), which notes that "in cases of severe data limitations, qualitative approaches [to determining stock status and fishery status] may be necessary, including [the use of] expert opinion and consensus-building methods." The determinations of the SFA Working Group were based on available scientific and anecdotal information (including anecdotal observations of fishermen as reported by fishery managers), life history information, and the status of individual species as evaluated in other regions. ABC estimates were developed using the natural mortality rate of each species/species group as a proxy for F_{MSY}. The actual yield associated with the current OY definition was estimated to equal 93.75% of MSY.

Alternative 2. (PREFERRED) Redefine management reference points or proxies for the snapper, grouper and/or parrotfish complexes based on the longest time series of pre-Comprehensive SFA Amendment catch data that is considered to be consistently reliable across all islands.

Discussion: Alternative 2 would define aggregate management reference points or proxies for the snapper, grouper and/or parrotfish complexes based on what the Council considers to be the longest time series of catch data prior to the implementation of the Comprehensive SFA Amendment that is consistently reliable across all islands. Specific definitions are detailed in Table 4.2.3. The Council chose to omit several years of landings data collected in Puerto Rico prior to 1999 in favor of selecting a more consistent baseline across all islands, noting the inclusion of those earlier landings data would not appreciably alter the various reference point estimates.

The MSY proxy specified by Alternative 2 would equate to average catch, calculated using commercial landings data from 1999–2005 for Puerto Rico and St. Croix and from 2000–2005 for St. Thomas/St. John, and recreational landings data from 2000–2005 for Puerto Rico only. Commercial data would be derived from trip ticket reports collected by the state governments. Recreational data would be derived from the MRFSS.

The overfishing threshold (OFL) would be defined as the amount of catch corresponding to the MSY proxy, and overfishing would be determined to occur if annual catches exceeded the overfishing threshold (Alternative 2(a)) or if annual catches exceeded the overfishing threshold and scientists (in consultation with managers) attributed the overage to increased catches versus improved data collection and monitoring (Alternative 2(b)).

TABLE 4.2.3—MANAGEMENT REFERENCE POINTS OR PROXIES PROPOSED FOR SNAPPER, GROUPER AND/OR PARROTFISH COMPLEXES UNDER ALTERNATIVE 2

Reference point	Alternative 2 (preferred)
Maximum Sustainable Yield	MSY proxy = average annual commercial catch from 1999–2005 for Puerto Rico and STX and from 2000–2005 for STT/STJ + average annual recreational catch from MRFSS during 2000–2005 for Puerto Rico.
Overfishing Threshold	
Alternative 2(a)	OFL = MSY proxy; overfishing occurs when annual catches exceed the OFL.

[1] The SFA Working Group was a Council-advisory group, which included staff from the Council, NMFS' Southeast Regional Office and SEFSC, USVI and Puerto Rico fishery management agencies, and several environmental non-governmental organizations. The discussion of biomass and fishing mortality rate estimates took place at the October 23–24, 2002 meeting of the SFA Working Group in Carolina, Puerto Rico. Notice of the meeting location, date, and agenda was provided in the **Federal Register** (67 FR 63622).

TABLE 4.2.3—MANAGEMENT REFERENCE POINTS OR PROXIES PROPOSED FOR SNAPPER, GROUPER AND/OR PARROTFISH COMPLEXES UNDER ALTERNATIVE 2—Continued

Reference point	Alternative 2 (preferred)
Alternative 2(b) (PREFERRED)	OFL = MSY proxy; overfishing occurs when annual catches exceed the OFL, unless NMFS' Southeast Fisheries Science Center (in consultation with the Caribbean Fishery Management Council and its Scientific and Statistical Committee) determines the overage occurred because data collection/monitoring improved, rather than because catches actually increased.
Optimum Yield/Annual Catch Limit	
Alternative 2(c)	OY = ACL = OFL.
Alternative 2(d)	OY = ACL = OFL × (0.85).
Alternative 2(e) (PREFERRED)	OY = ACL = OFL × (0.75) (PREFERRED for snappers, groupers and parrotfish).
Alternative 2(f)	OY = ACL = OFL × (0.50)
Alternative 2(g)	OY = ACL = ABC specified by Scientific and Statistical Committee.
Alternative 2(h) (PREFERRED)	OY = ACL = 0 (Grouper Units 1 and 2, midnight parrotfish, blue parrotfish, rainbow parrotfish) (PREFERRED for GU1 and GU2 and for midnight, blue and rainbow parrotfish).

The OY and ACL would be equal values, and the same socioeconomic and ecological tradeoffs would be considered in the determination of where to set both of these parameters. Most of the alternative ACL definitions considered here are more restrictive than the current OY definition and would prevent the fishery from achieving OY as currently defined.

ACL (= OY) Alternatives 2(c) through 2(f) would set those parameters equal to some proportion (100–50%) of the OFL to take into account uncertainty, ecological factors, and other concerns. Alternative 2(g) would set the ACL (= OY) equal to the ABC recommended by the Council's Scientific and Statistical Committee; however, of the complexes considered here, the SSC recommended an ABC only for parrotfish. Alternative 2(h) would set the ACL (= OY) equal to zero for Grouper Unit 1 (Nassau grouper) and/or Grouper Unit 2 (goliath grouper), indicating that take of these species should be prohibited to prevent overfishing. The Council chose to include three of the parrotfish (blue, midnight and rainbow) in Alternative 2(h) thereby creating the option to set OY and ACL equal to zero for these species as well.

The specific numerical values associated with the various Alternative 2 definitions are described in Table 4.2.2 under the columns titled, "Alternative 2."

The CFMC, at its 134th Regular Meeting held in St. Thomas, USVI during April 7–8 2010, chose the following alternatives as preferred alternatives to be taken to public hearings. These are not to be considered final actions by the CFMC. Instead, the Council will convene later in 2010, following the public hearings, to take final action on these alternatives.

In Action 2(a), Alternative 2 was chosen as the preferred alternative because it includes the longest pre-Comprehensive SFA Amendment data series for the commercial and recreational sectors. In 2005, implementation of the Comprehensive SFA Amendment to the reef fish and conch FMPs included a suite of management measures designed to curb or end overfishing, including for example seasonal and area closures. As a result, the management regime changed drastically in 2005. The Council therefore decided to use the pre-Comprehensive SFA Amendment time series for redefining management reference points because that time series does not include post-2005 years that are influenced by those potentially substantial changes in management and resultant reduction in catch. Moreover, Caribbean coral reefs and their associated community experienced a major bleaching event and an above-normal number of hurricanes and storms in 2005 (Wilkinson and Souter 2008), further complicating the interpretation of post-2005 harvest data.

The CFMC chose Alternative 2(b) as a preferred alternative in the public hearing draft document to ensure that AMs are not triggered indiscriminately without considering the effect of improved reporting and data collection efforts. The Council recognized the efforts that the local governments, fishers, and the SEFSC are undertaking to provide the necessary information for stock assessments in the region. In making the determination, the agency will assess the quality of the incoming data on an improved and timely schedule, and monitor along with the local governments the quality of the data. Additional information could be collected to determine if the increase in catches is due to more accurate reporting, including increases in the number of complete catches being sampled.

The Council preferred Alternatives 2(e), a scalar of 0.75, for the snapper complex, the grouper complex, and the parrotfish unit. This precautionary approach was taken in consideration of the combined management and scientific uncertainty inherent in the data, but also considering the many changes that have taken place in the U.S. Caribbean since 2005. Alternative 2(h) was chosen as a preferred alternative for GU1 (Nassau grouper), GU2 (goliath grouper), and for blue, midnight, and rainbow parrotfish. For Nassau and goliath grouper, fishing and possession of these species already is prohibited in all state and territorial waters and in the EEZ.

This amendment includes, as an alternative, a prohibition on fishing for and possession of midnight, blue, and rainbow parrotfish, as recommended by the SSC. The Council also chose Action 4(a) Alternative 2 prohibiting fishing for and possession of these parrotfish as the preferred alternative. This alternative, for the three species of parrotfish, responds to the important role these larger parrotfish have on the ecological health of the coral reefs and the testimony at Council public meetings (including scoping meetings on ACLs) on the decrease in numbers of these species on U.S. Caribbean coral reefs.

Alternative 3. Redefine management reference points or proxies for the snapper, grouper and/or parrotfish complexes based on the longest time series of catch data that is considered to be consistently reliable across all islands.

TABLE 4.2.4—MANAGEMENT REFERENCE POINTS OR PROXIES PROPOSED FOR SNAPPER, GROUPER AND/OR PARROTFISH COMPLEXES UNDER ALTERNATIVE 3

Reference point	Alternative 3
Maximum Sustainable Yield	MSY proxy = average annual commercial catch from 1999–2007 for Puerto Rico and STX and from 2000–2007 for STT/STJ + average annual recreational catch from MRFSS during 2000–2007 for Puerto Rico.
Overfishing Threshold	
Alternative 3(a)	OFL = MSY proxy; overfishing occurs when annual catches exceed the OFL.
Alternative 3(b)	OFL = MSY proxy; overfishing occurs when annual catches exceed the OFL, unless NMFS' Southeast Fisheries Science Center (in consultation with the Caribbean Fishery Management Council and its Scientific and Statistical Committee) determines the overage occurred because data collection/monitoring improved, rather than because catches actually increased.
Optimum Yield/Annual Catch Limit	
Alternative 3(c)	OY = ACL = OFL.
Alternative 3(d)	OY = ACL = OFL × (0.85).
Alternative 3(e)	OY = ACL = OFL × (0.75).
Alternative 3(f)	OY = ACL = OFL × (0.50).
Alternative 3(g)	OY = ACL = ABC specified by Scientific and Statistical Committee.
Alternative 3(h)	OY = ACL = 0 (Grouper Units 1 and 2 and/or parrotfish).

Discussion: Alternative 3 would define aggregate management reference points or proxies for the snapper, grouper and/or parrotfish complexes based on what the Council considers to be the longest time series of catch data that is consistently reliable across all islands. Specific definitions are detailed in Table 4.2.4.

The Council chose to omit several years of landings data collected in Puerto Rico prior to 1999 in favor of selecting a more consistent baseline across all islands, noting the inclusion of those earlier landings data would not appreciably alter the various reference point estimates.

The MSY proxy defined by Alternative 3 would equate to average catch, calculated using commercial landings data from 1999–2007 for Puerto Rico and St. Croix and from 2000–2007 for St. Thomas/St. John, and recreational landings data from 2000–2007 for Puerto Rico only. Commercial data would be derived from trip ticket reports collected by the state governments. Recreational data would be derived from the MRFSS. Alternative definitions for the overfishing threshold, OY, and ACL parameters are the same as those considered under Alternative 2. The specific numerical values associated with the various Alternative 3 definitions are described in Table 4.2.2 under the columns titled, "Alternative 3."

Alternative 4. Redefine management reference points or proxies for the snapper, grouper and/or parrotfish complexes based on the most recent five years of available catch data.

Discussion: Alternative 4 would define aggregate management reference points or proxies for the snapper, grouper and/or parrotfish complexes based on the most recent five years of available catch data as requested by the Council. Specific definitions are detailed in Table 4.2.5.

The MSY proxy defined by Alternative 4 would equate to average catch, calculated using commercial landings data from 2003–2007 for Puerto Rico and the USVI, and recreational landings data from 2003–2007 for Puerto Rico only. Commercial data would be derived from trip ticket reports collected by the state governments. Recreational data would be derived from the MRFSS. Alternative definitions for the overfishing threshold, OY and ACL parameter are the same as those considered under Alternatives 2 and 3. The specific numerical values associated with the various Alternative 4 definitions are described in Table 4.2.2 under the columns titled, "Alternative 4."

TABLE 4.2.5—MANAGEMENT REFERENCE POINTS OR PROXIES PROPOSED FOR SNAPPER, GROUPER AND/OR PARROTFISH COMPLEXES UNDER ALTERNATIVE 4

Reference point	Alternative 4
Maximum Sustainable Yield	MSY proxy = average annual commercial catch from 2003–2007 for Puerto Rico and the USVI + average annual recreational catch from MRFSS during 2003–2007 for Puerto Rico.
Overfishing Threshold	
Alternative 4(a)	OFL = MSY proxy; overfishing occurs when annual catches exceed the OFL.
Alternative 4(b)	OFL = MSY proxy; overfishing occurs when annual catches exceed the OFL, unless NMFS' Southeast Fisheries Science Center (in consultation with the Caribbean Fishery Management Council and its Scientific and Statistical Committee) determines the overage occurred because data collection/monitoring improved, rather than because catches actually increased.

TABLE 4.2.5—MANAGEMENT REFERENCE POINTS OR PROXIES PROPOSED FOR SNAPPER, GROUPER AND/OR PARROTFISH COMPLEXES UNDER ALTERNATIVE 4—Continued

Reference point	Alternative 4
Optimum Yield/Annual Catch Limit	
Alternative 4(c)	OY = ACL = OFL.
Alternative 4(d)	OY = ACL = OFL × (0.85).
Alternative 4(e)	OY = ACL = OFL × (0.75).
Alternative 4(f)	OY = ACL = OFL × (0.50).
Alternative 4(g)	OY = ACL = ABC specified by Scientific and Statistical Committee.
Alternative 4(h)	OY = ACL = 0 (Grouper Units 1 and 2 and/or parrotfish).

4.2.2 Action 2(b): Queen Conch Complex

Action 2(b) proposes to redefine management reference points or proxies for the queen conch complex. Queen conch is currently classified as overfished and subject to overfishing in NMFS' report to Congress on the status of U.S. marine fisheries. However, the status of this species has not been assessed since the Council and NMFS implemented measures to address overfishing through the Comprehensive SFA Amendment (CFMC 2005). Queen conch is currently entering the sixth year of a rebuilding plan designed to rebuild the stock by 2019.

Alternative 1. No action. Retain current management reference points or proxies for the queen conch complex.

TABLE 4.2.6—CURRENT MSY PROXY, OY, AND OVERFISHING THRESHOLD DEFINITIONS FOR QUEEN CONCH

Reference point	Status quo definition
Maximum Sustainable Yield	MSY proxy = $C/[(F_{CURR}/F_{MSY}) \times (B_{CURR}/B_{MSY})]$; where C is calculated based on commercial landings for the years 1997–2001 for Puerto Rico and 1994–2002 for the USVI, and on recreational landings for the years 2000–2001.
Overfishing Threshold	MFMT = F_{MSY}.
Optimum Yield	OY = average yield associated with fishing on a continuing basis at F_{OY}; where $F_{OY} = 0.75F_{MSY}$.

Discussion: This alternative would retain the present MSY proxy, OY, and overfishing threshold definitions specified in the Comprehensive SFA Amendment for queen conch. These definitions are detailed in Table 4.2.6.

The current MSY proxy is based on C and on estimates of where stock biomass and fishing mortality rates are in relation to MSY levels during the period over which catches are averaged. The overfishing threshold (MFMT) is defined as a rate of fishing which exceeds that which would produce MSY, and OY is defined as the amount of queen conch produced by fishing at a rate equal to 75% of that which would produce MSY. The numerical values associated with these parameters are provided in Table 4.2.2 under the columns titled, "Alternative 1."

The Comprehensive SFA Amendment in which these reference points were established pre-dated the MSRA provisions requiring FMPs to specify ACLs; consequently, the Comprehensive SFA Amendment did not explicitly specify this parameter for managed species/species groups. However, the ABC estimates derived from the Council's MSY control rule could be considered to represent the ACL of queen conch if no additional action were taken to revise management reference points in this amendment.

The average catch estimate used to calculate the MSY proxy was derived from commercial landings data recorded during 1997–2001 for Puerto Rico and during 1994–2002 for the USVI, and recreational landings data recorded during 2000–2001. These time series were considered to represent the longest time periods of relatively reliable data at the time the Comprehensive SFA Amendment was approved. Commercial catch data were derived from trip ticket reports collected by the state governments. Recreational catch data for Puerto Rico were derived from a two-month MRFSS survey specific for queen conch. Recreational catches for the USVI were assumed to equal 50% of USVI commercial landings based on information from Valle-Esquivel (pers. comm.).

Because data are insufficient to estimate biomass and fishing mortality rates in the U.S. Caribbean, the remaining information needed to calculate the MSY proxy was derived from the informed judgment of the SFA Working Group regarding whether queen conch was at risk of overfishing and/or overfished during the time period when catches were averaged. This is the same approach described in Section 4.2.1 for the snapper, grouper, and parrotfish complexes. ABC estimates were developed using the natural mortality rate of queen conch as a proxy for F_{MSY}. The actual yield associated with the current OY definition was estimated to equal 93.75% of MSY.

Alternative 2. (PREFERRED) Redefine management reference points or proxies for queen conch based on the longest time series of pre-Comprehensive SFA Amendment catch data that is considered to be consistently reliable across all islands.

TABLE 4.2.7—MANAGEMENT REFERENCE POINTS OR PROXIES PROPOSED FOR QUEEN CONCH UNDER ALTERNATIVE 2

Reference point	Alternative 2 (Preferred)
Maximum Sustainable Yield	MSY proxy = average annual commercial catch from 1999–2005 for Puerto Rico and STX and from 2000–2005 for STT/STJ.
Overfishing Threshold	
Alternative 2(a)	OFL = MSY proxy; overfishing occurs when annual catches exceed the OFL.
Alternative 2(b) (PREFERRED)	OFL = MSY proxy; overfishing occurs when annual catches exceed the OFL, unless NMFS' Southeast Fisheries Science Center (in consultation with the Caribbean Fishery Management Council and its Scientific and Statistical Committee) determines the overage occurred because data collection/monitoring improved, rather than because catches actually increased. (PREFERRED)
Optimum Yield/Annual Catch Limit	
Alternative 2(c)	OY = ACL = average annual landings from 1999–2005 for St. Croix.
Alternative 2(d)	OY = ACL = average annual landings from 1999–2005 for St. Croix × (0.85).
Alternative 2(e)	OY = ACL = average annual landings from 1999–2005 for St. Croix × (0.75).
Alternative 2(f)	OY = ACL = average annual landings from 1999–2005 for St. Croix × (0.50).
Alternative 2(g) (PREFERRED)	OY = ACL = ABC specified by Scientific and Statistical Committee (PREFERRED).
Alternative 2(h)	OY = ACL = 0.

Discussion: Alternative 2 would redefine management reference points or proxies for queen conch based on what the Council considers to be the longest time series of catch data prior to the implementation of the Comprehensive SFA Amendment that is considered reliable across all islands. Specific definitions are detailed in Table 4.2.7. The Council chose to omit several years of landings data collected in Puerto Rico prior to 1999 in favor of selecting a more consistent baseline across all islands, noting the inclusion of those earlier landings data would not appreciably alter the various reference point estimates.

The MSY proxy specified by Alternative 2 would equate to average catch, calculated using commercial landings data from 1999–2005 for Puerto Rico and St. Croix and from 2000–2005 for St. Thomas/St. John. These data would be derived from trip ticket reports collected by the state governments.

The OFL would be defined as the amount of catch corresponding to the MSY proxy, and overfishing would be determined to occur if annual catches exceeded the overfishing threshold (Alternative 2(a)) or if annual catches exceeded the overfishing threshold and scientists (in consultation with managers) attributed the overage to increased catches versus improved data collection and monitoring (Alternative 2(b)).

The OY and ACL would be equal values, and the same socioeconomic and ecological tradeoffs would be considered in the determination of where to set both of these parameters. Most of the alternative ACL definitions considered here are more restrictive than the current OY definition and would prevent the fishery from achieving OY as currently defined.

ACL (= OY) Alternatives 2(c) through 2(f) would set those parameters equal to some proportion (100–50%) of the average annual landings from 1999–2005 for St. Croix to take into account uncertainty, ecological factors, and other concerns. Alternative 2(g) would set those parameters equal to the 50,000 pound ABC recommended by the Council's SSC for queen conch. Alternative 2(h) would set these parameters equal to zero, indicating that queen conch take should be prohibited to prevent overfishing. Note that the EEZ is closed to queen conch harvest west of 64° 34′ W, with only the Lang Bank EEZ area east of St. Croix open to queen conch harvest in federal waters.

The specific numerical values associated with the various Alternative 2 definitions are described in Table 4.2.2 under the columns titled, "Alternative 2".

Alternative 3. Redefine management reference points or proxies for queen conch based on the longest time series of catch data that is considered to be consistently reliable across all islands.

Discussion: Alternative 3 would define aggregate management reference points or proxies for queen conch based on what the Council considers to be the longest time series of catch data that is consistently reliable across all islands. Specific definitions are detailed in Table 4.2.8.

The Council chose to omit several years of landings data collected in Puerto Rico prior to 1999 in favor of selecting a more consistent baseline across all islands, noting the inclusion of those earlier landings data would not appreciably alter the various reference point estimates.

TABLE 4.2.8—MANAGEMENT REFERENCE POINTS OR PROXIES PROPOSED FOR QUEEN CONCH UNDER ALTERNATIVE 3

Reference point	Alternative 3
Maximum Sustainable Yield	MSY proxy = average annual commercial catch from 1999–2007 for Puerto Rico and STX and from 2000–2007 for STT/STJ.
Overfishing Threshold	
Alternative 3(a)	OFL = MSY proxy; overfishing occurs when annual catches exceed the OFL.

TABLE 4.2.8—MANAGEMENT REFERENCE POINTS OR PROXIES PROPOSED FOR QUEEN CONCH UNDER ALTERNATIVE 3—Continued

Reference point	Alternative 3
Alternative 3(b)	OFL = MSY proxy; overfishing occurs when annual catches exceed the OFL, unless NMFS' Southeast Fisheries Science Center (in consultation with the Caribbean Fishery Management Council and its Scientific and Statistical Committee) determines the overage occurred because data collection/monitoring improved, rather than because catches actually increased.
Optimum Yield/Annual Catch Limit	
Alternative 3(c)	OY = ACL = average annual landings from 1999–2007 for St. Croix.
Alternative 3(d)	OY = ACL = average annual landings from 1999–2007 for St. Croix × (0.85).
Alternative 3(e)	OY = ACL = average annual landings from 1999–2007 for St. Croix × (0.75).
Alternative 3(f)	OY = ACL = average annual landings from 1999–2007 for St. Croix × (0.50).
Alternative 3(g)	OY = ACL = ABC specified by Scientific and Statistical Committee.
Alternative 3(h)	OY = ACL = 0.

The MSY proxy defined by Alternative 3 would equate to average catch, calculated using commercial landings data only from 1999–2007 for Puerto Rico and St. Croix and from 2000–2007 for St. Thomas/St. John. These data would be derived from trip ticket reports collected by the state governments. Alternative definitions for the overfishing threshold, OY, and ACL parameters are the same as those considered under Alternative 2. The specific numerical values associated with the various Alternative 3 definitions are described in Table 4.2.2 under the columns titled, "Alternative 3".

Alternative 4. Redefine management reference points or proxies for queen conch based on the most recent five years of available catch data.

Discussion: Alternative 4 would define management reference points or proxies for queen conch based on the most recent five years of available catch data, as requested by the Council. Specific definitions are detailed in Table 4.2.9.

TABLE 4.2.9.—MANAGEMENT REFERENCE POINTS OR PROXIES PROPOSED FOR QUEEN CONCH UNDER ALTERNATIVE 4

Reference point	Alternative 4
Maximum Sustainable Yield	MSY proxy = average annual commercial catch from 2003–2007 for Puerto Rico and the USVI.
Overfishing Threshold	
Alternative 4(a)	OFL = MSY proxy; overfishing occurs when annual catches exceed the OFL.
Alternative 4(b)	OFL = MSY; overfishing occurs when annual catches exceed the OFL, unless NMFS' Southeast Fisheries Science Center (in consultation with the Caribbean Fishery Management Council and its Scientific and Statistical Committee) determines the overage occurred because data collection/monitoring improved, rather than because catches actually increased.
Optimum Yield/Annual Catch Limit	
Alternative 4(c)	OY = ACL = average annual landings from 2003–2007 for St. Croix.
Alternative 4(d)	OY = ACL = average annual landings from 2003–2007 for St. Croix × (0.85).
Alternative 4(e)	OY = ACL = average annual landings from 2003–2007 for St. Croix × (0.75).
Alternative 4(f)	OY = ACL = average annual landings from 2003–2007 for St. Croix × (0.50).
Alternative 4(g)	OY = ACL = ABC specified by Scientific and Statistical Committee.
Alternative 4(h)	OY = ACL = 0.

The MSY proxy specified by Alternative 4 would equate to average catch, calculated using commercial landings data only from 2003–2007 for Puerto Rico and the USVI. These data would be derived from trip ticket reports collected by the state governments. Alternative definitions for the overfishing threshold, OY, and ACL parameters are the same as those considered under Alternatives 2 and 3. The specific numerical values associated with the various Alternative 4 definitions are described in Table 4.2.2 under the columns titled, "Alternative 4".

4.3 Action 3: Annual Catch Limit Allocation/Management

4.3.1 Action 3(a): Snapper and grouper unit allocation/management

Alternative 1. No action. Define reference points for sub-units within the snapper and grouper units.

Alternative 2. Define aggregate reference points for the snapper and grouper units:

A. Puerto Rico only.

B. USVI only.

C. Both Puerto Rico and the USVI.

Alternative 3. Define aggregate reference points for the grouper unit:

A. Puerto Rico only.

B. USVI only.

C. Both Puerto Rico and the USVI.

Alternative 4. (PREFERRED) Define aggregate reference points for snapper and grouper in the USVI and define aggregate reference points for grouper but not snapper in Puerto Rico.

Discussion: Commercial harvest data have been collected from Puerto Rico and USVI waters for many decades, but as explained in Section 3.3 the USVI landings data were generally reported by gear rather than species until the late 1990s. As a result of those data limitations, USVI commercial landings data only allow analysis to the family-group (snapper, grouper, parrotfish) level since calendar year (CY) 1998 for St. Croix (STX) and since CY 2000 for St. Thomas and St. John (STT/STJ). Moreover, at the September 2009 meeting of the Council a motion to include only data acquired since CY 1999 was presented and passed. Thus, the start date for any analyses included in this amendment is CY 1999 or later. The rationale for this was because family-level data were not available for STT/STJ until CY 2000, so that year represents the earliest start date for STT/STJ. The Council also requested that landings data for Puerto Rico adhere to this start year limitation despite the fact that Puerto Rico data have been reported to species for a longer period of time than family level data have been reported for USVI landings. For all three island groups, commercial landings data were available only through CY 2007 at the time of preparation of this document. Thus, the data record for STX and Puerto Rico is 1999–2007 and for STT/STJ it is 2000–2007. Consequently, reference points for snapper and grouper will be based on similar time periods for all islands.

A tangible goal of fisheries management in U.S. Caribbean waters is to manage at the level of individual species. Considering the large number of species being harvested in U.S. Caribbean waters, and given the data limitations discussed above, adequate data with which to conduct stock assessments and to set reference points for individual species are generally not available for the U.S. Caribbean (SEDAR 2009). Thus, although it is a worthwhile goal to manage at the level of the individual species, in practice this is difficult for many U.S. Caribbean species due to data limitations.

4.3.2 Action 3(b): Commercial and recreational sector allocation/management (Puerto Rico only)

Alternative 1. No action. Do not specify sector-specific annual catch limits.

Alternative 2. (PREFERRED) Specify separate commercial and recreational annual catch limits based on the preferred management reference point time series.

Discussion: Action 3(b) applies only to Puerto Rico waters because recreational harvest data are not available for the USVI. In Puerto Rico, the MRFSS program has been underway since 2000. That program obtains estimates of recreational harvest from statistically based telephone surveys and face-to-face intercepts of recreational fishers, for finfish species including snapper, grouper, and parrotfish. Queen conch is not included in the program.

4.3.3 Action 3(c): Geographic allocation/management

Alternative 1. No Action. Maintain U.S. Caribbean-wide reference points.

Alternative 2. (PREFERRED) Divide and manage annual catch limits by island group (i.e., Puerto Rico, STT/STJ, STX) based on the preferred management reference point time series (Table 4.3.1 and Action 2).

A. (PREFERRED) Use a mid-point or equidistant method for dividing the EEZ among islands.

B. Use a straight line approach for dividing the EEZ among islands.

C. Use the St. Thomas Fishermen's Association line.

Discussion: Action 3(c) addresses the opportunity to partition the EEZ consistent with the allocation of fishing regulations among the islands (Puerto Rico and STX) or island groups (STT/STJ). Partitioning management among the described islands or island groups has been expressed as a desire of local fishers, the fishing community, and the local governments. Those entities emphasize differences among the islands in terms of culture, markets, gear preferences, and seafood preferences as the basis for such a management regime.

Table 4.3.1. Average annual landings in pounds of conch, parrotfish, snapper, and grouper from each of Puerto Rico, St. Thomas/St. John, and St. Croix for each of the year-sequence (1999–2005, 1999–2007, 2003–2007) alternatives discussed in Action 2 of this amendment. Snapper and grouper FMUs are based upon the proposed species composition as described in Table 4.1.1. Also included are averages for 2006–2007, the two available post-Comprehensive SFA Amendment years, for comparison with the year-sequence alternatives. Table A summarizes Puerto Rico commercial landings, Table B summarizes Puerto Rico recreational landings in pounds (numbers of fish reported are in parentheses), Table C summarizes St. Thomas/St. John commercial landings, Table D summarizes St. Croix commercial landings, and Table E provides the summary totals.

FMU/Year sequence	1999–2005	1999–2007	2003–2007	2006–2007
(A) Puerto Rico average commercial landings				
Conch	403,349	369,298	384,584	250,122
Parrotfish	127,980	111,614	101,084	54,332
Snapper:				
Unit 1	334,923	294,118	240,463	151,300
Unit 2	171,666	167,075	192,721	151,007
Unit 3	406,794	357,281	321,952	183,987
Unit 4	439,171	394,787	351,629	239,445
Unclassified	80,114	71,001	64,930	39,104
Total	1,432,668	1,284,262	1,171,695	764,843
Grouper:				
Unit 1	17,469	14,066	7,423	2,152
Unit 2	735	572	995	0
Unit 3	112,875	95,626	79,201	35,254

FMU/Year sequence	1999–2005	1999–2007	2003–2007	2006–2007
Unit 4	5,720	5,035	4,710	2,641
Unit 5	9,477	9,356	10,138	8,929
Unclassified	62,563	54,138	44,474	24,649
Total	208,839	178,793	146,941	73,625
(B) Puerto Rico average recreational landings				
Conch	N/A	N/A	N/A	N/A
Parrotfish	37,042 (22,128)	29,464 (17,853)	25,650 (13,726)	6,730 (5,027)
Snapper:				
Unit 1	112,384 (97,879)	135,565 (112,851)	133,829 (120,137)	205,109 (157,768)
Unit 2	40,953 (9,250)	32,846 (7,860)	16,477 (6,027)	8,528 (3,690)
Unit 3	97,833 (91,793)	90,649 (92,272)	83,372 (80,233)	69,097 (93,711)
Unit 4	33,540 (32,783)	29,307 (32,071)	29,587 (34,226)	16,607 (29,935)
Unclassified	8,130 (6,336)	6,098 (4,752)	0 (0)	0 (0)
Total	292,840 (238,041)	294,465 (249,806)	263,265 (240,623)	299,341 (285,104)
Grouper:				
Unit 1	6,172 (574)	7,975 (915)	11,251 (1,289)	13,383 (1,937)
Unit 2	6,501 (716)	4,875 (537)	0 (0)	0 (0)
Unit 3	72,063 (108,149)	62,994 (91,529)	69,430 (98,691)	35,788 (41,671)
Unit 4	4,581 (306)	4,945 (367)	6,162 (437)	6,035 (548)
Unit 5	1,522 (349)	1,142 (262)	1,361 (330)	0 (0)
Unclassified	0	0	0	0
Total	90,839 (110,094)	81,931 (93,610)	88,204 (100,747)	55,206 (44,156)
(C) St. Thomas/St. John average commercial landings				
Conch	1,649	1,876	1,981	2,557
Parrotfish	48,818	47,245	49,353	42,528
Snapper	157,382	159,594	156,792	166,231
Grouper	60,999	59,952	64,201	56,812
(D) St. Croix average commercial landings				
Conch	107,720	116,899	138,587	149,026
Parrotfish	293,219	308,333	336,114	361,229
Snapper	121,113	123,217	134,046	130,581
Grouper	35,806	34,177	37,832	28,475
(E) Summary U.S. Caribbean average commercial and recreational landings				
Conch	512,718	488,073	525,152	401,705
Parrotfish	507,059	496,656	512,201	464,819
Snapper	2,004,003	1,861,538	1,725,798	1,360,996
Grouper	396,483	354,853	337,178	214,118

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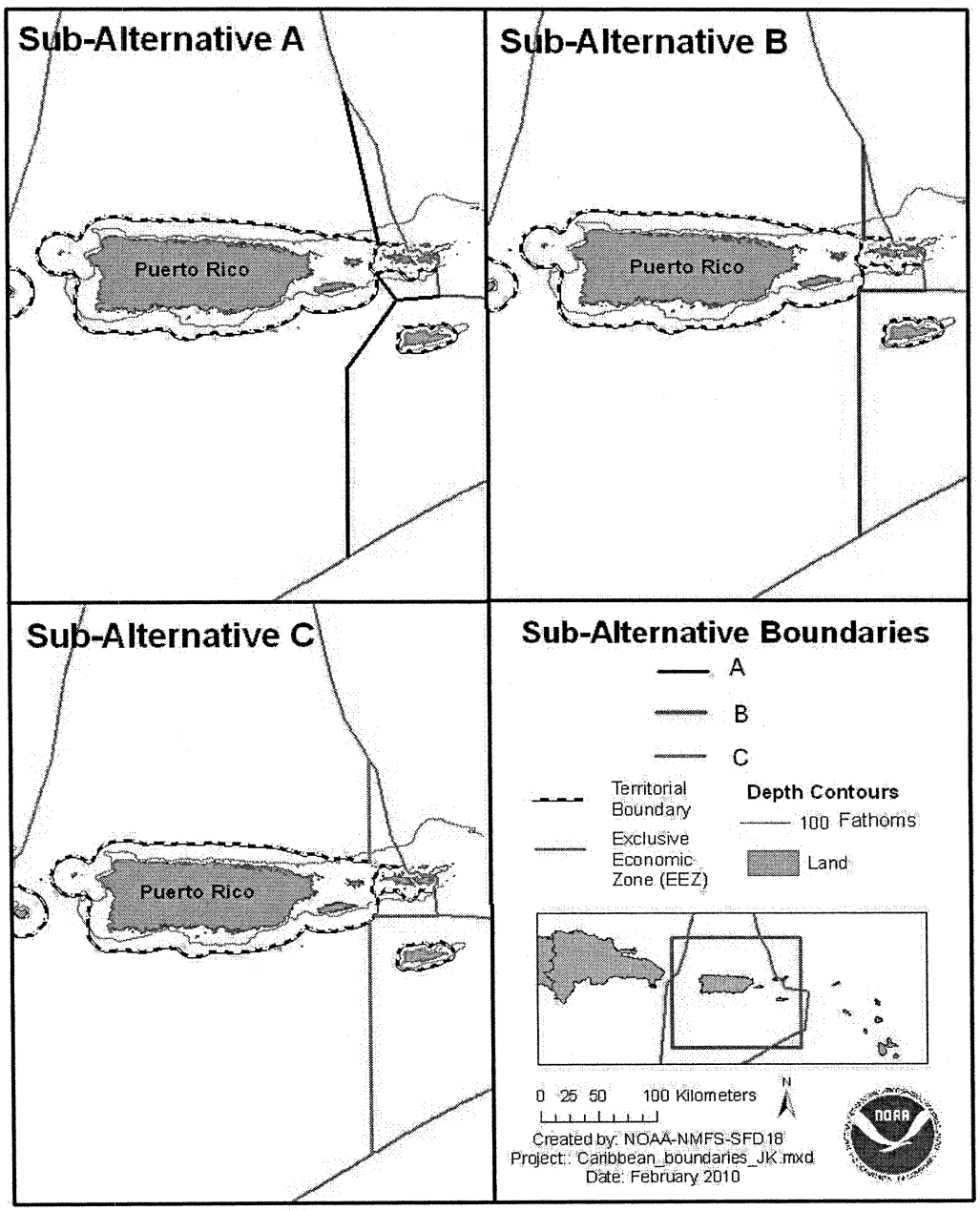

Figure 4.3.2. Alternative proposed boundaries for subdividing the U.S. Caribbean Exclusive Economic Zone by island group. Alternative 1 is the equidistant approach, Alternative 2 is the straight line approach, and Alternative 3 is the St. Thomas Fisherman's Association approach.

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4.4 Action 4: Management Measures

4.4.1 Action 4(a): Species-Specific Parrotfish Prohibitions

Alternative 1. No action. Do not establish species-specific prohibitions on parrotfish harvest.

Alternative 2. (PREFERRED) Prohibit fishing for or possessing in the EEZ:

A. Midnight parrotfish.

B. Blue parrotfish.

C. Rainbow parrotfish.

Discussion: Action 4(a) addresses concerns regarding the harvest of parrotfish, particularly the three largest species of parrotfish (midnight, blue, rainbow) that occur in U.S. Caribbean waters. Regarding those three large parrotfish, concern relates to the potential overharvest of these species due to their combination of large body size, a high susceptibility to spear gear and fish traps (Mumby *et al.* 2006), resultant relatively low resilience, and lack of abundance compared with most

parrotfish occupying U.S. Caribbean waters (Table 4.4.1).

TABLE 4.4.1—BIOLOGICAL CHARACTERISTICS OF COMMON U.S. CARIBBEAN PARROTFISH

Common name	Genus/species	Max size (cm)	Depth range (m)	Population doubling time	Resilience	Abundance
Blue parrotfish	*Scarus coeruleus*	120	3–25	1.4–4.4 yrs	Medium	occasional
Midnight parrotfish	*Scarus coelestinus*	77	5–75	1.4–4.4 yrs	Medium	occasional
Rainbow parrotfish	*Scarus* guacamaia	120	3–25	1.4–4.4 yrs	Medium	occasional
Queen parrotfish	*Scarus vetula*	61	3–25	<15 months	High	common
Princess parrotfish	*Scarus taeniopterus*	35	2–25	<15 months	High	common
Striped parrotfish	*Scarus iseri*	35	3–25	<15 months	High	common
Redband parrotfish	*Sparisoma aurofrenatum*	28	2–20	1.4–4.4 years	Medium	common
Redfin parrotfish	*Sparisoma rubripinne*	48	1–15	<15 months	High	common
Redtail parrotfish	*Sparisoma chrysopterum*	46	1–15	<15 months	High	common
Stoplight parrotfish	*Sparisoma viride*	64	3–50	1.4–4.4 years	Medium	common

Source: Humann 1994 and *http://www.fishbase.com.*

4.4.2 Action 4(b): Recreational Bag Limits

Alternative 1. No action. Do not establish bag limit restrictions on recreational reef fish harvest.

Alternative 2. Specify a 10-fish aggregate bag limit per person (would not apply to a fisherman who has a valid commercial fishing license issued by Puerto Rico or the USVI) for:

A. Species in the Snapper FMU.

B. Species in the Grouper FMU.

C. Species in the Parrotfish FMU.

Alternative 3. Specify a 5-fish aggregate bag limit per person (would not apply to a fisherman who has a valid commercial fishing license issued by Puerto Rico or the USVI) for:

A. Species in the Snapper FMU.

B. Species in the Grouper FMU.

C. Species in the Parrotfish FMU.

Alternative 4. Specify a 2-fish aggregate bag limit per person (would not apply to a fisherman who has a valid commercial fishing license issued by Puerto Rico or the USVI) for:

A. Species in the Snapper FMU.

B. Species in the Grouper FMU.

C. Species in the Parrotfish FMU.

Alternative 5. Establish a 0-fish aggregate bag limit per person (would not apply to a fisherman who has a valid commercial fishing license issued by Puerto Rico or the USVI) for species in the Parrotfish FMU.

Alternative 6. Establish a vessel limit (would not apply to a fisherman who has a valid commercial fishing license issued by Puerto Rico or the USVI) equivalent to the combined bag limit of:

A. Two fishers.

B. Three fishers.

C. Four fishers.

Alternative 7. (PREFERRED) Establish an aggregate bag limit for snapper, grouper and parrotfish FMUs of: 10 per fisher including not more than two parrotfish per fisher or six parrotfish per boat, and 30 aggregate snapper, grouper, and parrotfish per boat on a fishing day.

Discussion: As noted in Action 3(b) above, there is concern on the part of recreational fishing interests in the U.S. Caribbean that a conglomerate annual catch limit for the recreational and commercial sectors could create an unfair and economically untenable situation for the recreational fishers, particularly charter boat interests. The concern of the recreational fisher is that, in the race for a single quota, the commercial sector would dominate and there would be substantial losses of socioeconomic benefits to the recreational sector because the combined fishery would close before recreational fishers could achieve their historic average annual landings. It was therefore suggested at the December 2009 meeting of the Council, and a motion passed, to establish recreational bag limits for the U.S. Caribbean EEZ. Action 4(b) addresses the establishment of recreational bag limits. The goal of implementing bag limits would be to, when coupled with sector-specific (*i.e.*, recreational and commercial) ACLs, ensure that the recreational ACL for each complex is not exceeded until as near as possible to the end of the calendar year.

4.5 Action 5: Accountability Measures

Accountability Measures (AMs) are defined as management controls to prevent ACLs, including sector-specific ACLs, from being exceeded, and to correct or mitigate overages of the ACL if they occur (74 FR 3180).

4.5.1 Action 5(a): Triggering Accountability Measures

Action 3 includes alternatives to establish and allocate ACLs. If an ACL is exceeded, AM alternatives are provided to redress overages. Action 5 alternatives are presented in two parts, the first of which addresses the triggering of AMs and the second of which addresses the actual actions needed to redress overages.

Alternative 1. No Action. Do not trigger AMs.

Discussion: This alternative would maintain present status and no trigger to put into place corrective action would be set. Consequently, Alternative 1 would not achieve MSA compliance.

Alternative 2. Trigger AMs if the annual catch limit is exceeded based upon:

A. A single year of landings beginning with landings from 2010.

B. A single year of landings beginning with landings from 2010, then a 2-year running average of landings in 2011 (average of 2010+2011) and thereafter (i.e., 2010, 2010–2011, 2011–2012, etc.).

C. A single year of landings beginning with landings from 2010, a 2-year average of landings in 2011 (average of 2010+2011), then a 3-year running average of landings in 2012 (average of 2010+2011+2012) and thereafter (*i.e.,* 2010, 2010–2011, 2010–2012, 2011–2013, etc.).

Discussion: Alternative 2A would trigger AMs based on a single year of landings beginning in 2010. By adopting this alternative, the decision as to whether the ACL has been exceeded would be based on one year of landings data. Currently, the process used to consolidate or summarize landings data (*i.e.,* available for use) takes approximately two years. The landings data is initially acquired from fishers through each local government's fishery statistics program (often referred to as trip tickets in Puerto Rico and Commercial Catch Reports in the USVI), is proofed by the local government, and electronically transferred to the SEFSC.

The DPNER and the VIDPNR require commercial fishers to report landings or trip tickets monthly. Upon receipt, the SEFSC formats and stores landings data files and provides them to scientists and managers upon request for analysis or decision making. There may be as much as a two-year lag between the time catches are recorded and the data are released for management applications. For Alternative 2A, when landings data become available, they represent a single point of comparison to the established ACL. Consequently, the first one-year comparison to the originally established ACL should occur in 2012 or 2013. After that point in time, annual single-point comparisons can be made to existing ACLs.

In order to overcome the challenges of monitoring highly variable landings, Alternative 2B would trigger AMs based on a single year of landings beginning in 2010, and then a 2-year running average of landings in 2011 (average of 2010 + 2011) and thereafter (2010, 2010–2011, 2011–2012, etc.). Using the process described for Alternative 2A, the information might not be available for consideration until 2013 or 2014. By adopting this alternative, the decision as to whether the ACL has been exceeded would initially be based on landings from a single year but subsequent year comparisons would be based on two-year landing sets. Landings data can be highly variable; therefore, comparing average landings with the ACL can buffer peaks in landings, which may be a function of sampling or reporting rather than true estimation of actual harvest. While such a comparison is more robust than Alternatives 1 and 2A, a two-year average provides little information with regard to precision of the comparison.

Similar to Alternative 2B, Alternative 2C would trigger AMs based on a single year of landings beginning in 2010, then a 2-year average of landings in 2011 (average of 2010 + 2011), then a 3-year average of landings effective 2012 and thereafter (*i.e.,* 2010, 2010–2011, 2010–2012, 2011–2013, etc.). Using the process described for Alternative 2A, the information might not be available for consideration until 2013 or 2014. By adopting this alternative, the decision as to whether the ACL for each species/species group has been exceeded would initially be based on landings from a single year but in 2011 the comparison would be based on a two-year landing set (2010–2011), and subsequent comparisons would be based on 3-year landing sets (2010–2012, 2011–2013, etc.). Such a comparison is more robust than Alternatives 2A and 2B because it provides more information than a 1- or 2-year landings average with regard to precision of the comparison. Alternatives 2B and 2C prescribe a sound method for dealing with data uncertainty and provide a means by which any ACL overages may be accounted for in subsequent fishing years.

Alternative 3. (PREFERRED) Trigger AMs if the annual catch limit is exceeded as defined below and NMFS' SEFSC (in consultation with the Caribbean Fishery Management Council and its Scientific and Statistical Committee) determines the overage occurred because catches increased versus data collection/monitoring improved:

A. A single year of landings effective beginning 2010.

B. A single year of landings effective beginning 2010, then a 2-year running average of landings effective 2011 and thereafter (i.e., 2010, 2010–2011, 2011–2012, etc.).

C. (PREFERRED) A single year of landings effective beginning 2010, a 2-year running average of landings effective 2011, then a 3-year running average of landings effective 2012 and thereafter (*i.e.,* 2010, 2010–2011, 2010–2012, 2011–2013, etc.).

Discussion: The explanation of Alternative 3 is similar to that for Alternative 2 above with the addition of a consultation between the SEFSC, the SSC, and Council prior to the decision to determine whether an overage occurred. A data collection improvement program is under development by the SEFSC and is focused to provide more precise and accurate fishery landings information for the U.S. Caribbean, and there is a real possibility that more accurate and comprehensive landings data will be collected for each island mass. For Alternatives 3A–C a determination will have to be made to examine whether an overrun of the ACL was due to increased catches by fishers or to improved data collection/monitoring efforts. The SEFSC and the SSC will provide an analysis of the information and consult with the Council before any determination is made. A single year of landings beginning in 2010 will be the basis for the initial consultation and subsequent determination regarding the cause of any ACL overage.

Alternative 3B is similar to Alternative 3A except that after the initial single-year comparison (2010 information with established ACLs), then a 2-year running average of landings will begin in 2011 and thereafter (i.e., 2010, 2010–2011, 2011–2012, etc.).

Alternative 3C is similar to Alternative 3B except that after the initial single-year comparison (2010 information with established ACLs), and a 2-year running average of landings comparison will be made in 2011 (i.e., 2010, 2010–2011), after which a 3-year running average of landings will begin in 2012 and thereafter (i.e., 2010, 2010–2011, 2010–2012, 2011–2013, etc.). Using two or three year running averages of landings (Alternatives 3B and 3C) would provide a mechanism to deal with data uncertainty that may be due to reporting errors, underreporting, and highly variable landings.

4.5.2 Action 5(b): Applying Accountability Measures

Alternative 1. No Action. Do not apply AMs.

Alternative 2. (PREFERRED) If AMs are triggered, then reduce the length of the fishing season for that species or species group the year following the trigger determination by the amount needed to prevent such an overage from occurring again. The needed changes will remain in effect until modified.

Alternative 3. If AMs are triggered, then reduce the length of the fishing season for that species or species group the year following the trigger determination by the amount needed to prevent such an overage from occurring again and to pay back the overage. The needed changes will remain in effect until modified.

Discussion: Alternative 1 would not apply AMs when the ACL is exceeded and, consequently, would not comply with MSA provisions. Therefore, this is not a viable option when considering AMs. Reducing the length of the fishing season by the amount needed to pay back the overage in addition to shortening the season length to prevent a future overage (Alternative 3) would likely have a greater biological benefit than only reducing the length of the fishing season as specified in Alternative 2. However, AMs that shorten the fishing season can increase the magnitude of regulatory discards and may not be as effective as AMs that lower the target level but still allow some catch.

4.6 Action 6: Framework Measures

4.6.1 Action 6(a): Establish Framework Measures for Reef Fish FMP

Alternative 1: No Action. Do not amend the framework measures for the Reef Fish FMP

Alternative 2: Amend the framework procedures for the Reef Fish FMP to provide a mechanism to expeditiously adjust the following reference points

and management measures through framework action:

a. Quota Requirements.
b. Seasonal Closures.
c. Area Closures.
d. Fishing Year.
e. Trip/Bag Limit.
f. Size Limits.
g. Gear Restrictions or Prohibitions.
h. . Fishery Management Units (FMUs).
i. Total Allowable Catch (TAC).
j. Annual Catch Limits (ACLs).
k. Accountability Measures (AMs).
l. Annual Catch Targets (ACTs).
m. Maximum Sustainable Yield (MSY).
n. Optimum Yield (OY).
o. Minimum Stock Size Threshold (MSST).
p. Maximum Fishing Mortality Threshold (MFMT).
q. Overfishing Limit (OFL).
r. Acceptable Biological Catch (ABC) control rules.
s. Actions To Minimize the Interaction of Fishing Gear With Endangered Species or Marine Mammals.

Alternative 3: Amend the framework procedures for the Reef Fish FMP to provide the Council with a mechanism to expeditiously adjust a subset of management measures outlined in Alternative 2.

4.6.2 Action 6(b): Establish Framework Measures for Queen Conch FMP

Alternative 1: No Action. Do not amend the framework measures for the Queen Conch FMP.

Alternative 2: Amend the framework procedures for the Queen Conch FMP to provide a mechanism to expeditiously adjust the following reference points and management measures through framework action:

a. Quota Requirements.
b. Seasonal Closures.
c. Area Closures.
d. Fishing Year.
e. Trip/Bag Limit.
f. Size Limits.
g. Gear Restrictions or Prohibitions.
h. Total Allowable Catch (TAC).
i. Annual Catch Limits (ACLs).
j. Accountability Measures (AMs).
k. Annual Catch Targets (ACTs).
l. Maximum Sustainable Yield (MSY).
m. Optimum Yield (OY).
n. Minimum Stock Size Threshold (MSST).
o. Maximum Fishing Mortality Threshold (MFMT).
p. Overfishing Limit (OFL).
q. Acceptable Biological Catch (ABC) control rules.
r. Actions To Minimize the Interaction of Fishing Gear With Endangered Species or Marine Mammals.

Alternative 3: Amend the framework procedures for the Queen Conch FMP to provide the Council with a mechanism to expeditiously adjust a subset of management measures outlined in Alternative 2.

Discussion: In order to modify regulations, the Council generally must follow the FMP amendment procedure which takes longer to implement than if the Council had the availability of a framework process. The current process for amending a FMP is not the most expedient possible for making timely preseason, in season, or other adjustments (see the above list) to management measures. However, this amendment establishes a process to make changes in a more expeditious manner via a regulatory amendment. Regulatory amendments can be implemented in a shorter period of time than plan amendments because the level of public participation is not as extensive as for the full plan amendment process. In order to complete a regulatory amendment, a framework section must be established for each FMP to which changes will be made.

Action 6 lists the framework measures which may be adjusted under regulatory amendment. This discussion section describes a framework procedure and how each might be achieved. Such a procedure will provide the Council with a mechanism to make management changes in the queen conch or reef fish fisheries in a more timely fashion than provided through the FMP amendment process.

Establish an assessment group and adjustments:

The following discussion outlines the procedure by which the Council may make management changes through regulatory amendment. As previously discussed, the purpose of frameworks and regulatory amendments is to provide the most responsive and efficient modifications to management measures. If an additional review process was included, there could be substantial delays, thus resulting in a longer lag time between identification of a problem and implementation of a response.

1. When the Council determines that management measures require modification, the Council will appoint an assessment group (Group) that will assess the condition of species in the reef fish or queen conch management units (including periodic economic and sociological assessments as needed). The Group will present a report of its assessment and recommendations to the Council.

2. The Council will consider the report and recommendations of the Group and hold public hearings at a time and place of the Council's choosing to discuss the Group's report. The Council may convene its Scientific and Statistical Committee to provide advice prior to taking final action. After receiving public input, the Council will make decisions on the need for change.

3. If changes to management regulations are needed, the Council will advise the Regional Administrator (RA) in writing of its recommendations accompanied by the Group's report (where appropriate), relevant background material, draft regulations, Regulatory Impact Review, and public comments.

4. The RA will review the Council's recommendations, supporting rationale, public comments, and other relevant information. If the RA concurs that the Council's recommendations are consistent with the goals and objectives of the fishery management plan, the national standards, and other applicable laws, the RA will recommend that the Secretary take appropriate regulatory action for the reef fish or queen conch fisheries on such date as may be agreed upon with the Council.

5. Should the RA reject the recommendations, the RA will provide written reasons to the Council for the rejection, and existing measures will remain in effect until the issue is resolved.

6. Appropriate adjustments that may be implemented by the Secretary include:

a. Specification of Maximum Sustainable Yield (MSY) or MSY proxy and subsequent adjustment where this information is available;
b. Specification of an Acceptable Biological Catch (ABC) control rule and subsequent adjustment where this information is available;
c. Specification of TAC and subsequent adjustment where this information is available;
d. Specification of Annual Catch Limits (ACLs) and subsequent adjustment;
e. Specification of AMs and subsequent adjustment;
f. Specification of Optimum Yield (OY) and subsequent adjustment where this information is available;
g. Specification of Minimum Stock Size Threshold (MSST) and subsequent adjustment;
h. Specification of Maximum Fishing Mortality Threshold (MFMT) or Overfishing Level (OFL) and subsequent adjustment;

i. Specification (or modification) of quotas (including zero quotas), trip limits, bag limits (including zero bag limits), minimum size limits, gear restrictions (ranging from modifying current regulations to a complete prohibition), season/area closures (including spawning closures), and fishing year;

j. Initial specification and subsequent adjustment of biomass levels and age structured analyses.

Authority is granted to the RA to close any fishery, i.e. revert any bag limit to zero and close any commercial fishery, once a quota has been established through the procedure described above and such quota has been filled.

If the NMFS decides not to publish the proposed rule of the recommended management measures, or to otherwise hold the measures in abeyance, then the RA must notify the Council of its intended action and the reasons for NMFS's concern, along with suggested changes to the proposed management measures that would alleviate the concerns. Such notice shall specify: (1) The applicable law with which the amendment is inconsistent; (2) the nature of such inconsistencies; and (3) recommendations concerning the action that could be taken by the Council to conform the amendment to the requirements of applicable law.

Dated: June 24, 2010.

Tracey L. Thompson,

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

[FR Doc. 2010–15778 Filed 6–28–10; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XT64

Notice of Public Review and Comment Period on NOAA's Next Generation Strategic Plan (NGSP)

AGENCY: Office of Program Planning & Integration, National Oceanic and Atmospheric Administration.

ACTION: Notice; request for comments.

SUMMARY: NOAA's Next Generation Strategic Plan (Plan) sets the course for the agency's mission, a vision of the future, the societal outcomes that NOAA aims to help realize, and, consequently, the actions that the agency must take. The draft Plan lays the foundation for NOAA to play a leading Federal role in responding to the Nation's most urgent challenges, ranging from climate change, severe weather, and natural or human-induced disasters to declining biodiversity and threatened or degraded ocean and coastal resources. NOAA's draft strategy emerged from extensive consultations across the Nation with staff and stakeholders—the extended community of partners and collaborators in the public, private, and academic sectors who have a stake in NOAA's mission. During more than 20 regional stakeholder forums, a national forum in Washington, DC, and through web-based engagement and idea generation, NOAA gathered input that helped assess the greatest challenges facing our Nation and the highest priority goals for NOAA. NOAA invites comments on the Plan on its: mission statement; vision of the future; long-term strategic goals and five-year objectives; enterprise components and five-year objectives; and strategic partnerships.

DATES: The public comment period is open from June 29, 2010, to August 10, 2010. Comments must be submitted by COB on August 10, 2010.

ADDRESSES: Submit comments via the following methods—

- NGSP Website (*www.noaa.gov/ngsp*).
- Mail: National Oceanic and Atmospheric Administration, Office of Program Planning and Integration, 1315 East West Highway, Room 15749, Silver Spring, Maryland 20910.
- Email comments to *strategic.planning@noaa.gov*.

FOR FURTHER INFORMATION CONTACT: Marla Trollan, NGSP Communications Director, at *marla.trollan@noaa.gov* or (302) 270–6288.

SUPPLEMENTARY INFORMATION: You may view the Plan in its entirety at: *www.noaa.gov/ngsp*.

I. Summary of the Plan

Through its longstanding mission of science, service, and stewardship, NOAA generates tremendous value for the Nation — and the world — by advancing our understanding of and ability to anticipate changes in the Earth's environment, by improving society's ability to make scientifically-informed decisions, and by conserving and managing ocean and coastal resources. NOAA's mission of science, service, and stewardship is to understand and anticipate changes in climate, weather, oceans, and coasts, share knowledge and information with others, and conserve and manage marine resources.

NOAA's mission is central to many of today's greatest challenges. Climate change. Severe weather. Natural and human-induced disasters. Declining biodiversity. Threatened or degraded ocean and coastal resources. These challenges convey a common message: Human health, prosperity, and well-being depend upon the health and resilience of natural ecosystems.

NOAA's vision of the future is one of healthy ecosystems, communities, and economies that are resilient in the face of change. Resilient ecosystems, communities, and economies can maintain and improve their health and vitality over time by anticipating, absorbing, and diffusing change—whether sudden or prolonged. This vision of resilience will guide NOAA and its partners in our collective effort to reduce the vulnerability of communities and ecological systems in the short term, while helping society avoid or adapt to long-term environmental, social, and economic changes. To this end, NOAA will focus on four long-term outcomes within its primary mission domains.

NOAA's Long-Term Goals:

- Climate Adaptation and Mitigation: An informed society anticipating and responding to climate and its impacts;
- Weather-Ready Nation: Society is prepared for and responds to weather-related events;
- Healthy Oceans: Vibrant marine fisheries, habitats, and biodiversity sustained within healthy and productive ecosystems; and
- Resilient Coastal Communities and Economies: Coastal and Great Lakes communities are environmentally and economically sustainable.

NOAA cannot achieve these goals on its own, but neither can society achieve them without NOAA. This Plan describes the long-term outcomes that NOAA will contribute to in each of these areas, along with the specific objectives that NOAA will pursue over the next five years. Over the next five years, NOAA will direct its collective mission capabilities toward objectives for society in each of its four interrelated and mutually supportive long-term goals:

- Long-term goal: Climate Adaptation and Mitigation - An informed society anticipating and responding to climate and its impacts.
- Objective: Improved scientific understanding of the changing climate system and its impacts.
- Objective: Integrated assessments of current and future states of the climate system that identify potential impacts and inform science, services, and decisions.
- Objective: Mitigation and adaptation efforts supported by sustained, reliable, and timely climate services.

• Objective: A climate-literate public that understands its vulnerabilities to a changing climate and makes informed decisions.

• Long-term goal: Weather-Ready Nation - Society is prepared for and responds to weather-related events.

• Objective: Reduced loss of life, property, and disruption from high-impact events.

• Objective: Improved water resource management.

• Objective: Improved transportation efficiency and safety.

• Objective: Healthy people and communities through improved air and water quality.

• Objective: Secure, reliable infrastructure for energy, communications, and agriculture.

• Long-term goal: Healthy Oceans - Vibrant marine fisheries, habitats, and biodiversity sustained within healthy and productive ecosystems.

• Objective: Improved understanding of ecosystems to inform resource management decisions.

• Objective: Recovered, rebuilt, and sustained living marine resources.

• Objective: Healthy habitats that sustain resilient and thriving marine resources and communities.

• Objective: Safe and sustainable seafood for healthy populations.

• Long-term goal: Resilient Coastal Communities and Economies - Coastal and Great Lakes communities that are environmentally and economically sustainable.

• Objective: Resilient coastal communities that can adapt to the impacts of hazards and climate change.

• Objective: Comprehensive ocean and coastal planning and management.

• Objective: Safe, efficient and environmentally sound marine transportation.

• Objective: Improved coastal water quality supporting human health and coastal ecosystem services.

• Objective: Safe, environmentally sound Arctic access and resource management.

As a whole, NOAA's capacity to achieve these goals and objectives will depend upon the continued strengthening and integration of NOAA's enterprise-wide science and technology, stronger partnerships and stakeholder engagement, and effective organizational and administrative functions. Over the next five years, NOAA will also direct its capabilities toward objectives for society in each of these components of its enterprise.

• NOAA's Science & Technology Enterprise:

• Objective: A holistic understanding of the Earth system through research.

• Objective: Accurate and reliable data from sustained and integrated earth observing systems.

• Objective: An integrated environmental modeling system.

• NOAA's Engagement Enterprise:

• Objective: An engaged and educated public with an improved capacity to make scientifically informed environmental decisions.

• Objective: Integrated services meeting the evolving demands of regional stakeholders.

• Objective: Full and effective use of international partnerships and policy leadership to achieve NOAA's mission objectives.

• NOAA's Organization & Administration Enterprise:

• Objective: Diverse and constantly evolving capabilities in NOAA's workforce.

• Objective: A modern information technology infrastructure for a scientific enterprise.

• Objective: Sound, life-cycle management of capital investments.

II. Request for Comments

NOAA invites comments on its: mission statement; vision of the future; long-term strategic goals and five-year objectives; enterprise components and five-year objectives; and strategic partnerships. NOAA prefers that you submit comments online via the NGSP website, *www.noaa.gov/ngsp*, where you may post general comments on the plan, comment on any particular section, as well as vote on the comments posted by others. This method will help NOAA understand which aspects of the plan deserve the most attention in developing a final version. You may also mail comments to: National Oceanic and Atmospheric Administration, Office of Program Planning and Integration, 1315 East West Highway, Room 15749, Silver Spring, Maryland 20910 or email comments to *strategic.planning@noaa.gov*.

Dated: June 24, 2010

Susan A. Kennedy,

Deputy Director of Strategic Planning, Office of Program Planning and Integration, National Oceanic and Atmospheric Administration.

[FR Doc. 2010–15768 Filed 6–28–10; 8:45 am]

BILLING CODE 3510–NW–S

COMMODITY FUTURES TRADING COMMISSION

Order Exempting the Trading and Clearing of Certain Products Related to ETFS Physical Swiss Gold Shares and ETFS Physical Silver Shares

AGENCY: Commodity Futures Trading Commission.

ACTION: Final order.

SUMMARY: On April 15, 2010, the Commodity Futures Trading Commission ("CFTC" or the "Commission") published for public comment in the **Federal Register** [1] a proposal to exempt the trading and clearing of certain contracts called "options" and other contracts called "security futures" on each of ETFS Physical Swiss Gold Shares ("Gold Products") and ETFS Physical Silver Shares ("Silver Products") (collectively, "Gold and Silver Products"), which would be traded on national securities exchanges (as to options) and designated contract markets registered with the Securities and Exchange Commission ("SEC") as limited purpose national securities exchanges (as to security futures), and in either case cleared through the Options Clearing Corporation ("OCC") in its capacity as a registered securities clearing agency, from the provisions of the Commodity Exchange Act ("CEA") [2] and the regulations thereunder, to the extent necessary to permit them to be so traded and cleared. Authority for this exemption is found in Section 4(c) of the CEA.[3] The Commission also requested comment on whether it should amend all orders issued exempting the trading and clearing of options on gold and silver share-based products from CEA provisions and Commission regulations thereunder, to impose market and large trader reporting requirements under Commission regulations to the trading and clearing of the options in order to assist the Commission in monitoring and addressing, among other things, the effect on designated contract markets of trading in such products.[4]

DATES: *Effective Date:* June 14, 2010

[1] 75 FR 19619 (April 15, 2010).

[2] 7 U.S.C. 1 *et seq.*

[3] 7 U.S.C. 6(c).

[4] The Commission has provided exemptions for gold and silver products in three prior cases. See Order Exempting the Trading and Clearing of Certain Products Related to SPDR® Gold Trust Shares, 73 FR 31981 (June 5, 2008), Order Exempting the Trading and Clearing of SPDR Gold Futures Contracts, 73 FR 31979 (June 5, 2008), and Order Exempting the Trading and Clearing of Certain Products Related to iShares® COMEX Gold Trust Shares and iShares® Silver Trust Shares, 73 FR 79830 (December 30, 2008).

FOR FURTHER INFORMATION CONTACT: Robert B. Wasserman, Associate Director, 202–418–5092, *rwasserman@cftc.gov,* or Lois J. Gregory, Special Counsel, 202–418–5569, *lgregory@cftc.gov,* Division of Clearing and Intermediary Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1151 21st Street, NW., Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

I. Introduction

The OCC is both a Derivatives Clearing Organization ("DCO") registered pursuant to Section 5b of the CEA,[5] and a securities clearing agency registered pursuant to Section 17A of the Securities Exchange Act of 1934 ("the '34 Act").[6]

OCC has filed with the CFTC, pursuant to Section 5c(c) of the CEA and Commission Regulations 39.4(a) and 40.5 thereunder,[7] a request for approval of rules and rule amendments that would enable OCC (1) to clear and settle contracts called "options" ("Options") on Gold and Silver Products traded on national securities exchanges, in its capacity as a registered securities clearing agency (and not in its capacity as a DCO) and (2) to clear and settle contracts called "security futures" ("Security Futures") on Gold and Silver Products traded on designated contract markets[8] registered with the SEC as limited purpose national securities exchanges pursuant to Section 6(g) of the '34 Act[9] ("DCMs") as security futures subject to the CEA and CFTC regulations thereunder governing security futures, in OCC's capacity as a registered securities clearing agency (and not in its capacity as a DCO).[10] Section 5c(c)(3) provides that the CFTC must approve such rules and rule amendments submitted for approval unless it finds that the rules or rule amendments would violate the CEA.

In each case, the shares of the ETFS Physical Swiss Gold Shares and the ETFS Physical Silver Shares are designed to reflect the performance of the price of gold and silver bullion, respectively, less the expenses of operations. The shares represent entitlement to a specified quantity of physical gold or silver bullion, or, in certain circumstances, the proceeds from the sale of such quantity of such physical gold or silver bullion.

The gold and silver bullion is held in vault by or on behalf of the custodian. All physical gold and silver conforms to the London Bullion Market Association's rules for good delivery.

II. Section 4(c) of the Commodity Exchange Act

Section 4(c)(1) of the CEA empowers the CFTC to "promote responsible economic or financial innovation and fair competition" by exempting any transaction or class of transactions from any of the provisions of the CEA (subject to exceptions not relevant here) where the Commission determines that the exemption would be consistent with the public interest.[11] The Commission may grant such an exemption by rule, regulation or order, after notice and opportunity for hearing, and may do so on application of any person or on its own initiative.

Section 4(c) does not require the Commission determine the jurisdictional status of the Options and Security Futures on Gold and Silver Products. In enacting Section 4(c), Congress noted that the goal of the provision "is to give the Commission a means of providing certainty and stability to existing and emerging markets so that financial innovation and market development can proceed in an effective and competitive manner."[12] Permitting Options and Security Futures on Gold and Silver Products to trade on national securities exchanges (as to Options) and DCMs (as to Security Futures) and to be cleared by OCC in its capacity as a securities clearing agency, as discussed above, may foster both financial innovation and competition.

The Options and Security Futures on Gold and Silver Products described above are novel instruments. Given, among other things, the fact that the Commission has previously exempted similar Gold and Silver Products, the Commission believes that this is an appropriate case for issuing an exemption without issuing a finding as to the nature of these particular instruments.

Section 4(c)(2) provides that the Commission may grant exemptions only when it determines: that the requirements for which an exemption is being provided should not be applied to the agreements, contracts or transactions at issue, and the exemption is consistent with the public interest and the purposes of the CEA; that the agreements, contracts or transactions will be entered into solely between appropriate persons; and that the exemption will not have a material adverse effect on the ability of the Commission or any contract market or derivatives transaction execution facility to discharge its regulatory or self-regulatory responsibilities under the CEA.[13]

In the April 15, 2010 **Federal Register** release, the CFTC requested comment as to whether this exemption from the requirements of the CEA and regulations thereunder should be granted in the context of these transactions. The CFTC also requested comment as to whether national securities exchanges that list Options on Gold and Silver Products should comply with market reporting requirements and brokers and traders that carry accounts or trade in Options on Gold and Silver products should

[5] 7 U.S.C. 7a–1

[6] 15 U.S.C. 78q–l.

[7] 7 U.S.C. 7a–2(c), 17 C.F.R. §§ 39.4(a), 40.5.

[8] *See* Section 5 of the CEA, 7 U.S.C. 7.

[9] 15 U.S.C. 78f(g).

[10] *See* Securities Exchange Act Release No. 61591 (February 25, 2010), 75 FR 9981 (March 4, 2010) (File No. SR–OCC–2009–20 filed with both the Commission and the Securities and Exchange Commission ("SEC")). See also Securities Exchange Act Release No. 61483 (February 3, 2010), 75 FR 6753 (February 10, 2010)(SEC approval of securities exchanges' listing and trading options on ETFS Physical Swiss Gold Shares and ETFS Physical Silver Shares).

[11] Section 4(c)(1) of the CEA, 7 U.S.C. 6(c)(1), provides in full that:

In order to promote responsible economic or financial innovation and fair competition, the Commission by rule, regulation, or order, after notice and opportunity for hearing, may (on its own initiative or on application of any person, including any board of trade designated or registered as a contract market or derivatives transaction execution facility for transactions for future delivery in any commodity under section 7 of this title) exempt any agreement, contract, or transaction (or class thereof) that is otherwise subject to subsection (a) of this section (including any person or class of persons offering, entering into, rendering advice or rendering other services with respect to, the agreement, contract, or transaction), either unconditionally or on stated terms or conditions or for stated periods and either retroactively or prospectively, or both, from any of the requirements of subsection (a) of this section, or from any other provision of this chapter (except subparagraphs (c)(ii) and (D) of section 2(a)(1) of this title, except that the Commission and the Securities and Exchange Commission may by rule, regulation, or order jointly exclude any agreement, contract, or transaction from section 2(a)(1)(D) of this title), if the Commission determines that the exemption would be consistent with the public interest.

[12] HOUSE CONF. REPORT NO. 102–978, 1992 U.S.C.C.A.N. 3179, 3213 ("4(c) Conf. Report").

[13] Section 4(c)(2) of the CEA, 7 U.S.C. 6(c)(2), provides in full that:

The Commission shall not grant any exemption under paragraph (1) from any of the requirements of subsection (a) of this section unless the Commission determines that—

(A) The requirement should not be applied to the agreement, contract, or transaction for which the exemption is sought and that the exemption would be consistent with the public interest and the purposes of this Act; and

(B) the agreement, contract, or transaction—

(i) will be entered into solely between appropriate persons; and

(ii) will not have a material adverse effect on the ability of the Commission or any contract market or derivatives transaction execution facility to discharge its regulatory or self-regulatory duties under this Act.

comply with large trader reporting requirements.[14]

Five comments were received: One from OCC, two from national securities exchanges,[15] and two from private citizens.[16] Two of the comments (OCC and CBOE) support the current exemption, but urge the Commission to deal with the status of commodity-based ETFs on a categorical rather than a case-by-case basis. The Commission will consider this suggestion.

OCC and CBOE also argue that any large trader reporting requirements imposed by the Commission would result in unnecessary and duplicative regulatory burdens, while ISE (which also supports the proposed exemption) notes that securities options exchanges have large option position reporting requirements in place, and that the Commission should consider coordinating these protections between markets in order to address its concern regarding the effective regulation of interconnected markets. By contrast, one public commenter (who opposes granting the exemption) suggests that, if the exemption is granted, it is crucial that reporting requirements be imposed. The Commission will consider these comments in deciding what action to take and or to propose with respect to market and large trader reporting for the trading and clearing of Options Gold and Silver Products and similar options on gold and silver products for which exemptions have previously been granted.[17]

III. Findings and Conclusions

After considering the complete record in this matter, the Commission has determined that the requirements of Section 4(c) have been met. First, the exemption is consistent with the public interest and with the purposes of the CEA, including "promot[ing] responsible innovation and fair competition among boards of trade, other markets and market participants."[18] Particularly in light of the exemptions previously granted by the Commission with respect to Options and Security Futures on Gold and Silver Products, it appears consistent with these and the other purposes of the CEA, and with the public interest, for the mode of trading and clearing these Options and Security Futures—whether the mode applicable to options on securities or commodities, or to security futures or futures—to be determined by competitive market forces.

Second, Options and Security Futures on Gold and Silver Products will be entered into solely between appropriate persons. Section 4(c)(3) includes within the term "appropriate persons" a number of specified categories of persons, and also in subparagraph (K) thereof "such other persons that the Commission determines to be appropriate in light of * * * the applicability of appropriate regulatory protections." National securities exchanges and OCC, as well as their members who will intermediate Options on Gold and Silver Products, are subject to extensive and detailed regulation by the SEC under the '34 Act. Similarly, DCMs and OCC, as well as their members who will intermediate Security Futures on Gold and Silver Products, are subject to regulation by the SEC and CFTC. Given that the Options and Security Futures on Gold and Silver Products will be traded on national securities exchanges (as to Options) and DCMs (as to Security Futures), the regulatory protections available under securities laws and regulations governing security futures, and the goal of promoting fair competition, the Options and Security Futures on Gold and Silver Products will be traded by appropriate persons.

Third, in light of the previous exemptions granted for similar gold and silver products, the grant of this exemption would not have a material adverse effect on the ability of the Commission or any DCM to carry out their regulatory responsibilities under the CEA.

Therefore, upon due consideration, pursuant to its authority under Section 4(c) of the CEA, the Commission hereby issues this Order and exempts the trading of Options on Gold and Silver Products on national securities exchanges and the trading of Security Futures on Gold and Silver Products on DCMs registered with the SEC as limited purpose national securities exchanges, and the clearing of both the Options and Security Futures through the Options Clearing Corporation ("OCC") in its capacity as a registered securities clearing agency, from the provisions of the CEA and the regulations thereunder, to the extent necessary to permit the Options and Security Futures to be so traded and cleared.

This Order is subject to termination or revision, on a prospective basis, if the Commission determines upon further information that this exemption is not consistent with the public interest. If the Commission believes such exemption becomes detrimental to the public interest, the Commission may revoke this Order on its own motion.

IV. Related Matters

A. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 ("PRA")[19] imposes certain requirements on federal agencies (including the Commission) in connection with their conducting or sponsoring any collection of information as defined by the PRA. The proposed exemptive order would not, if approved, require a new collection of information from any entities that would be subject to the proposed order.

B. Cost-Benefit Analysis

Section 15(a) of the CEA,[20] as amended by Section 119 of the Commodity Futures Modernization Act of 2000, requires the Commission to consider the costs and benefits of its action before issuing an order under the CEA. By its terms, Section 15(a) as amended does not require the Commission to quantify the costs and benefits of an order or to determine whether the benefits of the order outweigh its costs. Rather, Section 15(a) simply requires the Commission to "consider the costs and benefits" of its action.

Section 15(a) of the CEA further specifies that costs and benefits shall be evaluated in light of five broad areas of market and public concern: protection of market participants and the public; efficiency, competitiveness, and financial integrity of futures markets; price discovery; sound risk management practices; and other public interest considerations. Accordingly, the Commission could in its discretion give greater weight to any one of the five enumerated areas and could in its discretion determine that, notwithstanding its costs, a particular order was necessary or appropriate to protect the public interest or to effectuate any of the provisions or to accomplish any of the purposes of the CEA.

The Commission has considered the costs and benefits of the order in light

[14] *See* Parts 15 through 21 of the Commission's regulations.

[15] Chicago Board Options Exchange (CBOE) and International Securities Exchange (ISE).

[16] All five comments are available on the Commission's Web site, under comment file 10–04, at *http://www.cftc.gov/LawRegulation/PublicComments/10-004.html.*

[17] *See* footnote 4, supra. The other public commenter submitted an article suggesting that the silver and gold futures markets were being manipulated. There was no reference, however, to Options on Gold or Silver Products.

[18] CEA § 3(b), 7 U.S.C. § 5(b). *See also* CEA § 4(c)(1), 7 U.S.C. § 6(c)(1) (purpose of exemptions is "to promote responsible economic or financial innovation and fair competition.").

[19] 44 U.S.C. 3507(d).

[20] 7 U.S.C. 19(a).

of the specific provisions of Section 15(a) of the CEA, as follows: [21]

1. *Protection of market participants and the public.* National securities exchanges, OCC, and their members who would intermediate the above-described Options and Security Futures on Gold and Silver Products are subject to extensive regulatory oversight.

2. *Efficiency, competition, and financial integrity.* The exemptive order may enhance market efficiency and competition since it could encourage potential trading of Options and Security Futures on Gold and Silver Products through modes other than those normally applicable; that is, designated contract markets or derivatives transaction execution facilities. Financial integrity will not be affected since the Options and Security Futures on Gold and Silver Products will be cleared by OCC, a DCO and SEC-registered clearing agency, intermediated by SEC-registered broker-dealers.

3. *Price discovery.* Price discovery may be enhanced through market competition.

4. *Sound risk management practices.* The Options and Security Futures on Gold and Silver Products will be subject to OCC's current risk-management practices including its margining system. In addition, OCC is supervised by both the SEC and the Commission, and the Commission has found OCC's risk management practices, including its margining system, generally sound.[22]

5. *Other public interest considerations.* The exemptive order appears likely to encourage development of derivative products through market competition without unnecessary regulatory burden.

The Commission requested comment on its application of these factors in the proposing release. As noted above, one comment was received.

After considering these factors, the Commission has determined to issue this order.

Issued in Washington, DC, on June 14, 2010 by the Commission.

Sauntia S. Warfield,

Assistant Secretary of the Commission.

[FR Doc. 2010–14818 Filed 6–28–10; 8:45 am]

BILLING CODE 6351–01–P

[21] *See also* Previous Orders, 73 FR at 31982 (June 5, 2008), 73 FR at 3 FR at 31980 (June 5, 2008), and 73 FR at 79832 (December 30, 2008).

[22] One commenter questioned whether the Commission's conclusions regarding sound risk management practices at OCC were unduly reliant on supervision by others. In fact, the Commission itself conducts supervision of OCC and its risk management practices.

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

Information Collection; Submission for OMB Review, Comment Request

AGENCY: Corporation for National and Community Service.

ACTION: Notice.

SUMMARY: The Corporation for National and Community Service (hereinafter the "Corporation"), has submitted a public information collection request (ICR), titled the Application for the President's Higher Education Community Service Honor Roll, to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995, Public Law 104–13, (44 U.S.C. Chapter 35). Copies of this ICR, with applicable supporting documentation, may be obtained by calling the Corporation, Kevin Michael Days, at (202) 606–6899. Individuals who use a telecommunications device for the deaf (TTY–TDD) may call (202) 606–3472 between 8:30 a.m. and 5 p.m. eastern time, Monday through Friday.

ADDRESSES: Comments may be submitted, identified by the title of the information collection activity, to the Office of Information and Regulatory Affairs, Attn: Ms. Sharon Mar, OMB Desk Officer for the Corporation for National and Community Service, by any of the following two methods within 30 days from the date of publication in this **Federal Register**:

(1) *By fax to:* (202) 395–6974, *Attention:* Ms. Sharon Mar, OMB Desk Officer for the Corporation for National and Community Service; and

(2) *Electronically by e-mail to: smar@omb.eop.gov.*

SUPPLEMENTARY INFORMATION: The OMB is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Corporation, 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;
- Propose ways to enhance the quality, utility, and clarity of the information to be collected; and
- Propose ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

Comments

A 60-day public comment Notice was published in the **Federal Register** on March 30, 2010. This comment period ended June 1, 2010. No public comments were received from this Notice.

Description: The Corporation is seeking approval of the Application for the President's Higher Education Community Service Honor Roll. The President's Higher Education Community Service Honor Roll program is designed to identify and reward exemplary higher education community service programs and practices. This program helps fulfill the Corporation's strategic goals of engaging Americans, particularly millions of college students, in service, and ensuring that all higher education institutions provide, or stimulate the creation of resources to coordinate service, service-learning, and community partnerships. During this fifth year of the Honor Roll program, the application will include a special focus area that will highlight the national service priorities of the Administration and the Edward M. Kennedy Serve America Act, by encouraging higher education institutions' efforts to tackle priorities ranging from increasing high school graduation rates to fostering economic opportunity.

Type of Review: Renewal.

Agency: Corporation for National and Community Service.

Title: Application for the President's Higher Education Community Service Honor Roll.

OMB Number: 3045- 0120.

Agency Number: None.

Affected Public: Degree-granting colleges and universities located in the U.S. and its territories.

Total Respondents: 4,500.

Frequency: Annual.

Average Time per Response: Averages 1 hour.

Estimated Total Burden Hours: 4,500 hours.

Total Burden Cost (capital/startup): None.

Total Burden Cost (operating/maintenance): None.

Dated: June 23, 2010.

Elson Nash,

Associate Director, Learn and Serve America.

[FR Doc. 2010–15693 Filed 6–28–10; 8:45 am]

BILLING CODE 6050–$$–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Federal Advisory Committee; Defense Advisory Committee on Military Personnel Testing

AGENCY: Under Secretary of Defense for Personnel and Readiness, DoD.

ACTION: Meeting notice.

SUMMARY: Under the provisions of the Federal Advisory Committee Act of 1972 (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.150, DoD announces that the Defense Advisory Committee on Military Personnel Testing will meet on July 22 and 23, 2010, in Baltimore, MD.

DATES: The meeting will be held on Thursday, July 22 (from 8:30 a.m. to 4 p.m.) and on Friday, July 23, 2010 (from 8:30 a.m. to 12 p.m.).

ADDRESSES: The meeting will be held at the Monaco Hotel, 2 North Charles St., Baltimore, MD 21201.

FOR FURTHER INFORMATION CONTACT: *Committee's Designated Federal Officer or Point of Contact:* Dr. Jane M. Arabian, Assistant Director, Accession Policy, Office of the Under Secretary of Defense (Personnel and Readiness), Room 3C1066, The Pentagon, Washington, DC 20301–4000, telephone (703) 697–9271.

SUPPLEMENTARY INFORMATION:

Purpose of the Meeting

The purpose of the meeting is to review planned changes and progress in developing computerized and paper-and-pencil enlistment tests.

Agenda

The agenda includes an overview of current enlistment test development timelines and planned research for the next 3 years.

Public's Accessibility to the Meeting

Pursuant to 5 U.S.C. 552b and 41 CFR 102–3.140 through 102–3.165, and the availability of space, this meeting is open to the public.

Oral Presentations/Written Statements

Persons desiring to make oral presentations or submit written statements for consideration at the Committee meeting must contact Dr. Jane M. Arabian (*see* **FOR FURTHER INFORMATION CONTACT**) no later than July 12, 2010.

Dated: June 24, 2010.

Mitchell S. Bryman,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2010–15732 Filed 6–28–10; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Army

[Docket ID: USA–2010–0015]

Privacy Act of 1974; System of Records

AGENCY: Department of the Army, DoD.

ACTION: Notice to amend a system of records.

SUMMARY: The Department of the Army is proposing to amend a system of records notice in its existing inventory of records systems subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended.

DATES: The changes will be effective on July 29, 2010, unless comments are received that would result in a contrary determination.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

- *Federal Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Federal Docket Management System Office, 1160 Defense Pentagon, Washington, DC 20301–1160.

Instructions: All submissions received must include the agency name and docket number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Mr. Leroy Jones at (703) 428–6185.

SUPPLEMENTARY INFORMATION: The Department of the Army systems of records notices subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the Department of the Army, Privacy Office, U.S. Army Records Management and Declassification Agency, 7701 Telegraph Road, Casey Building, Suite 144, Alexandria, VA 22325–3905.

The specific changes to the records system being amended are set forth below followed by the notice, as amended, published in its entirety. The proposed amendments are not within the purview of subsection (r) of the Privacy Act of 1974, (5 U.S.C. 552a), as amended, which requires the submission of a new or altered system report.

Dated: June 24, 2010.

Mitchell S. Bryman,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

A0095–1a TRADOC

SYSTEM NAME:

Centralized Aviation Flight Records System (CAFRS) (July 18, 2008; 73 FR 41338).

CHANGES:

* * * * *

SYSTEM LOCATION:

Delete entry and replace with "Network Enterprise Center, Sparkman Center, Building 5301, Redstone Arsenal, AL 35898–5000."

* * * * *

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Delete entry and replace with "10 U.S.C. 3013, Secretary of the Army; Army Regulation 95–1, Aviation Flight Regulations; Army Regulation 95–20, Contractor Flight and Ground Operations; Army Regulation 95–23, Aviation Unmanned Aircraft System Flight Regulations; Army Regulation 350–1, Army Training and Leader Development; Army Regulation 600–1–5, Personnel General Aviation Service of Rated Army Officers; Army Regulation 600–1–6, Personnel General Flying Status for Nonrated Army Aviation Personnel; and E.O. 9397 (SSN), as amended."

* * * * *

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

Add as last paragraph "NOTE: This system of records contains individually identifiable health information. The DoD Health Information Privacy Regulation (DoD 6025.18–R) issued pursuant to the Health Insurance Portability and Accountability Act of 1996, applies to most such health information. DoD 6025.18–R may place additional procedural requirements on the uses and disclosures of such information beyond those found in the Privacy Act of 1974 or mentioned in this system of records notice."

* * * * *

SYSTEM MANAGER(S) AND ADDRESS:

Delete entry and replace with "U.S. Army Program Executive Office (PEO)

Aviation, ATTN: SFAE–AV–AS–ANMP, Sparkman Center, Building 5309, Redstone Arsenal, AL 35898–5000."

NOTIFICATION PROCEDURE:

Delete entry and replace with "Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to the Flight Operations Section of their current unit, contractor facility or via the CAFRS Help Desk at *cafrs.help@us.army.mil.*

All written inquiries should contain the full name, Social Security Number (SSN), date of birth, military status and current mailing address and any details which may assist in locating record, and their signature.

In addition, the requester must provide a notarized statement or an unsworn declaration made in accordance with 28 U.S.C. 1746, in the following format:

If executed outside the United States: 'I declare (or certify, verify, or state) under penalty of perjury under the laws of the United State of America that the foregoing is true and correct. Executed on (date). (Signature)'.

If executed within the United States, its territories, possessions, or commonwealths: 'I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)'."

RECORD ACCESS PROCEDURES:

Delete entry and replace with "Individuals seeking access to records about themselves contained in this record system should address written inquiries to the Flight Operations Section of their current unit, contractor facility or via the CAFRS Help Desk at *cafrs.help@us.army.mil.*

All written inquiries should contain the full name, Social Security Number (SSN), date of birth, military status and current mailing address and any details which may assist in locating record, and their signature.

In addition, the requester must provide a notarized statement or an unsworn declaration made in accordance with 28 U.S.C. 1746, in the following format:

If executed outside the United States: 'I declare (or certify, verify, or state) under penalty of perjury under the laws of the United State of America that the foregoing is true and correct. Executed on (date). (Signature)'.

If executed within the United States, its territories, possessions, or commonwealths: 'I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)'."

* * * * *

A0095–1a TRADOC

SYSTEM NAME:

Centralized Aviation Flight Records System (CAFRS).

SYSTEM LOCATION:

Network Enterprise Center, Sparkman Center, Building 5301, Redstone Arsenal, AL 35898–5000.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Army aviators who are members of the Active and Reserve Components and qualified and current in the aircraft to be flown; civilian employees of Government agencies and Government contractors who have appropriate certifications or ratings, flight surgeons or aeromedical physicians' assistants in aviation service, enlisted crew chief/crew members, aerial observers, personnel in non-operational aviation positions, and those restricted or prohibited by statute from taking part in aerial flights. Designated personnel assigned to perform duties as an Unmanned Aerial System (UAS) crewmember.

CATEGORIES OF RECORDS IN THE SYSTEM:

DA Forms 759 and 759–1 (Individual Flight and Flight Certificate Army (Sections I, II, and III)); DA Form 4186 (Medical Recommendations for Flying Duty), DD Form 1821 (Contractor Crewmember Record); name, Social Security Number (SSN), home address, date of birth, military status, security clearance data, education, waivers, qualifications, disqualifications, re-qualifications, training, proficiency, and experience data, medical and physiological data, approvals to operate Government aircraft, requests for approval or contractor flight crewmember and contractor qualification training, and similar relevant documents.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

10 U.S.C. 3013, Secretary of the Army; Army Regulation 95–1, Aviation Flight Regulations; Army Regulation 95–20, Contractor Flight and Ground Operations; Army Regulation 95–23, Aviation Unmanned Aircraft System Flight Regulations; Army Regulation 350–1, Army Training and Leader Development; Army Regulation 600–1–5, Personnel General Aviation Service of Rated Army Officers; Army Regulation 600–1–6, Personnel General Flying Status for Nonrated Army Aviation Personnel; and E.O. 9397 (SSN), as amended.

PURPOSE(S):

To record the flying experience, qualifications and training data of each aviator, crew member, UAS operator and flight surgeon in aviation service; and to monitor and manage individual contractor flight and ground personnel records.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act of 1974, these records contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

Information may be disclosed to the Federal Aviation Agency and/or the National Transportation Safety Board for the purpose of conducting a flight violation or accident investigation.

The DoD 'Blanket Routine Uses' set forth at the beginning of the Army's compilation of system of record notices apply to this record system.

Note: This system of records contains individually identifiable health information. The DoD Health Information Privacy Regulation (DoD 6025.18–R) issued pursuant to the Health Insurance Portability and Accountability Act of 1996, applies to most such health information. DoD 6025.18–R may place additional procedural requirements on the uses and disclosures of such information beyond those found in the Privacy Act of 1974 or mentioned in this system of records notice.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper records in file folders and notebooks and on electronic storage media.

RETRIEVABILITY:

By name, Social Security Number (SSN), or other personal identifier.

SAFEGUARDS:

Records are maintained in secure areas available only to designated persons having official need for the record. Automated systems employ computer hardware/software safeguard features and controls which meet administrative, physical, and technical safeguards.

RETENTION AND DISPOSAL:

PERMANENT. Keep in Current Files Area (CFA) until no longer needed for conducting business, then retire to

Records Holding Area/Army Electronic Archives (RHA/AEA). The Transition Center will pull the most current DA Form 759, Individual Flight Record and Flight Certificate-Army from the Individual Flight Record Folder (IFRF) and forward it to the Official Military Personnel File (OMPF) Custodian for inclusion in the soldier's OMPF. The remainder of the IFRF will be given to the soldier upon separation processing at the Transition Center.

SYSTEM MANAGER(S) AND ADDRESS:

U.S. Army Program Executive Office (PEO) Aviation, ATTN: SFAE–AV–AS–ANMP, Sparkman Center, Building 5309, Redstone Arsenal, AL 35898–5000.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to the Flight Operations Section of their current unit, contractor facility or via the CAFRS Help Desk at *cafrs.help@us.army.mil.*

All written inquiries should contain the full name, Social Security Number (SSN), date of birth, military status and current mailing address and any details which may assist in locating record, and their signature.

In addition, the requester must provide a notarized statement or an unsworn declaration made in accordance with 28 U.S.C. 1746, in the following format:

If executed outside the United States: 'I declare (or certify, verify, or state) under penalty of perjury under the laws of the United State of America that the foregoing is true and correct. Executed on (date). (Signature)'.

If executed within the United States, its territories, possessions, or commonwealths: 'I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)'.

RECORD ACCESS PROCEDURES:

Individuals seeking access to records about themselves contained in this record system should address written inquiries to the Flight Operations Section of their current unit, contractor facility or via the CAFRS Help Desk at *cafrs.help@us.army.mil.*

All written inquiries should contain the full name, Social Security Number (SSN), date of birth, military status and current mailing address and any details which may assist in locating record, and their signature.

In addition, the requester must provide a notarized statement or an unsworn declaration made in accordance with 28 U.S.C. 1746, in the following format:

If executed outside the United States: 'I declare (or certify, verify, or state) under penalty of perjury under the laws of the United State of America that the foregoing is true and correct. Executed on (date). (Signature)'.

If executed within the United States, its territories, possessions, or commonwealths: 'I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)'.

CONTESTING RECORD PROCEDURES:

The Army's rules for accessing records, contesting contents, and appealing initial determinations are contained in Army Regulation 340–21; 32 CFR part 505; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

From the individual, Federal Aviation Administration, flight surgeons, evaluation reports, proficiency and readiness tests, and other relevant records and reports.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 2010–15718 Filed 6–28–10; 8:45 am]

BILLING CODE 5001–06–P

DELAWARE RIVER BASIN COMMISSION

Notice of Commission Meeting and Public Hearing

Notice is hereby given that the Delaware River Basin Commission will hold an informal conference followed by a public hearing on Wednesday, July 14, 2010. The hearing will be part of the Commission's regular business meeting. The conference session and business meeting both are open to the public and will be held at the West Trenton Volunteer Fire Company, located at 40 West Upper Ferry Road, West Trenton, New Jersey.

The conference among the commissioners and staff will begin at 10:30 a.m. and will consist of a presentation on the pass-by flow study being conducted by the Susquehanna River Basin Commission in partnership with The Nature Conservancy and a presentation by the U.S. Fish and Wildlife Service on the Delaware River Dwarf Wedgemussel Habitat Study.

The subjects of the public hearing to be held during the 1:30 p.m. business meeting include the dockets listed below:

1. *City of Burlington, D–1973–046 CP–2.* An application for a surface water withdrawal (SWWD) project to reduce the total system allocation from 120 million gallons per month (mgm) to 80 mgm from existing Intakes Nos. 2 and 3. The project is located in the Delaware River Watershed in the City of Burlington, Burlington County, New Jersey.

2. *Town of Bethel—Kauneonga Lake, D–1974–196 CP–2.* An application for the approval of an existing 0.6 million gallons per day (mgd) discharge from the Kauneonga Lake WWTP. The Kauneonga Lake WWTP discharges to the Delaware River at River Mile 261.10—16.21—5.43 (Delaware River—Mongaup River—White Lake Brook) and is located in the Town of Bethel, Sullivan County, New York. The project is located within the drainage area of the section of the Delaware River known as the Upper Delaware, which is classified as Special Protection Waters.

3. *Pottstown Borough Authority, D–1989–055 CP–2.* An application for the renewal of an existing 12.85 mgd discharge from Outfall No. 001. Additionally, the applicant has requested a Total Dissolved Solids (TDS) Determination, which is required for any discharge of more than 1,000 mg/l (the basin-wide monthly average effluent limit). The monthly average and daily maximum TDS effluent limit concentrations requested are 2,235 mg/l and 3,000 mg/l, respectively. The project will continue to discharge to the Schuylkill River at River Mile 92.47—51.3 (Delaware River—Schuylkill River) in the Borough of Pottstown, Montgomery County, Pennsylvania.

4. *Honey Brook Borough Authority, D–1991–099 CP–2.* An application for renewal of an existing groundwater withdrawal project to continue to supply up to 12 mgm of water to the applicant's public water supply system from existing Wells Nos. 5, 6, 7, and 8. The project wells are completed in Precambrian-gneiss. The project is located in the West Branch Brandywine Creek Watershed in Honeybrook Township, Chester County, Pennsylvania.

5. *Hamburg Municipal Authority, D–1992–073 CP–3.* An application for approval of the Hamburg Municipal Authority WWTP. The project WWTP was approved by DRBC Docket No. D–1992–73 CP–2 on March 1, 2006; however, the docket expired on September 30, 2009. The project WWTP will continue to discharge 1.5 mgd of treated sewage effluent to the Schuylkill River. The facility is located in the Borough of Hamburg, Berks County, Pennsylvania.

6. *Hatfield Quality Meats, LLC, D–1999–072–2.* An application for the

renewal of a groundwater withdrawal to supply up to 20.57 mgm of water to the docket holder's meat processing system from Wells Nos. H–1, H–3, H–4, H–8, H–10, and H–12. No increase in the current allocation is proposed. The six project wells are constructed in the Brunswick Formation. The project is located in the Upper Reach Skippack Creek Watershed in Hatfield Township, Montgomery County, Pennsylvania and is located in the Southeastern Pennsylvania Ground Water Protected Area.

7. *Borough of Dublin, D–2000–011 CP–2.* An application for the renewal of a groundwater withdrawal to continue the withdrawal of up to 7.13 mgm to supply the docket holder's public water supply from existing Wells Nos. 1, 2, 3, and 5 in the Lockatong Formation and Brunswick Group. The project is located in the East Branch Perkiomen—Morris Run and Tohickon Deep Run watersheds in the Borough of Dublin, Bucks County, Pennsylvania, within the Southeastern Pennsylvania Ground Water Protected Area.

8. *United Mobile Homes, D–2005–003–2.* An application for approval to continue discharging 79,500 gallons per day (gpd) of treated effluent from the Kinnebrook WWTP. The WWTP is located at River Mile 261.1—16.0—3.62—1.17 (Delaware River—Mongaup River—Kinne Brook—Unnamed Tributary). The facility discharges to an unnamed tributary of Kinne Brook, and is located in the drainage area of the section of the non-tidal Delaware River known as the Upper Delaware, which is classified as Special Protection Waters. The project is located in the Town of Thompson, Sullivan County, New York.

9. *Camp Ramah in the Poconos, D–2005–030–2.* An application for approval of the Camp Ramah in the Poconos WWTP. The project WWTP was approved by DRBC Docket No. D–2005–030–001 on March 1, 2006; however, the docket expired on April 30, 2007. The project WWTP will continue to discharge 30,000 gpd of treated sewage effluent to an unnamed tributary of the Equinunk Creek, which is a tributary of the Delaware River. The facility is located in Buckingham Township, Wayne County, Pennsylvania, and is located within the drainage area of the section of the non-tidal Delaware River known as the Upper Delaware, which is classified as Special Protection Waters.

10. *Lehigh County Authority, D–2010–001 CP–1.* An application for approval of the existing 0.06 mgd Wynnewood Terrace WWTP. The Wynnewood Terrace WWTP discharges to the Lehigh River at River Mile 183.66—28.14 (Delaware River—Lehigh River) and is located in North Whitehall Township, Lehigh County, Pennsylvania within the drainage area of the section of the non-tidal Delaware River known as the Lower Delaware, which is classified as Special Protection Waters.

11. *Lynn Township Sewer Authority, D–1977–041 CP–2.* An application for approval of an expansion of the existing Lynn Township Sewer Authority WWTP. The 0.08 mgd WWTP will be expanded to treat an average annual daily flow rate of 0.16 mgd. The WWTP will continue to discharge to Ontelaunee Creek, which is a tributary of the Schuylkill River. The facility is located in Lynn Township, Lehigh County, Pennsylvania.

12. *Upper Gwynedd Township, D–1991–088 CP–5.* An application for approval of the modification of the Upper Gwynedd Township Wastewater Treatment Plant (WWTP). The docket holder proposes to replace the current disinfection system (chlorine contact tanks) with an ultraviolet light (UV) disinfection system. The WWTP will continue to treat an average annual flow of 5.7 mgd and discharge treated sewage effluent to the Wissahickon Creek, a tributary of the Schuylkill River. The facility is located in Upper Gwynedd Township, Montgomery County, Pennsylvania.

13. *Borough of Bally, D–1994–044 CP–2.* An application for approval to increase the discharge from the Bally WWTP from 0.2 mgd to 0.5 mgd. Docket No. D–1994–044 CP–1 approved the construction of a 0.5 mgd WWTP but limited the discharge to 0.2 mgd. In 1996 the Borough of Bally Municipal Authority obtained PADEP approval to discharge at the WWTP design flow of 0.5 mgd. The Borough now seeks DRBC's approval for the larger discharge. In addition, the Borough of Bally has requested that DRBC issue a Transfer of Ownership to record that the Borough and not the Municipal Authority (which no longer exists) currently owns the facility. The Bally WWTP will continue to discharge to the West Branch of the Perkiomen Creek at River Mile 92.47—32.08—18.65—5.20—3.55 (Delaware River—Schuylkill River—Perkiomen Creek—Green Lane Reservoir—West Branch Perkiomen Creek) and is located in Washington Township, Berks County, Pennsylvania.

14. *Lyons Borough Municipal Authority, D–1994–080 CP–2.* An application for approval to expand and upgrade the Lyons Borough Municipal Authority WWTP from 0.2 mgd to 0.3 mgd. Modifications will include phosphorous removal by chemical precipitation, effluent filtering, and replacement of the existing gas chlorination system with UV disinfection. The increase in annual average flow is proposed to treat additional industrial process water from East Penn Manufacturing Company, an existing industrial wastewater discharger to the WWTP. The WWTP will continue to discharge to Saucony Creek, a tributary of Maiden Creek, which is a tributary of the Schuylkill River. The project is located in the Borough of Lyons, Berks County, Pennsylvania.

15. *Plumstead Township, D–1997–033 CP–3.* An application for approval of a groundwater withdrawal to supply up to 4.1 mgm of water to the docket holder's public water supply system from new Well No. 6 and to retain the existing withdrawal limit for all wells of 15.82 mgm. The project wells are located in the Brunswick Group, Lockatong Formation and Stockton Formation in Plumstead Township, Bucks County, Pennsylvania. The project wells are in the following subbasins of the Southeastern Pennsylvania Ground Water Protected Area: Tohickon-Geddes-Cabin runs, Pine Run, and North Branch Neshaminy Creek.

16. *Superior Water Company, D–2001–015 CP–2.* An application for the renewal of a groundwater withdrawal, consolidation of one docket and two GWPA permits, and to increase the withdrawal from all wells from 23.4 million gallons per 30 days (mg/30 days) to 36.82 mgm of water to the docket holder's distribution system. The increased allocation is requested in order to meet projected increases in service area demand. The ten project wells are constructed in the Brunswick, Lockatong and Leithsville Formations. The project is located in the Zacharias Creek, Scioto Creek and Minister Creek watersheds in Upper Frederick, Douglass, New Hanover, and Worcester townships in Montgomery County, Pennsylvania within the Southeastern Pennsylvania Ground Water Protected Area.

17. *Tidewater Utilities, Inc.—Camden District, D–2004–024 CP–3.* An application for modification of an existing groundwater withdrawal project to include new Wells Nos. 222367 and 178898 completed in the Cheswold and Frederica aquifers, respectively. No increase is proposed in the previous allocation of 88.977 mg/30 days. The wells were installed to meet projected increases in service area demand. The project is located in the Saint Jones River Watershed in Dover West Township, Kent County, Delaware.

18. *Borough of Freeland Municipal Authority, D–1965–052 CP–3.* An

application for approval of an expansion of the existing borough of Freeland Municipal Authority Wastewater Treatment Plant (WWTP) from 0.75 mgd to 1.2 mgd and to replace the existing trickling filter treatment system with a conventional activated sludge treatment process. The WWTP will continue to discharge to Pond Creek, a tributary of Sandy Run, which is a tributary of the Lehigh River. The project WWTP is located within the drainage area of the section of the non-tidal Delaware River known as the Lower Delaware, which is classified as Special Protection Waters. The facility is located in Foster Township, Luzerne County, Pennsylvania.

19. *East Vincent Municipal Authority, D–2005–007 CP–1.* An application to rerate a 48,800 gpd sewage treatment plant (STP) to process a maximum monthly flow of 52,900 gpd, while continuing to provide tertiary treatment. The project will continue to serve flows from the built-out residential development known as Bartons Meadows in East Vincent Township, Chester County, Pennsylvania. The additional 4,000 gpd is needed to handle wet weather related flows due to inflow and infiltration. Following ultraviolet light disinfection, STP effluent will continue to be discharged to subsurface seepage beds in the drainage area of French Creek, which is designated as a Scenic River in the DRBC Comprehensive Plan. The project is located in the Schuylkill River Watershed within the Southeastern Pennsylvania Ground Water Protected Area, off Sheeder Road just north of its intersection with Pughtown Road.

20. *Naval Surface Warfare Center, Carderock Division, Ship Systems Engineering Station D–2009–003–1.* An application for approval of a surface water withdrawal of 1,100.24 mg/30 days from an existing surface water intake. The existing Naval Surface Warfare Center, Carderock Division, Ship Systems Engineering Station currently withdraws surface water from the Philadelphia U.S. Naval Shipyard Reserve Basin located on the Schuylkill River immediately upstream of the confluence of the Schuylkill River with the Delaware River. The surface water withdrawal is used for non-contact cooling water. The facility is located in the City of Philadelphia, Philadelphia County, Pennsylvania.

21. *Naval Surface Warfare Center, Carderock Division, Ship Systems Engineering Station, D–2009–004–1.* An application for approval of a non-contact cooling water (NCCW) discharge from two existing (2) outfalls owned and operated by Naval Surface Warfare Center, Carderock Division, Ship Systems Engineering Station (NSWCCD–SSES): 1) Outfall 001 is located on the Navy Reserve Basin, and the application includes increasing the discharge of NCCW from 24.0 mgd to 36.0 mgd; and 2) Outfall 005 is located on the Delaware River in Water Quality Zone 4 and will continue to discharge up to 0.60 mgd. The Navy Reserve Basin is located on the Schuylkill River immediately upstream of its confluence with the Delaware River. The facility is located in the Schuylkill River Watershed in the City of Philadelphia, Philadelphia County, Pennsylvania.

22. *Deb-El Food Products, D–2009–036–1.* An application for approval to construct a 0.05 mgd industrial waste treatment plant (IWTP) that will discharge to the Neversink River at River Mile 253.64—28.7 (Delaware River—Neversink River) in the drainage area of the section of the non-tidal Delaware River known as the Middle Delaware, which is classified as Special Protection Waters. The IWTP is located in the Town of Thompson, Sullivan County, New York.

23. *ArcelorMittal Plate, LLC—Conshohocken, D–2009–039–1.* An application for approval of a groundwater and surface water withdrawal project to supply up to 13.4 mgm of groundwater and 46.5 mgm of surface water to the applicant's industrial process from the existing Q&T Well and existing surface water intake. Surface water will be withdrawn from the Schuylkill River in the Schuylkill-Crow Creek Watershed. The well is located in the Elbrook Formation in the Schuylkill-Crow Creek Watershed in Plymouth Township, Montgomery County, Pennsylvania in the Southeastern Pennsylvania Ground Water Protected Area.

24. *Wallenpaupack Area School District, D–2009–027 CP.* An application for approval of the existing Newfoundland Elementary School WWTP. The WWTP will continue to discharge an average annual flow of 0.01 mgd of treated sewage effluent to Wallenpaupack Creek, a tributary of the Lackawaxen River. The facility is located in Dreher Township, Wayne County, Pennsylvania, within the drainage area of the section of the non-tidal Delaware River known as the Upper Delaware, which is classified as Special Protection Waters.

25. *Green Top Management, LLC, D–2010–002 CP–1.* An application for approval of an expansion of the Green Top Mobile Home Park WWTP from 12,000 gpd to 18,000 gpd. The expansion includes the addition of a sequencing batch reactor unit. The WWTP will continue to discharge to an unnamed tributary of the Tohickon Creek, which is located upstream of Lake Nockamixon. The project is located within the drainage area of the section of the non-tidal Delaware River known as the Lower Delaware, which is classified as Special Protection Waters. The facility is located in West Rockhill Township, Bucks County, Pennsylvania.

26. *NIS Hollow Estates, LLC, D–2010–003 CP–1.* An application for approval of the existing NIS Hollow Estates, LLC WWTP. The WWTP will continue to discharge 18,000 gpd of treated sewage effluent to an unnamed tributary of the Lehigh River. The facility is located in East Penn Township, Carbon County, Pennsylvania, within the drainage area of the section of the non-tidal Delaware River known as the Lower Delaware, which is classified as Special Protection Waters.

In addition to the standard business meeting items, including adoption of the Minutes of the Commission's May 5, 2010 business meeting; announcements of upcoming meetings and events; a report on hydrologic conditions; and reports by the Executive Director and the Commission's General Counsel; the business meeting will include public hearings and consideration by the Commission of resolutions: (a) Approving the Commission's FY 2010–2015 Water Resources Program; (b) authorizing the Executive Director to require effluent nutrient monitoring by point source dischargers in Zones 2 through 6 of the Delaware Estuary; and (c) authorizing the Executive Director to enter into a contract for laboratory analysis of soil and water samples in connection with the control of polychlorinated biphenyls (PCBs) in the Delaware Estuary. The section of the meeting consisting of the General Counsel's report will include consideration by the Commission of two requests for hearing filed with the Commission in May 2010—one by Damascus Citizens for Sustainability concerning the applicability of the Commission's section 3.8 project review procedure to certain exploratory natural gas well projects sponsored by Newfield-Appalachia PA, LLC; and the other, jointly by the Delaware Riverkeeper Network and Nockamixon Township concerning the applicability of the Section 3.8 review procedure to the Cabot #2 natural gas well project sponsored by Arbor Operating, LLC in Nockamixon Township. The Commissioners also will consider draft water withdrawal Docket No. D–2009–013–1 for the Stone Energy Corporation, on which a hearing was conducted on February 24, 2010 and for which the

written comment period opened on February 8, 2010 and closed on April 12, 2010. No additional testimony on the latter project will be accepted. An opportunity for public dialogue will be provided at the end of the meeting.

Draft dockets scheduled for public hearing on July 14, 2010 can be accessed through the Notice of Commission Meeting and Public Hearing on the Commission's website, drbc.net, ten days prior to the meeting date. Additional public records relating to the dockets may be examined at the Commission's offices. Please contact William Muszynski at 609–883–9500, extension 221, with any docket-related questions.

Note that conference items are subject to change and items scheduled for hearing are occasionally postponed to allow more time for the Commission to consider them. Please check the Commission's website, drbc.net, closer to the meeting date for changes that may be made after the deadline for filing this notice.

Individuals in need of an accommodation as provided for in the Americans with Disabilities Act who wish to attend the informational meeting, conference session or hearings should contact the Commission Secretary directly at 609–883–9500 ext. 203 or through the Telecommunications Relay Services (TRS) at 711, to discuss how the Commission can accommodate your needs.

Dated: June 22, 2010.

Pamela M. Bush,

Commission Secretary.

[FR Doc. 2010–15723 Filed 6–28–10; 8:45 am]

BILLING CODE 6360–01–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

SUMMARY: The Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before August 30, 2010.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g. new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: June 23, 2010.

Darrin A. King,

Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management.

Office of Postsecondary Education

Type of Review: Reinstatement.

OMB Number: 1840–0564.

Title: Financial Report for Grantees under the Title III Part A, Title III Part B, and the Title V Program Endowment Activities and Endowment Challenge Grant.

Frequency: Semi-Annually.

Affected Public: Not-for-profit institutions.

Reporting and Recordkeeping Hour Burden:

Responses: 500.

Burden Hours: 1,500.

Abstract: This financial reporting form will be utilized for Title III Part A, Title III Part B and Title V Program Endowment Activities and Title III Part C Endowment Challenge Grant Program. The purpose of this Annual Financial Report is to have the grantees report annually the kind of investments that have been made, the income earned and spent, and whether any part of the Endowment Fund Corpus has been spent. This information allows us to give technical assistance and determine whether the grantee has complied with the statutory and regulatory investment requirements.

Requests for copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov,* by selecting the "Browse Pending Collections" link and by clicking on link number 4345. When you access the information collection, click on "Download Attachments" to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 2010–15761 Filed 6–28–10; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Office of Postsecondary Education; Overview Information; Training Program for Federal TRIO Programs (Training Program)

Notice inviting applications for new awards for fiscal year (FY) 2010.

Catalog of Federal Domestic Assistance (CFDA) Number: 84.103A.

DATES: Applications Available: June 29, 2010. Deadline for Transmittal of Applications: July 29, 2010. Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The Training Program provides grants to train the staff and leadership personnel employed in, participating in, or preparing for employment in, projects funded under the Federal TRIO Programs to improve the operation of these projects.

Priorities: In accordance with 34 CFR 75.105(b)(2)(iv) and 34 CFR 75.105(b)(2)(ii), these priorities are from

section 402G(b) of the Higher Education Act of 1965, as amended (HEA) and the regulations for this program (34 CFR 642.34).

Note: Each successful applicant must provide annually at least one training session, covering every topic listed within the applicable priority or priorities. The training must be tailored to the specific needs of TRIO staff and leadership personnel with less than two years of TRIO project experience. Each applicant must identify in its application how it will meet this requirement.

Absolute Priorities: For FY 2010, these priorities are absolute priorities. Under 34 CFR 75.105(c)(3) we consider only applications that meet these priorities.

These priorities are:

Priority 1. Training to improve: recordkeeping; reporting student and project performance; and the rigorous evaluation of project performance in order to design and operate a model TRIO project.

Number of expected awards: 1–2.

Maximum award amount: $450,000.

Priority 2. Training on: budget management, and the legislative and regulatory requirements for operation of projects funded under the Federal TRIO Programs.

Number of expected awards: 1–2.

Maximum award amount: $400,000.

Priority 3. Training on: assessment of student needs; proven retention and graduation strategies, including both secondary and postsecondary retention and graduation strategies; and the use of educational technology in order to design and operate a model TRIO project.

Number of expected awards: 1–2.

Maximum award amount: $450,000.

Priority 4. Training on: student financial aid; college and university admissions policies and procedures; and proven strategies to improve the financial literacy and economic literacy of students, including topics such as basic personal income, household money management and financial planning skills, and basic economic decision making skills.

Number of expected awards: 1–2.

Maximum award amount: $400,000.

Priority 5. Training on: proven strategies for recruiting and serving hard to reach populations—including students who are limited English proficient, students from groups that are traditionally underrepresented in postsecondary education, students who are individuals with disabilities, students who are homeless children and youths (as this term is defined in section 725 of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a)), students who are foster care youth, or other disconnected students.

Number of expected awards: 1–2.

Maximum award amount: $400,000.

Maximum number of applications: Each application must clearly identify the specific priority number for which a grant is requested and must address each of the topics listed under that specific priority. An application for a grant under a specific priority should address only that priority. A grantee who wants to apply under more than one priority must submit separate applications for each priority.

For example, an application for a grant under Priority 1 must address only training to improve recordkeeping; reporting student and project performance; and the rigorous evaluation of project performance in order to design and operate a model TRIO project. If an applicant submits more than one application under a specific priority we will accept only the application with the latest "date/time received" validation, and we will reject all other applications.

Program Authority: 20 U.S.C. 1070a–11 and 1070a–17.

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 80, 82, 84, 85, 86, 97, 98 and 99. (b) The regulations for this program in 34 CFR part 642.

Note: The regulations in 34 CFR part 79 apply to all applicants except federally recognized Indian tribes.

Note: The regulations in 34 CFR part 86 apply to institutions of higher education only.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: $3,424,802.

Estimated Range of Awards: $350,000-$450,000.

Estimated Average Size of Awards: $425,000.

Maximum Award: We will reject any application that proposes a budget exceeding the maximum amount listed for the applicable priority, listed as follows, for a single budget period of 12 months:

- Priority 1: $450,000;
- Priority 2: $400,000;
- Priority 3: $450,000;
- Priority 4: $400,000; and
- Priority 5: $400,000.

To be consistent with the goal of serving all regions of the country, as provided in 34 CFR 642.33, each successful applicant will be expected to provide training to at least 290 participants, annually, unless we specifically approve another number of participants.

Estimated Number of Awards: 8–10.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 24 months.

III. Eligibility Information

1. *Eligible Applicants:* Institutions of higher education and other public and private nonprofit institutions and organizations.

2. *Cost Sharing or Matching:* This program does not require cost sharing or matching.

IV. Application and Submission Information

1. *Address to Request Application Package:* Suzanne Ulmer, U.S. Department of Education, 1990 K Street, NW., room 7000, Washington, DC 20006–8510. Telephone: (202) 502–7600 or by e-mail: *TRIO@ed.gov.*

If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

Individuals with disabilities can obtain a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) by contacting the program contact person listed in this section.

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this program.

Page Limit: Part III—the Project Narrative is where you, the applicant, address the selection criteria and priorities that reviewers use to evaluate your application. You must limit Part III—the Project Narrative to no more than 50 pages, using the following standards:

- A "page" is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides. Page numbers and an identifier may be within the 1″ margin.
- Double space (no more than three lines per vertical inch) all text in the project narrative, including titles, headings, footnotes, quotations, references, and captions, as well as all text in figures and graphs. Text in charts and tables may be single-spaced. You should also include a table of contents in the project narrative, which will not be counted against the 50-page limit.
- Use a font that is either 12 point or larger or no smaller than 10 pitch (characters per inch).
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial. An application submitted in any other font (including Times Roman and Arial Narrow) will not be accepted.

The page limit does not apply to Part I—the Application for Federal Assistance face sheet (SF 424); Part II—the Budget Information Summary form (ED Form 524); Part III–A—the Program Profile form; Part III–B—the one-page Project Abstract form; and Part IV—the Assurances and Certifications. If you include any attachments or appendices, these items will be counted as part of Part III—the Project Narrative for purposes of the page limit requirement. You must include your complete response to the selection criteria and priorities in Part III—The Project Narrative.

We will reject your application if you exceed the page limit.

3. *Submission Dates and Times:*

Applications Available: June 29, 2010.

Deadline for Transmittal of Applications: July 29, 2010.

Applications for grants under this program must be submitted electronically using the Electronic Grant Application System (e-Application) accessible through the Department's e-Grants site. For information (including dates and times) about how to submit your application electronically, or in paper format by mail or hand delivery if you qualify for an exception to the electronic submission requirement, please refer to section IV. 7. *Other Submission Requirements* of this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice.

4. *Intergovernmental Review:* This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this program.

5. *Funding Restrictions:* We specify unallowable costs in 34 CFR part 642. We reference additional regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Data Universal Numbering System Number, Taxpayer Identification Number, and Central Contractor Registry:* To do business with the Department of Education, (1) you must have a Data Universal Numbering System (DUNS) number and a Taxpayer Identification Number (TIN); (2) you must register both of those numbers with the Central Contractor Registry (CCR), the Government's primary registrant database; and (3) you must provide those same numbers on your application.

You can obtain a DUNS number from Dun and Bradstreet. A DUNS number can be created within one business day.

If you are a corporate entity, agency, institution, or organization, you can obtain a TIN from the Internal Revenue Service. If you are an individual, you can obtain a TIN from the Internal Revenue Service or the Social Security Administration. If you need a new TIN, please allow 2–5 weeks for your TIN to become active.

The CCR registration process may take five or more business days to complete. If you are currently registered with the CCR, you may not need to make any changes. However, please make certain that the TIN associated with your DUNS number is correct. Also note that you will need to update your CCR registration on an annual basis. This may take three or more business days to complete.

7. *Other Submission Requirements:* Applications for grants under this program must be submitted electronically unless you qualify for an exception to this requirement in accordance with the instructions in this section.

a. *Electronic Submission of Applications.*

Applications for grants under the Training Program—CFDA Number 84.103A must be submitted electronically using e-Application, accessible through the Department's e-Grants Web site at: *http://e-grants.ed.gov.*

We will reject your application if you submit it in paper format unless, as described elsewhere in this section, you qualify for one of the exceptions to the electronic submission requirement *and* submit, no later than two weeks before the application deadline date, a written statement to the Department that you qualify for one of these exceptions. Further information regarding calculation of the date that is two weeks before the application deadline date is provided later in this section under *Exception to Electronic Submission Requirement.*

While completing your electronic application, you will be entering data online that will be saved into a database. You may not e-mail an electronic copy of a grant application to us.

Please note the following:

- You must complete the electronic submission of your grant application by 4:30:00 p.m., Washington, DC time, on the application deadline date. E-Application will not accept an application for this program after 4:30:00 p.m., Washington, DC time, on the application deadline date. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the application process.
- The hours of operation of the e-Grants Web site are 6:00 a.m. Monday until 7:00 p.m. Wednesday; and 6:00 a.m. Thursday until 8:00 p.m. Sunday, Washington, DC time. Please note that, because of maintenance, the system is unavailable between 8:00 p.m. on Sundays and 6:00 a.m. on Mondays, and between 7:00 p.m. on Wednesdays and 6:00 a.m. on Thursdays, Washington, DC time. Any modifications to these hours are posted on the e-Grants Web site.
- You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you qualify for an exception to the electronic submission requirement, as described elsewhere in this section, and submit your application in paper format.
- You must submit all documents electronically, including all information you typically provide on the following forms: the Application for Federal Assistance (SF 424), the Department of Education Supplemental Information for SF 424, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications. You must attach any narrative sections of your application as files in a .DOC (document), .RTF (rich text), or .PDF (Portable Document) format. If you upload a file type other than the three file types specified in this paragraph or submit a password protected file, we will not review that material.
- Your electronic application must comply with any page limit requirements described in this notice.
- Prior to submitting your electronic application, you may wish to print a copy of it for your records.
- After you electronically submit your application, you will receive an automatic acknowledgement that will include a PR/Award number (an identifying number unique to your application).
- Within three working days after submitting your electronic application, fax a signed copy of the SF 424 to the

Application Control Center after following these steps:

(1) Print SF 424 from e-Application.

(2) The applicant's Authorizing Representative must sign this form.

(3) Place the PR/Award number in the upper right hand corner of the hard-copy signature page of the SF 424.

(4) Fax the signed SF 424 to the Application Control Center at (202) 245–6272.

• We may request that you provide us original signatures on other forms at a later date.

Application Deadline Date Extension in Case of e-Application Unavailability: If you are prevented from electronically submitting your application on the application deadline date because e-Application is unavailable, we will grant you an extension of one business day to enable you to transmit your application electronically, by mail, or by hand delivery. We will grant this extension if—

(1) You are a registered user of e-Application and you have initiated an electronic application for this competition; and

(2)(a) E-Application is unavailable for 60 minutes or more between the hours of 8:30 a.m. and 3:30 p.m., Washington, DC time, on the application deadline date; or

(b) E-Application is unavailable for any period of time between 3:30 p.m. and 4:30:00 p.m., Washington, DC time, on the application deadline date.

We must acknowledge and confirm these periods of unavailability before granting you an extension. To request this extension or to confirm our acknowledgment of any system unavailability, you may contact either (1) the person listed elsewhere in this notice under **FOR FURTHER INFORMATION CONTACT** (*see* VII. Agency Contact) or (2) the e-Grants help desk at 1–888–336–8930. If e-Application is unavailable due to technical problems with the system and, therefore, the application deadline is extended, an e-mail will be sent to all registered users who have initiated an e-Application. Extensions referred to in this section apply only to the unavailability of e-Application.

Exception to Electronic Submission Requirement: You qualify for an exception to the electronic submission requirement, and may submit your application in paper format, if you are unable to submit an application through e-Application because—

• You do not have access to the Internet; or

• You do not have the capacity to upload large documents to e-Application;

and

• No later than two weeks before the application deadline date (14 calendar days; or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday), you mail or fax a written statement to the Department, explaining which of the two grounds for an exception prevents you from using the Internet to submit your application. If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. If you fax your written statement to the Department, we must receive the faxed statement no later than two weeks before the application deadline date.

Address and mail or fax your statement to: Eileen S. Bland, U.S. Department of Education, 1990 K Street, NW., room 7000, Washington, DC 20006–8510. FAX: (202) 502–7857.

Your paper application must be submitted in accordance with the mail or hand delivery instructions described in this notice.

b. *Submission of Paper Applications by Mail.*

If you qualify for an exception to the electronic submission requirement, you may mail (through the U.S. Postal Service or a commercial carrier) your application to the Department. You must mail the original and two copies of your application, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.103A), LBJ Basement Level 1, 400 Maryland Avenue, SW., Washington, DC 20202–4260.

You must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

c. *Submission of Paper Applications by Hand Delivery.*

If you qualify for an exception to the electronic submission requirement, you (or a courier service) may deliver your paper application to the Department by hand. You must deliver the original and two copies of your application, by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.103A), 550 12th Street, SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8:00 a.m. and 4:30:00 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

Note for Mail or Hand Delivery of Paper Applications: If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424 the CFDA number, including suffix letter, if any, of the competition under which you are submitting your application; and

(2) The Application Control Center will mail to you a notification of receipt of your grant application. If you do not receive this grant notification within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this program are in 34 CFR 642.31 and are listed in the application package.

Note: For the FY 2010 competition, the Secretary has identified the "Need" for training projects through the selection of five absolute priorities. Therefore, the Secretary will consider that an applicant has satisfied the "Need" criterion listed in 34 CFR 642.31(f) by applying for a grant under one of these priorities, and applicants are not otherwise required to address this criterion. The application package contains instructions on addressing the remaining selection criteria.

2. *Review and Selection Process:* A panel of non-Federal reviewers will review each application in accordance with the selection criteria, pursuant to 34 CFR 642.30(a). The individual scores of the reviewers will be added and the sum divided by the number of reviewers to determine the peer review score received in the review process. In accordance with 34 CFR 642.32, the

Secretary will award prior experience points to an applicant by evaluating the applicant's performance under its expiring Training program grant. Prior experience points, if any, will be added to the application's averaged peer review score to determine the total score for each application. Under section 402A(c)(3) of the HEA, the Secretary is not required to make awards under the Training Program for Federal TRIO Programs in the order of the scores received by the application in the peer review process and adjusted for prior experience.

In accordance with section 437(d)(1) of the General Education Provisions Act (GEPA), 20 U.S.C. 1232(d)(1), for FY 2010, the Secretary will select an application for funding within each specific absolute priority for which a grant is requested in the order of the peer review score received by the application in the peer review process.

Within each specific priority, if there are insufficient funds to fund all applications at the next peer review score, the Secretary adds the prior experience points awarded under 34 CFR 642.32 to the peer review score to determine an adjusted total score for those applications. The Secretary makes awards at the next peer review score to the applicants that have the highest total adjusted score.

In the event a tie score still exists, the Secretary will select for funding the applicant that has the greatest capacity to provide training to eligible participants in all regions of the Nation in order to assure accessibility to the greatest number of prospective training participants, consistent with 34 CFR 642.33.

Waiver of Proposed Rulemaking: Under the Administrative Procedure Act (5 U.S.C. 553) the Department generally offers interested parties the opportunity to comment on proposed requirements. Section 437(d)(1) of GEPA, however, allows the Secretary to exempt from rulemaking requirements, regulations governing the first grant competition under a new or substantially revised program authority. This is the first grant competition for this program under sections 402A and 402G of the HEA and therefore qualifies for this exemption. In order to ensure timely grant awards, the Secretary has decided to forego public comment on the requirements in the *Review and Selection Process section of this notice,* under section 437(d)(1) of GEPA. These requirements will apply to the FY 2010 grant competition only.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN). We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multi-year award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *http://www.ed.gov/fund/grant/apply/appforms/appforms.html.*

4. *Performance Measures:* The success of the Training Program is measured by its cost-effectiveness based on the number of TRIO project personnel receiving training each year; the percentage of Training Program participants that, each year, evaluate the training as benefiting them in increasing their qualifications and skills in meeting the needs of disadvantaged students; and the percentage of Training Program participants that, each year, evaluate the trainings as benefiting them in increasing their knowledge and understanding of the Federal TRIO Programs. All grantees will be required to submit an annual performance report documenting their success in training personnel working on TRIO-funded projects, including the average cost per trainee and the trainees' evaluations of the effectiveness of the training provided. The success of the Training Program also is assessed on the quantitative and qualitative outcomes of the training projects based on project evaluation results.

VII. Agency Contacts

FOR FURTHER INFORMATION CONTACT: Suzanne Ulmer, or if unavailable, contact Eileen S. Bland, U.S. Department of Education, 1990 K Street, NW., room 7000, Washington, DC 20006–8510. Telephone: (202) 502–7600 or by e-mail: *TRIO@ed.gov*

If you use a TDD, call the FRS, toll free, at 1–800–877–8339.

VIII. Other Information

Accessible Format: Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) on request to the program contact persons listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice.

Electronic Access to This Document: You can view this document, as well as all other documents of this Department published in the **Federal Register,** in text or Adobe Portable Document Format (PDF), on the Internet at the following site: *http://www.ed.gov/news/fedregister.* To use PDF, you must have Adobe Acrobat Reader, which is available free at this site.

Note: The official version of this document is the document published in the **Federal Register.** Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html.*

Delegation of Authority: *The Secretary of Education has delegated authority to Daniel T. Madzelan, Director, Forecasting and Policy Analysis for the Office of Postsecondary Education, to perform the functions and duties of the Assistant Secretary for Postsecondary Education.*

Dated: June 24, 2010.

Daniel T. Madzelan,

Director, Forecasting and Policy Analysis.

[FR Doc. 2010–15776 Filed 6–28–10; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Agency Information Collection Extension

AGENCY: U.S. Department of Energy.

ACTION: Submission for Office of Management and Budget (OMB) review; comment request.

SUMMARY: The Department of Energy (DOE) has submitted an information collection request to the OMB for extension under the provisions of the Paperwork Reduction Act of 1995. The information collection requests a three-year extension of its Financial Assistance Information Collection, OMB Control Number 1910–0400. This

information collection request covers information necessary to administer and manage DOE's financial assistance programs.

DATES: Comments regarding this collection must be received on or before July 29, 2010. If you anticipate difficulty in submitting comments within that period or if you want access to the collection of information, without charge, contact the person listed below as soon as possible.

ADDRESSES: Written comments should be sent to the following: Denise Clarke, Procurement Analyst, MA–612/950 L'Enfant Plaza Building, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585–1615, *deniset.clarke@hq.doe.gov.*

FOR FURTHER INFORMATION CONTACT: Denise Clarke at the above address, or by telephone at (202) 287–1748.

SUPPLEMENTARY INFORMATION: This information collection request contains: (1) OMB No. 1910–0400 (Renewal); (2) Information Collection Request Title: DOE Financial Assistance Information Clearance; (3) Purpose: This package contains information collections necessary to annually plan, solicit, negotiate, award, administer, and closeout grants and cooperative agreements under the Department's financial assistance programs; (4) Estimated Number of Respondents 48,860; (5) Estimated Total Burden Hours: 890,537; and (6) Number of Collections: The information collection request contains 16 information and/or recordkeeping requirements.

Statutory Authority: Federal Grant and Cooperative Agreement Act, 31 U.S.C. 6301–6308. Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 (Pub. L. 104–13).

Issued in Washington, DC, on June 23, 2010.

Patrick M. Ferraro,

Acting Director, Office of Procurement and Assistance Management.

[FR Doc. 2010–15728 Filed 6–28–10; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2629–008]

Village of Morrisville, VT; Notice of Intent To File License Application, Filing of Pre-Application Document, Commencement of Licensing Proceeding and Scoping, Request for Comments on the Pad and Scoping Document, and Identification of Issues and Associated Study Requests

June 22, 2010.

a. *Type of Filing:* Notice of Intent to File License Application for a New License and Commencing Licensing Proceeding.

b. *Project No.:* 2629–008.

c. *Dated Filed:* April 26, 2010.

d. *Submitted By:* Village of Morrisville, Vermont.

e. *Name of Project:* Morrisville Hydroelectric Project.

f. *Location:* On the Green and Lamoille Rivers, in Lamoille County, Vermont. The project does not occupy any federal lands.

g. *Filed Pursuant to:* 18 CFR part 5 of the Commission's Regulations.

h. *Potential Applicant Contact:* Craig Myotte, Village of Morrisville, Water & Light Department, P.O. Box 460—857 Elmore Street, Morrisville, Vermont, 05661–0460, at (802) 888–6521 or e-mail at *cmyotte@mwlvt.com.*

i. *FERC Contact:* Steve Kartalia at (202) 502–6131 or e-mail at *stephen.kartalia@ferc.gov.*

j. *Cooperating agencies:* Federal, state, local, and tribal agencies with jurisdiction and/or special expertise with respect to environmental issues that wish to cooperate in the preparation of the environmental document should follow the instructions for filing such requests described in item o below. Cooperating agencies should note the Commission's policy that agencies that cooperate in the preparation of the environmental document cannot also intervene. *See,* 94 FERC ¶ 61,076 (2001).

k. With this notice, we are initiating informal consultation with: (a) The U.S. Fish and Wildlife Service and/or NOAA Fisheries under section 7 of the Endangered Species Act and the joint agency regulations thereunder at 50 CFR, Part 402; and (b) the State Historic Preservation Officer, as required by Section 106, National Historical Preservation Act, and the implementing regulations of the Advisory Council on Historic Preservation at 36 CFR 800.2.

l. With this notice, we are designating the Village of Morrisville, Vermont as the Commission's non-federal representative for carrying out informal consultation, pursuant to section 7 of the Endangered Species Act and section 106 of the National Historic Preservation Act.

m. The Village of Morrisville, Vermont filed a Pre-Application Document (PAD; including a proposed process plan and schedule) with the Commission, pursuant to 18 CFR 5.6 of the Commission's regulations.

n. A copy of the PAD is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site *(http://www.ferc.gov),* using the eLibrary link. Enter the docket number, excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCONlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, (202) 502–8659. A copy is also available for inspection and reproduction at the address in paragraph h.

Register online at *http://ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filing and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

o. With this notice, we are soliciting comments on the PAD and Scoping Document issued June 22, 2010, as well as study requests. All comments on the PAD and Scoping Document, and study requests should be sent to the address above in paragraph h. In addition, all comments on the PAD and Scoping Document, study requests, requests for cooperating agency status, and all communications to and from Commission staff related to the merits of the potential application (original and eight copies) must be filed with the Commission at the following address: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. All filings with the Commission must include on the first page, the project name (Morrisville Hydroelectric Project) and number (P–2629–008), and bear the heading Comments on Pre-Application Document, Study Requests, Comments on Scoping Document, Request for Cooperating Agency Status, or Communications to and from Commission Staff. Any individual or entity interested in submitting study requests, commenting on the PAD or Scoping Document, and any agency requesting cooperating status must do so by August 24, 2010.

Comments on the PAD and Scoping Document, study requests, requests for cooperating agency status, and other

permissible forms of communications with the Commission may be filed electronically via the Internet in lieu of paper. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov/docs-filing/ferconline.asp*) under the e-filing link. For a simpler method of submitting text only comments, click on "Quick Comment."

p. Although our current intent is to prepare an environmental assessment (EA), there is the possibility that an Environmental Impact Statement (EIS) will be required. Nevertheless, this meeting will satisfy the NEPA scoping requirements, irrespective of whether an EA or EIS is issued by the Commission.

Scoping Meetings

Commission staff will hold two scoping meetings in the vicinity of the project at the time and place noted below. The daytime meeting will focus on resource agency, Indian tribes, and non-governmental organization concerns, while the evening meeting is primarily for receiving input from the public. We invite all interested individuals, organizations, and agencies to attend one or both of the meetings, and to assist staff in identifying particular study needs, as well as the scope of environmental issues to be addressed in the environmental document. The times and locations of these meetings are as follows:

Daytime Scoping Meeting

Date: Wednesday July 21, 2010.
Time: 10 a.m.
Location: TEGU Building, 43 Portland Street, Morrisville, Vermont 05661.
Phone: Craig Myotte at (802) 888–6521.

Evening Scoping Meeting

Date: Wednesday July 21, 2010.
Time: 7 p.m.
Location: TEGU Building, 43 Portland Street, Morrisville, Vermont 05661.
Phone: Craig Myotte at (802) 888–6521.

The Scoping Document, which outlines the subject areas to be addressed in the environmental document, was mailed to the individuals and entities on the Commission's mailing list. Copies of the Scoping Document will be available at the scoping meetings, or may be viewed on the Web at *http://www.ferc.gov,* using the eLibrary link. Follow the directions for accessing information in paragraph n. Based on all oral and written comments, a revised Scoping Document may be issued which may include a revised process plan and schedule, as well as a list of issues, identified through the scoping process.

Site Visit

The potential applicant and Commission staff will conduct a site visit of the project on Tuesday, July 20, 2010, starting at 10 a.m. All participants should meet at Village of Morrisville Water and Light, 857 Elmore Street, Morrisville, VT 05661. Some transportation will be provided by the Village of Morrisville or participants may use their own transportation. Please notify Craig Myotte at 802–888–6521 by July 16, 2010, if you plan to attend the site visit.

Meeting Objectives

At the scoping meetings, staff will: (1) Initiate scoping of the issues; (2) review and discuss existing conditions and resource management objectives; (3) review and discuss existing information and identify preliminary information and study needs; (4) review and discuss the process plan and schedule for pre-filing activity that incorporates the time frames provided for in Part 5 of the Commission's regulations and, to the extent possible, maximizes coordination of federal, state, and tribal permitting and certification processes; and (5) discuss the appropriateness of any federal or state agency or Indian tribe acting as a cooperating agency for development of an environmental document.

Meeting participants should come prepared to discuss their issues and/or concerns. Please review the PAD in preparation for the scoping meetings. Directions on how to obtain a copy of the PAD and Scoping Document are included in item n. of this document.

Meeting Procedures

The meetings will be recorded by a stenographer and will become part of the formal record of the Commission proceeding on the project.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–15700 Filed 6–28–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12574–002]

Santiam Water Control District; Notice of Application Ready for Environmental Analysis, and Soliciting Comments, Terms Conditions, and Recommendations

June 22, 2010.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Exemption from Licensing.
b. *Project No.:* 12574–002.
c. *Date filed:* June 18, 2007 and supplemented on July 18, 2007, pursuant to Order Denying Rehearing (119 FERC ¶ 61,159).
d. *Applicant:* Santiam Water Control District.
e. *Name of Project:* Stayton Hydroelectric Project.
f. *Location:* On the Stayton Ditch near the Town of Stayton, Marion County, Oregon. The project would not occupy United States land.
g. *Filed Pursuant to:* Public Utility Regulatory Policies Act of 1978, 16 U.S.C. 2705 and 2708.
h. *Applicant Contact:* Brent Stevenson, Santiam Water Control District, 284 East Water Street, Stayton OR 97383, (503) 769–2669.
i. *FERC Contact:* Joseph Hassell, (202) 502–8079.
j. *Deadline for filing comments, recommendations, terms and conditions:* 60 days from the issuance date of this notice; reply comments are due 105 days from the issuance date of this notice.

All documents (original and eight copies) should be filed with: Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

The Commission's Rules of Practice require all intervenors filing documents with the Commission to serve a copy of that document on each person whose name appears on 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.

Comments, recommendations, terms and conditions may be filed electronically via the Internet in lieu of paper. The Commission strongly encourages electronic filings. See 18

CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov*) under the "eFiling" link.

k. This application has been accepted and is now ready for environmental analysis at this time.

l. *Description of Project:* The Stayton Hydropower Project would consist of the existing: (1) Power canal headgate structure and fish ladder, fish screen, and 28-inch-diameter, 600-foot-long juvenile fish bypassed return pipe located near the upstream end of Stayton Ditch; (2) the 0.5-mile-long Stayton Ditch; (3) 24-foot-long by 12-foot-high intake structure equipped with 24.6-foot-long by 12-foot-high and 3-inch bar spacing trashracks located just upstream of the powerhouse; (4) the 40-foot-long V-type spillway weir and integral powerhouse containing a single 600-kilowatt generating unit; (5) the 24-foot-long by 12-foot-high outlet structure located just downstream of the powerhouse; (6) the 0.5-mile-long tailrace channel and tailrace fish barrier; (7) the100-foot-long, 2,400-kilovolt transmission line; and (8) appurtenant facilities. The project would have an average annual generation of 4,320 megawatt-hours.

m. A copy of the application is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at 1–866–208–3676, or for TTY, (202) 502–8659. A copy is also available for inspection and reproduction at the address in item h. above.

All filings must: (1) Bear in all capital letters the title "COMMENTS", "REPLY COMMENTS", "RECOMMENDATIONS," or "TERMS AND CONDITIONS," (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 submitting the filing; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, recommendations, terms and conditions 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. Each filing must be accompanied by proof of service on all persons listed on the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b), and 385.2010.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

n. *Procedural schedule:* The Commission staff proposes to issue a single Environmental Assessment (EA) rather than issuing a draft and final EA. Staff intends to allow 30 days for entities to comment on the EA, and will take into consideration all comments received on the EA before final action is taken on the exemption application. The application will be processed according to the schedule, but revisions to the schedule may be made as appropriate:

Milestone	Target date
Notice of Acceptance and Ready for Environmental Analysis	June 18, 2010.
Filing comments, recommendations, terms and conditions	August 17, 2010.
Reply comments	October 1, 2010.
Notice of availability of Final EA	December 1, 2010.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–15697 Filed 6–28–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

June 18, 2010.

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP10–784–000.
Applicants: CenterPoint Energy Gas Transmission Comp.
Description: CenterPoint Energy Gas Transmission Company submits an amended negotiated rate agreement with Chesapeake Energy Marketing, Inc.
Filed Date: 05/28/2010.
Accession Number: 20100528–0243.
Comment Date: 5 p.m. e.t. on Wednesday, June 23, 2010.

Docket Numbers: RP10–846–000.
Applicants: Granite State Gas Transmission, Inc.
Description: Granite State Gas Transmission, Inc submits First Revised Page No. 115 *et al.* to FERC Gas Tariff, Fourth Revised Volume No. 1, to be effective 7/15/10.
Filed Date: 06/15/2010.
Accession Number: 20100615–0202.
Comment Date: 5 p.m. e.t. on Monday, June 28, 2010.

Docket Numbers: RP10–847–000.
Applicants: Monroe Gas Storage Company, LLC.
Description: Monroe Gas Storage Company, LLC submits First Revised Sheet 17 *et al.* to FERC Gas Tariff, Original Volume 1 to be effective 7/15/10.
Filed Date: 06/15/2010.
Accession Number: 20100616–0201.
Comment Date: 5 p.m. e.t. on Monday, June 28, 2010.

Docket Numbers: RP10–848–000.
Applicants: Equitrans, L.P.
Description: Equitrans, L.P. submits tariff filing per 154.203: Annual Gathering Retainage Rate Filing, to be effective 6/9/2010.
Filed Date: 06/16/2010.
Accession Number: 20100616–5022.
Comment Date: 5 p.m. e.t. on Monday, June 28, 2010.

Docket Numbers: RP10–849–000.
Applicants: Midcontinent Express Pipeline LLC.
Description: Midcontinent Express Pipeline LLC submits First Revised Sheet 199 *et al.* of its FERC Gas Tariff Gas Tariff, Original Volume 1, to be effective 7/17/10.
Filed Date: 06/16/2010.
Accession Number: 20100616–0203.
Comment Date: 5 p.m. e.t. on Monday, June 28, 2010.

Docket Numbers: RP10–850–000.
Applicants: Wyoming Interstate Company, L.L.C.
Description: Wyoming Interstate Company, L.L.C. submits tariff filing per 154.204: Pro Forma Update to be effective 7/19/2010.
Filed Date: 06/16/2010.
Accession Number: 20100616–5092.
Comment Date: 5 p.m. e.t. on Monday, June 28, 2010.

Docket Numbers: RP10–851–000.

Applicants: Dominion Transmission, Inc.

Description: Dominion Transmission, Inc. submits tariff filing per 154.203: DTI 2010–6–17 Volume 1A Subsequent Approvals to be effective 7/1/2010.

Filed Date: 06/17/2010.

Accession Number: 20100617–5015.

Comment Date: 5 p.m. e.t. on Tuesday, June 29, 2010.

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. e.t. 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. 2010–15739 Filed 6–28–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

June 21, 2010.

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC10–75–000.

Applicants: ITC Midwest LLC, Northern States Power Company (Minnesota).

Description: FPA 203 Joint Application of ITC MW and NSPM.

Filed Date: 06/18/2010.

Accession Number: 20100618–5167.

Comment Date: 5 p.m. Eastern Time on Friday, July 9, 2010.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER07–412–005; ER06–745–005; ER09–1099–004; ER10–1089–001; ER10–1383–001; ER99–1714–009.

Applicants: ECP Energy I, LLC; MASSPOWER; Empire Generating Co, LLC; EquiPower Resources Management, LLC; Dighton Power, LLC; Lake Road Generating Company, L.P.

Description: Dighton Power, LLC *et al.* notifies the Commission of a non-material change in status.

Filed Date: 06/18/2010.

Accession Number: 20100621–0205.

Comment Date: 5 p.m. Eastern Time on Friday, July 9, 2010.

Docket Numbers: ER09–1063–004.

Applicants: PJM Interconnection L.L.C.

Description: PJM Interconnection, LLC submits proposed package of reforms to establish just and reasonable pricing for operative reserve shortages in the PJM Region.

Filed Date: 06/18/2010.

Accession Number: 20100621–0201.

Comment Date: 5 p.m. Eastern Time on Friday, July 9, 2010.

Docket Numbers: ER10–1251–001.

Applicants: Midwest Independent Transmission System Operator, Inc.

Description: Midwest Independent Transmission System Operator, Inc. submits an amendment to its previous filing on 5/14/10 *etc.*

Filed Date: 06/18/2010.

Accession Number: 20100618–0209.

Comment Date: 5 p.m. Eastern Time on Friday, July 9, 2010.

Docket Numbers: ER10–1480–000.

Applicants: Portland General Electric Company.

Description: Portland General Electric Company submits modifications to their Open Access Transmission tariff.

Filed Date: 06/18/2010.

Accession Number: 20100618–0207.

Comment Date: 5 p.m. Eastern Time on Friday, July 9, 2010.

Docket Numbers: ER10–1481–000.

Applicants: PJM Interconnection, L.L.C.

Description: PJM Interconnection, LLC submits Request for Limited Tariff waiver.

Filed Date: 06/18/2010.

Accession Number: 20100618–0206.

Comment Date: 5 p.m. Eastern Time on Friday, July 9, 2010.

Docket Numbers: ER10–1482–000.

Applicants: Wildorado Wind, LLC.

Description: Wildorado Wind, LLC *et al.* submits an Assignment, Cotenancy and Common Facilities Agreement *etc.*

Filed Date: 06/17/2010.

Accession Number: 20100621–0206.

Comment Date: 5 p.m. Eastern Time on Thursday, July 8, 2010.

Docket Numbers: ER10–1483–000.

Applicants: Dominion Energy Kewaunee, Inc.

Description: Dominion Energy Kewaunee, Inc. submits tariff filing per 35.12: Baseline to be effective 6/30/2010.

Filed Date: 06/18/2010.

Accession Number: 20100618–5081.

Comment Date: 5 p.m. Eastern Time on Friday, July 9, 2010.

Docket Numbers: ER10–1484–000.

Applicants: Shell Energy North America (US), L.P.

Description: Shell Energy North America (US), L.P. submits tariff filing per 35.12: Shell Energy North America (US), L.P. Market-Based Rate Tariff to be effective 6/18/2010.

Filed Date: 06/18/2010.

Accession Number: 20100618–5119.

Comment Date: 5 p.m. Eastern Time on Friday, July 9, 2010.

Docket Numbers: ER10–1485–000.

Applicants: Midwest Independent Transmission System Operator, Inc.

Description: Midwest Independent Transmission System Operator, Inc. submits proposed amendment to Module E of its Open Access Transmission, Energy and Operating Reserve Markets Tariff.

Filed Date: 06/18/2010.

Accession Number: 20100621–0207.

Comment Date: 5 p.m. Eastern Time on Friday, July 9, 2010.

Docket Numbers: ER10–1486–000.
Applicants: Forward Energy LLC.
Description: Forward Energy LLC submits tariff filing per 35.12: Initial Baseline Filing to be effective 6/21/2010.
Filed Date: 06/21/2010.
Accession Number: 20100621–5036.
Comment Date: 5 p.m. Eastern Time on Monday, July 12, 2010.

Docket Numbers: ER10–1487–000.
Applicants: Willow Creek Energy LLC.
Description: Willow Creek Energy LLC submits tariff filing per 35.12: Initial Baseline Filing to be effective 6/21/2010.
Filed Date: 06/21/2010.
Accession Number: 20100621–5038.
Comment Date: 5 p.m. Eastern Time on Monday, July 12, 2010.

Docket Numbers: ER10–1488–000.
Applicants: Sheldon Energy LLC.
Description: Sheldon Energy LLC submits tariff filing per 35.12: Initial Baseline Tariff to be effective 6/21/2010.
Filed Date: 06/21/2010.
Accession Number: 20100621–5039.
Comment Date: 5 p.m. Eastern Time on Monday, July 12, 2010.

Docket Numbers: ER10–1489–000.
Applicants: Grand Ridge Energy LLC.
Description: Grand Ridge Energy LLC submits tariff filing per 35.12: Initial Baseline Tariff to be effective 6/21/2010.
Filed Date: 06/21/2010.
Accession Number: 20100621–5040.
Comment Date: 5 p.m. Eastern Time on Monday, July 12, 2010.

Docket Numbers: ER10–1490–000.
Applicants: Grand Ridge Energy II LLC.
Description: Grand Ridge Energy II LLC submits tariff filing per 35.12: Initial Baseline Tariff to be effective 6/21/2010.
Filed Date: 06/21/2010.
Accession Number: 20100621–5041.
Comment Date: 5 p.m. Eastern Time on Monday, July 12, 2010.

Docket Numbers: ER10–1491–000.
Applicants: Grand Ridge Energy III LLC.
Description: Grand Ridge Energy III LLC submits tariff filing per 35.12: Initial Baseline Filing to be effective 6/21/2010.
Filed Date: 06/21/2010.
Accession Number: 20100621–5042.
Comment Date: 5 p.m. Eastern Time on Monday, July 12, 2010.

Docket Numbers: ER10–1492–000.
Applicants: Midwest ISO and Midwest ISO Transmission.
Description: Midwest Independent Transmission System Operator, Inc *et al.* submits Open Access Transmission and Energy Markets Tariff but takes no position on the substance of the filing itself.
Filed Date: 06/18/2010.
Accession Number: 20100621–0204.
Comment Date: 5 p.m. Eastern Time on Friday, July 9, 2010.

Docket Numbers: ER10–1493–000.
Applicants: West Penn Power Company.
Description: Alleghany Power submits Interconnection Agreement with Duquesne Light Company dated 6/18/10 and designated as Original Service Agreement No 2532 under the FERC Electric Tariff, Sixth Revised Volume 1 to be effective 8/17/10.
Filed Date: 06/18/2010.
Accession Number: 20100621–0203.
Comment Date: 5 p.m. Eastern Time on Friday, July 9, 2010.

Docket Numbers: ER10–1494–000.
Applicants: Otter Tail Power Company.
Description: Otter Tail Power Company submits an unexecuted version of a Transmission Capacity Exchange Agreement, FERC Electric Tariff, Rate Schedule No 10.
Filed Date: 06/18/2010.
Accession Number: 20100621–0202.
Comment Date: 5 p.m. Eastern Time on Friday, July 9, 2010.

Docket Numbers: ER10–1495–000.
Applicants: Grand Ridge Energy IV LLC.
Description: Grand Ridge Energy IV LLC submits tariff filing per 35.12: Initial Baseline Filing to be effective 6/21/2010.
Filed Date: 06/21/2010.
Accession Number: 20100621–5059.
Comment Date: 5 p.m. Eastern Time on Monday, July 12, 2010.

Docket Numbers: ER10–1496–000.
Applicants: Grand Ridge Energy V LLC.
Description: Grand Ridge Energy V LLC submits tariff filing per 35.12: Initial Baseline Filing to be effective 6/21/2010.
Filed Date: 06/21/2010.
Accession Number: 20100621–5060.
Comment Date: 5 p.m. Eastern Time on Monday, July 12, 2010.

Docket Numbers: ER10–1497–000.
Applicants: Spring Canyon Energy LLC.
Description: Spring Canyon Energy LLC submits tariff filing per 35.12: Initial Baseline Filing to be effective 6/21/2010.
Filed Date: 06/21/2010.
Accession Number: 20100621–5061.
Comment Date: 5 p.m. Eastern Time on Monday, July 12, 2010.

Docket Numbers: ER10–1498–000.
Applicants: Judith Gap Energy LLC.
Description: Judith Gap Energy LLC submits tariff filing per 35.12: Initial Baseline Filing to be effective 6/21/2010.
Filed Date: 06/21/2010.
Accession Number: 20100621–5062.
Comment Date: 5 p.m. Eastern Time on Monday, July 12, 2010.

Docket Numbers: ER10–1499–000.
Applicants: Invenergy TN LLC.
Description: Invenergy TN LLC submits tariff filing per 35.12: Initial Baseline Filing to be effective 6/21/2010.
Filed Date: 06/21/2010.
Accession Number: 20100621–5063.
Comment Date: 5 p.m. Eastern Time on Monday, July 12, 2010.

Docket Numbers: ER10–1500–000.
Applicants: Grays Harbor Energy LLC.
Description: Grays Harbor Energy LLC submits tariff filing per 35.12: Initial Baseline Filing to be effective 6/21/2010.
Filed Date: 06/21/2010.
Accession Number: 20100621–5064.
Comment Date: 5 p.m. Eastern Time on Monday, July 12, 2010.

Docket Numbers: ER10–1501–000.
Applicants: Hardee Power Partners Limited.
Description: Hardee Power Partners Limited submits tariff filing per 35.12: Initial Baseline Filing to be effective 6/21/2010.
Filed Date: 06/21/2010.
Accession Number: 20100621–5065.
Comment Date: 5 p.m. Eastern Time on Monday, July 12, 2010.

Docket Numbers: ER10–1502–000.
Applicants: Spindle Hill Energy LLC.
Description: Spindle Hill Energy LLC submits tariff filing per 35.12: Initial Baseline Filing to be effective 6/21/2010.
Filed Date: 06/21/2010.
Accession Number: 20100621–5066.
Comment Date: 5 p.m. Eastern Time on Monday, July 12, 2010.

Docket Numbers: ER10–1503–000.
Applicants: Invenergy Cannon Falls LLC.
Description: Invenergy Cannon Falls LLC submits tariff filing per 35.12: Initial Baseline Filing to be effective 6/21/2010.
Filed Date: 06/21/2010.
Accession Number: 20100621–5067.
Comment Date: 5 p.m. Eastern Time on Monday, July 12, 2010.

Docket Numbers: ER10–1504–000.
Applicants: Beech Ridge Energy LLC.
Description: Beech Ridge Energy LLC submits tariff filing per 35.12: Initial Baseline Filing to be effective 6/21/2010.

Filed Date: 06/21/2010.
Accession Number: 20100621–5068.
Comment Date: 5 p.m. Eastern Time on Monday, July 12, 2010.

Docket Numbers: ER10–1505–000.
Applicants: Public Service Company of New Mexico.
Description: Public Service Company of New Mexico submits a transmission service agreement with NextEra Energy Resources, LLC.
Filed Date: 06/21/2010.
Accession Number: 20100621–0210.
Comment Date: 5 p.m. Eastern Time on Monday, July 12, 2010.

Docket Numbers: ER10–1506–000.
Applicants: Wolverine Creek Energy LLC.
Description: Wolverine Creek Energy LLC submits tariff filing per 35.12: Initial Baseline Filing to be effective 6/21/2010.
Filed Date: 06/21/2010.
Accession Number: 20100621–5078.
Comment Date: 5 p.m. Eastern Time on Monday, July 12, 2010.

Docket Numbers: ER10–1507–000.
Applicants: New York Independent System Operator Inc, Niagara Mohawk Power Corporation.
Description: Joint Filing Parties submits an executed Standard Large Generator Interconnection Agreement.
Filed Date: 06/21/2010.
Accession Number: 20100621–0211.
Comment Date: 5 p.m. Eastern Time on Monday, July 12, 2010.

Docket Numbers: ER10–1508–000.
Applicants: Tampa Electric Company.
Description: Tampa Electric Company submits tariff filing per 35.12: Baseline-OATT to be effective 6/21/2010.
Filed Date: 06/21/2010.
Accession Number: 20100621–5097.
Comment Date: 5 p.m. Eastern Time on Monday, July 12, 2010.

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.

As it relates to any qualifying facility filings, the notices of self-certification [or self-recertification] listed above, do not institute a proceeding regarding qualifying facility status. A notice of self-certification [or self-recertification] simply provides notification that the entity making the filing has determined the facility named in the notice meets the applicable criteria to be a qualifying facility. Intervention and/or protest do not lie in dockets that are qualifying facility self-certifications or self-recertifications. Any person seeking to challenge such qualifying facility status may do so by filing a motion pursuant to 18 CFR 292.207(d)(iii). Intervention and protests may be filed in response to notices of qualifying facility dockets other than self-certifications and self-recertifications.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed dockets(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2010–15738 Filed 6–28–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings No. 1

June 21, 2010.

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP10–852–000.
Applicants: Equitrans, L.P.
Description: Equitrans, L.P. submits tariff filing per 154.203: Tennessee Capacity Surcharge Tracker Compliance, to be effective 6/9/2010.
Filed Date: 06/17/2010.
Accession Number: 20100617–5055.
Comment Date: 5 p.m. Eastern Time on Tuesday, June 29, 2010.

Docket Numbers: RP10–853–000.
Applicants: Transwestern Pipeline Company, LLC.
Description: Transwestern Pipeline Company, LLC submits Seventh Revised Sheet 1 et al. to FERC Gas Tariff, Third Revised Volume 1 to be effective & 7/18/10.
Filed Date: 06/17/2010.
Accession Number: 20100617–0208.
Comment Date: 5 p.m. Eastern Time on Tuesday, June 29, 2010.

Docket Numbers: RP10–854–000.
Applicants: Mojave Pipeline Company.
Description: Mojave Pipeline Company submits tariff filing per 154.203: Tariff Update, to be effective 6/7/2010.
Filed Date: 06/17/2010.
Accession Number: 20100617–5107.
Comment Date: 5 p.m. Eastern Time on Tuesday, June 29, 2010.

Docket Numbers: RP10–855–000.
Applicants: Kinder Morgan Interstate Gas Trans. LLC.
Description: Kinder Morgan Interstate Gas Transmission LLC submits First Revised Sheet 4G.03 et al. to FERC Gas Tariff, Fourth Revised Volume 1A, to be effective 6/17/2010.
Filed Date: 06/17/2010.
Accession Number: 20100618–0203.
Comment Date: 5 p.m. Eastern Time on Tuesday, June 29, 2010.

Docket Numbers: RP10–856–000.
Applicants: CenterPoint Energy—Mississippi River Transmission.
Description: CenterPoint Energy—Mississippi River Transmission Corporation submits tariff filing per 154.203: MRT Baseline to be effective 6/18/2010.
Filed Date: 06/18/2010.
Accession Number: 20100618–5025.
Comment Date: 5 p.m. Eastern Time on Wednesday, June 30, 2010.

Docket Numbers: RP10–857–000.
Applicants: El Paso Natural Gas Company.
Description: El Paso Natural Gas Company submits tariff filing per 154.204: Tariff Merger to be effective 5/1/2010.
Filed Date: 06/18/2010.
Accession Number: 20100618–5038.
Comment Date: 5 p.m. Eastern Time on Wednesday, June 30, 2010.

Docket Numbers: RP10–858–000.
Applicants: TransColorado Gas Transmission Company LLC.
Description: TransColorado Gas Transmission Company LLC submits tariff filing per 154.204: No Fuel Filing to be effective 7/19/2010.
Filed Date: 06/18/2010.
Accession Number: 20100618–5045.
Comment Date: 5 p.m. Eastern Time on Wednesday, June 30, 2010.

Docket Numbers: RP10–859–000.
Applicants: Egan Hub Storage, LLC.
Description: Egan Hub Storage, LLC submits Sixth Revised Sheet 206 et al. of its FERC Gas Tariff, First Revised Volume 1, to be effective 6/18/10.
Filed Date: 06/18/2010.
Accession Number: 20100618–0211.
Comment Date: 5 p.m. Eastern Time on Wednesday, June 30, 2010.

Docket Numbers: RP10–860–000.
Applicants: Tennessee Gas Pipeline Company.
Description: Tennessee Gas Pipeline Company submits tariff filing per 154.203: Baseline Filing Volume No. 2 to be effective 6/18/2010.
Filed Date: 06/18/2010.
Accession Number: 20100618–5143.
Comment Date: 5 p.m. Eastern Time on Wednesday, June 30, 2010.

Docket Numbers: RP10–861–000.
Applicants: Egan Hub Storage, LLC.
Description: Egan Hub Storage, LLC submits tariff filing per 154.203: Egan Hub Baseline Filing to be effective 6/21/2010.
Filed Date: 06/21/2010.
Accession Number: 20100621–5008.
Comment Date: 5 p.m. Eastern Time on Tuesday, July 6, 2010.

Docket Numbers: RP10–862–000.
Applicants: Texas Eastern Transmission, LP.
Description: Texas Eastern Transmission, LP submits tariff filing per 154.204: LLFT rate correction to be effective 4/22/2010.
Filed Date: 06/21/2010.
Accession Number: 20100621–5009.
Comment Date: 5 p.m. Eastern Time on Tuesday, July 6, 2010.

Docket Numbers: RP10–863–000.
Applicants: Williston Basin Interstate Pipeline Comp.
Description: Williston Basin Interstate Pipeline Company submits tariff filing per 154.203: Baseline Filing to be effective 6/21/2010.
Filed Date: 06/21/2010.
Accession Number: 20100621–5026.
Comment Date: 5 p.m. Eastern Time on Tuesday, July 6, 2010.

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.

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Nathaniel J. Davis, Sr.,
Deputy Secretary.
[FR Doc. 2010–15737 Filed 6–28–10; 8:45 am]
BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings No. 2

June 21, 2010.

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP09–809–003.
Applicants: Maritimes & Northeast Pipeline, L.L.C.
Description: Maritimes & Northeast Pipeline, LLC FERC Gas Tariff, First revised Volume 1, to be effective 7/7/10.
Filed Date: 06/18/2010.
Accession Number: 20100618–0212.
Comment Date: 5 p.m. Eastern Time on Wednesday, June 30, 2010.

Docket Numbers: RP09–809–004.
Applicants: Maritimes & Northeast Pipeline, L.L.C.
Description: Maritimes & Northeast Pipeline, LLC FERC Gas Tariff, First revised Volume 1, to be effective 7/7/10.
Filed Date: 06/18/2010.
Accession Number: 20100618–0212.
Comment Date: 5 p.m. Eastern Time on Wednesday, June 30, 2010.

Docket Numbers: RP09–882–000.
Applicants: Questar Pipeline Company.
Description: Questar Pipeline Company's Annual Gas Sales Report for its Clay Basin Storage Reservoir for the 12-month period ending April 30, 2010.
Filed Date: 06/18/2010.
Accession Number: 20100618–5121.
Comment Date: 5 p.m. Eastern Time on Wednesday, June 30, 2010.

Docket Numbers: RP10–660–001.
Applicants: North Baja Pipeline, LLC.
Description: North Baja Pipeline, LLC submits tariff filing per 154.203: RP10–660 Baseline Compliance to be effective 4/28/2010.
Filed Date: 06/18/2010.
Accession Number: 20100618–5050.
Comment Date: 5 p.m. Eastern Time on Wednesday, June 30, 2010.

Any person desiring to protest this filing must file in accordance with Rule 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.211). Protests to this filing 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. Such protests must be filed on or before 5 p.m. Eastern on the specified comment date. Anyone filing a protest must serve a copy of that document on all the parties to the proceeding.

The Commission encourages electronic submission of protests 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 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.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2010–15736 Filed 6–28–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

June 23, 2010.

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP10–864–000.
Applicants: Kinder Morgan Interstate Gas Trans. LLC.
Description: Kinder Morgan Interstate Gas Transmission LLC submits an Original 4G.04 *et al.* to FERC Gas Tariff, Fourth Revised Volume 1A.
Filed Date: 06/18/2010.
Accession Number: 20100621–0208.
Comment Date: 5 p.m. Eastern Time on Wednesday, June 30, 2010.

Docket Numbers: RP10–865–000.
Applicants: CenterPoint Energy Gas Transmission Company.
Description: Petition of CenterPoint Energy Gas Transmission Company for a Waiver of Tariff Provisions.
Filed Date: 06/18/2010.
Accession Number: 20100618–5174.
Comment Date: 5 p.m. Eastern Time on Wednesday, June 30, 2010.

Docket Numbers: RP10–866–000.
Applicants: Mojave Pipeline Company.
Description: Mojave Pipeline Company submits tariff filing per 154.203: Baseline to be effective 6/21/2010.
Filed Date: 06/21/2010.
Accession Number: 20100621–5143.
Comment Date: 5 p.m. Eastern Time on Tuesday, July 06, 2010.

Docket Numbers: RP10–867–000.
Applicants: Mojave Pipeline Company.
Description: Mojave Pipeline Company submits tariff filing per 154.203: Baseline to be effective 6/21/2010.
Filed Date: 06/21/2010.
Accession Number: 20100621–5166.
Comment Date: 5 p.m. Eastern Time on Tuesday, July 06, 2010.

Docket Numbers: RP10–868–000.
Applicants: Rockies Express Pipeline LLC.
Description: Rockies Express Pipeline LLC submits tariff filing per 154.203: Update Baseline with recently approved sheets (into sections) to be effective 6/11/2010.
Filed Date: 06/22/2010.
Accession Number: 20100622–5041.
Comment Date: 5 p.m. Eastern Time on Tuesday, July 06, 2010.

Docket Numbers: RP10–869–000.
Applicants: Midwestern Gas Transmission Company.
Description: Midwestern Gas Transmission Company submits First Revised Sheet No. 237B to FERC Gas Tariff, Third Revised Volume 1, to be effective 7/01/2010.
Filed Date: 06/22/2010.
Accession Number: 20100622–0207.
Comment Date: 5 p.m. Eastern Time on Tuesday, July 06, 2010.

Docket Numbers: RP10–870–000.
Applicants: Empire Pipeline, Inc.
Description: Empire Pipeline, Inc. submits tariff filing per 154.203: Empire Baseline to be effective 6/22/2010.
Filed Date: 06/22/2010.
Accession Number: 20100622–5050.
Comment Date: 5 p.m. Eastern Time on Tuesday, July 06, 2010.

Docket Numbers: RP10–871–000.
Applicants: Tennessee Gas Pipeline Company.
Description: Tennessee Gas Pipeline Company submits tariff filing per 154.204: PCB Extension—RP91–203 to be effective 7/1/2010.
Filed Date: 06/22/2010.
Accession Number: 20100622–5054.
Comment Date: 5 p.m. Eastern Time on Tuesday, July 06, 2010.

Docket Numbers: RP10–872–000.
Applicants: Gulf South Pipeline Company, LP.
Description: Gulf South Pipeline Company, LP submits Fifth Revised Sheet 2901 of its FERC Gas Tariff, Sixth Revised Volume 1, to be effective 7/22/10.
Filed Date: 06/22/2010.
Accession Number: 20100622–0211.
Comment Date: 5 p.m. Eastern Time on Tuesday, July 06, 2010.

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.

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(866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2010–15741 Filed 6–28–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

June 22, 2010.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER00–2129–004; ER09–1110–003; ER09–1111–002; ER09–1116–002.

Applicants: Orion Power Midwest, L.P.; RRI Energy Florida, LLC; RRI Energy Mid-Atlantic Power Holdings, Inc.; RRI Energy Wholesale Generation, LLC.

Description: Orion Power Midwest, LP *et al.* submits filing demonstrating that they are Category 1 Sellers under section 35.36.

Filed Date: 06/21/2010.

Accession Number: 20100622–0201.

Comment Date: 5 p.m. e.t. on Monday, July 12, 2010.

Docket Numbers: ER09–1114–004; ER10–1323–001.

Applicants: RRI Energy Services, Inc., RRI Energy West, Inc.

Description: Triennial Report of the RRI Southwest MBR Companies.

Filed Date: 06/21/2010.

Accession Number: 20100621–5196.

Comment Date: 5 p.m. e.t. on Friday, August 20, 2010.

Docket Numbers: ER09–412–001.

Applicants: PJM Interconnection L.L.C.

Description: PJM Interconnection, LLC submits revisions to the PJM Open Access Transmission Tariff in compliance with the Commission's May 20, 2010 order in the proceeding.

Filed Date: 06/21/2010.

Accession Number: 20100622–0203.

Comment Date: 5 p.m. e.t. on Monday, July 12, 2010.

Docket Numbers: ER10–549–001.

Applicants: PJM Interconnection, L.L.C.

Description: PJM Interconnection, LLC submits compliance filing in order to clarify the inclusion of certain baseline upgrades as reliability project in the PJM Regional Expansion Plan.

Filed Date: 06/22/2010.

Accession Number: 20100622–0204.

Comment Date: 5 p.m. e.t. on Tuesday, July 13, 2010.

Docket Numbers: ER10–1466–000.

Applicants: Community Power & Utilities.

Description: Community Power & Utility submits petition for acceptance of initial tariff, waivers and Blanket Authority.

Filed Date: 06/17/2010.

Accession Number: 20100616–0220.

Comment Date: 5 p.m. e.t. on Thursday, July 08, 2010.

Docket Numbers: ER10–1509–000.

Applicants: Louisville Gas and Electric Company.

Description: Louisville Gas and Electric Company submits tariff filing per 35.12: LGEKU Baseline Transmission to be effective 7/18/2010.

Filed Date: 06/21/2010.

Accession Number: 20100621–5137.

Comment Date: 5 p.m. e.t. on Monday, July 12, 2010.

Docket Numbers: ER10–1510–000.

Applicants: Kentucky Utilities Company

Description: Kentucky Utilities Company submits tariff filing per 35.12: KU Transmission Baseline Concurrence to be effective 7/18/2010.

Filed Date: 06/21/2010.

Accession Number: 20100621–5147.

Comment Date: 5 p.m. e.t. on Monday, July 12, 2010.

Docket Numbers: ER10–1511–000.

Applicants: Louisville Gas and Electric Company.

Description: Louisville Gas and Electric Company submits tariff filing per 35.12: Energy Marketing Baseline to be effective 7/18/2010.

Filed Date: 06/22/2010.

Accession Number: 20100622–5000.

Comment Date: 5 p.m. e.t. on Tuesday, July 13, 2010.

Docket Numbers: ER10–1512–000.

Applicants: Kentucky Utilities Company.

Description: Kentucky Utilities Company submits tariff filing per 35.12: KU Energy Marketing Concurrence Baseline to be effective 7/18/2010.

Filed Date: 06/22/2010.

Accession Number: 20100622–5004.

Comment Date: 5 p.m. e.t. on Tuesday, July 13, 2010.

Docket Numbers: ER10–1513–000.

Applicants: Wolverine Power Supply Cooperative, Inc.

Description: Wolverine Power Supply Cooperative, Inc. submits tariff filing per 35.12: Initial Baseline Market Based Rate Tariff Filing to be effective 6/22/2010.

Filed Date: 06/22/2010.

Accession Number: 20100622–5017.

Comment Date: 5 p.m. e.t. on Tuesday, July 13, 2010.

Docket Numbers: ER10–1514–000.

Applicants: CPV Keenan II Renewable Energy Company.

Description: CPV Keenan II Renewable Energy Company, LLC submits tariff filing per 35.12: Initial Baseline Market Based Rate Tariff Filing to be effective 6/22/2010.

Filed Date: 06/22/2010.

Accession Number: 20100622–5018.

Comment Date: 5 p.m. e.t. on Tuesday, July 13, 2010.

Docket Numbers: ER10–1515–000.

Applicants: CPV Liberty, LLC.

Description: CPV Liberty, LLC submits tariff filing per 35.12: Initial Baseline Market Based Rate Tariff Filing to be effective 6/22/2010.

Filed Date: 06/22/2010.

Accession Number: 20100622–5020.

Comment Date: 5 p.m. e.t. on Tuesday, July 13, 2010.

Docket Numbers: ER10–1516–000.

Applicants: CPV Milford, LLC.

Description: CPV Milford, LLC submits tariff filing per 35.12: Initial Baseline Market Based Rate Tariff Filing to be effective 6/22/2010.

Filed Date: 06/22/2010.

Accession Number: 20100622–5021.

Comment Date: 5 p.m. e.t. on Tuesday, July 13, 2010.

Docket Numbers: ER10–1518–000.

Applicants: Milford Power Company, LLC.

Description: Milford Power Company, LLC submits tariff filing per 35.12: Initial Baseline Market Based Rate Tariff Filing to be effective 6/22/2010.

Filed Date: 06/22/2010.

Accession Number: 20100622–5031.

Comment Date: 5 p.m. e.t. on Tuesday, July 13, 2010.

Docket Numbers: ER10–1519–000.

Applicants: Liberty Electric Power, LLC.

Description: Liberty Electric Power, LLC submits tariff filing per 35.12: Initial Baseline Market Based Rate Tariff Filing to be effective 6/22/2010.

Filed Date: 06/22/2010.

Accession Number: 20100622–5032.

Comment Date: 5 p.m. e.t. on Tuesday, July 13, 2010.

Docket Numbers: ER10–1520–000.

Applicants: Occidental Power Services, Inc.

Description: Occidental Power Services, Inc. submits tariff filing per 35.12: Baseline Tariff Filing to be effective 6/22/2010.

Filed Date: 06/22/2010.

Accession Number: 20100622–5040.

Comment Date: 5 p.m. e.t. on Tuesday, July 13, 2010.

Docket Numbers: ER10–1521–000.

Applicants: Occidental Power Marketing, L.P.

Description: Occidental Power Marketing, L.P. submits tariff filing per 35.12: Baseline Tariff Filing to be effective 6/22/2010.

Filed Date: 06/22/2010.

Accession Number: 20100622–5042.

Comment Date: 5 p.m. e.t. on Tuesday, July 13, 2010.

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. e.t. 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.

As it relates to any qualifying facility filings, the notices of self-certification [or self-recertification] listed above, do not institute a proceeding regarding qualifying facility status. A notice of self-certification [or self-recertification] simply provides notification that the entity making the filing has determined the facility named in the notice meets the applicable criteria to be a qualifying facility. Intervention and/or protest do not lie in dockets that are qualifying facility self-certifications or self-recertifications. Any person seeking to challenge such qualifying facility status may do so by filing a motion pursuant to 18 CFR 292.207(d)(iii). Intervention and protests may be filed in response to notices of qualifying facility dockets other than self-certifications and self-recertifications.

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.

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Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2010–15740 Filed 6–28–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 606–027—California]

Pacific Gas and Electric Company; Notice of Availability of the Draft Environmental Impact Statement for the Kilarc-Cow Creek Hydroelectric Project and Announcing Intention To Hold Public Meeting

June 22, 2010.

In accordance with the National Environmental Policy Act of 1969, as amended, and the Federal Energy Regulatory Commission's (Commission) regulations, 18 CFR part 380 (Order No. 486, 52 FR 47897), the Office of Energy Projects has reviewed the application, filed March 12, 2009, requesting surrender of the Kilarc-Cow Creek Project (FERC No. 606) license. The project is located on Old Cow Creek, South Cow Creek, and tributaries in Shasta County, California. Commission staff has prepared a Draft Environmental Impact Statement (Draft EIS) for the project.

The Draft EIS contains staff's evaluation of the licensee's proposal and the alternatives for surrendering the license of the Kilarc-Cow Creek Project. The Draft EIS documents the views of governmental agencies, non-governmental organizations, affected Indian tribes, the public, the license applicant, and Commission staff.

A copy of the Draft EIS is available for review in the Commission's Public Reference Branch, Room 2A, located at 888 First Street, NE., Washington, DC 20426. The Draft EIS also may be viewed on the Commission's Web site at *http://www.ferc.gov,* under the eLibrary link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at 1–866–208–3676, or for TTY, (202) 502–8659.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

Comments should be filed with: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. All comments must be filed by *August 9, 2010,* and should reference Project No. 606–027. Comments may be filed electronically via the Internet in lieu of paper. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and instructions on the Commission's Web site at *http://www.ferc.gov* under the eLibrary link.

Anyone may intervene in this proceeding based on this Draft EIS (18 CFR 380.10). You must file your request to intervene as specified above.[1] You do not need intervenor status to have your comments considered.

In addition to, or in lieu of, sending written comments, you are invited to attend a public meeting that will be held to receive comments on the Draft EIS. The time and location of the meeting will be announced in a subsequent notice.

At this meeting, resource agency personnel and other interested persons will have the opportunity to provide oral and written comments, as well as recommendations, regarding the Draft EIS. The meeting will be recorded by a court reporter, and all statements (verbal and written) will become part of the Commission's public record for the project. This meeting will be posted on the Commission's calendar located at *http://www.ferc.gov/EventCalendar/EventsList.aspx* along with other related information.

For further information, contact the environmental coordinator, CarLisa Linton-Peters at (202) 502–8416, or via e-mail at *carlisa.linton-peters@ferc.gov.*

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–15696 Filed 6–28–10; 8:45 am]

BILLING CODE 6717–01–P

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[1] Interventions may also be filed electronically via the Internet in lieu of paper. See the previous discussion on filing comments electronically.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. ER09–1589–004]

American Transmission Systems, Inc.; Notice of Filing

June 21, 2010.

Take notice that on February 16, 2010, American Transmission Systems, Inc. filed a compliance filing, pursuant to Paragraph 86 and Ordering Paragraph (A) of the Federal Energy Regulatory Commission's December 17, 2009 Order Addressing RTO Realignment Request and Complaint, *American Transmission Sys., Inc.,* 129 FERC ¶ 61,249 (2009) *reh'g pending.*

Any person desiring to intervene or to protest this filing must file in accordance with rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant and all the parties in this proceeding.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. e.t. on Thursday, July 1, 2010.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–15702 Filed 6–28–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER10–1466–000]

Community Power & Utility LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

June 22, 2010.

This is a supplemental notice in the above-referenced proceeding of Community Power & Utility LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with rules 211 and 214 of the Commission's rules of practice and procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is July 12, 2010.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–15695 Filed 6–28–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER10–1470–000]

Plymouth Rock Energy, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

June 21, 2010.

This is a supplemental notice in the above-referenced proceeding of Plymouth Rock Energy, LLC.'s application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is July 12, 2010.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the

Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed dockets(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–15699 Filed 6–28–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER10–1472–000]

Choice Energy, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

June 21, 2010.

This is a supplemental notice in the above-referenced proceeding of Choice Energy, LLC.'s application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with rules 211 and 214 of the Commission's rules of practice and procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is July 12, 2010.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed dockets(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–15698 Filed 6–28–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 606–027—California]

Pacific Gas & Electric Co.; Notice of Public Meeting on Draft Environmental Impact Statement

June 22, 2010.

The Federal Energy Regulatory Commission (Commission) hereby gives notice that members of its staff will conduct a public meeting on the draft environmental impact statement (Draft EIS) for the Kilarc-Cow Creek Hydroelectric Project (FERC Project No. 606–027). In addition to or in lieu of sending written comments on the Draft EIS, you are invited to attend a public meeting that will be held to receive comments on the Draft EIS. The time and location of this public meeting is as follows:

Kilarc-Cow Creek Project Public Meeting

Date: July 14, 2010.

Time: 6 p.m. to 8 p.m. (p.s.t.).

Place: Holiday Inn Hotel—in Redding.

Address: 1900 Hilltop Drive, Redding, CA 96002.

Telephone: (530) 221–7500.

The purpose of this meeting is to solicit comments on the Draft EIS prepared as part of processing the surrender of license application for the Kilarc-Cow Creek Project. The Draft EIS was issued and publicly noticed on June 22, 2010, and is available for review on the Commission's Web site at *http://www.ferc.gov,* under the "eLibrary" link. Enter the docket number (*e.g.,* P–606) excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at 1–866–208–3676, or for TTY, (202) 502–8659.

The Kilarc-Cow Creek Project is located on the Old Cow Creek, South Cow Creek, and tributaries in Shasta County, California. The project contains 1.87 acres that are held in trust by the United States under the jurisdiction of the Bureau of Indian Affairs. The licensee of the project is Pacific Gas and Electric Company.

This meeting is open to the public. At this meeting, State and Federal resource agency personnel, Indian tribes, non-governmental organizations, and other interested persons will have the opportunity to provide oral and/or written comments regarding the Draft EIS. The meeting will be recorded by a court reporter, and all statements (verbal and written) will become part of the Commission's public record for the project. This meeting will be posted on the Commission's calendar located at *http://www.ferc.gov/EventCalendar/EventsList.aspx* along with other related information.

The deadline for filing comments on the Draft EIS is August 9, 2010. Comments should be filed with: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE.,Washington, DC 20426. Comments should reference Project No. 606–027 (Kilarc-Cow Creek Project). Comments may be filed electronically via the Internet in lieu of paper. The Commission strongly encourages electronic filings. See 18 CFR 385.2001(a)(1)(iii) and instructions on the Commission's Web site at *http://www.ferc.gov* under the eLibrary link.

For further information on this project, contact the environmental coordinator CarLisa Linton-Peters at (202) 202–8416, or at *carlisa.linton-peters@ferc.gov.*

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–15701 Filed 6–28–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13351–000—Illinois]

Marseilles Land and Water Company; Marseilles Lock and Dam Project; Notice of Proposed Restricted Service List for a Programmatic Agreement for Managing Properties Included in or Eligible for Inclusion in the National Register of Historic Places

June 22, 2010.

Rule 2010 of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure provides that, to eliminate unnecessary expense or improve administrative efficiency, the Secretary may establish a restricted service list for a particular phase or issue in a proceeding.[1] The restricted service list should contain the names of persons on the service list who, in the judgment of the decisional authority establishing the list, are active participants with respect to the phase or issue in the proceeding for which the list is established.

The Commission staff is consulting with the Illinois State Historic Preservation Officer (hereinafter, "Illinois SHPO") and the Advisory Council on Historic Preservation, pursuant to section 106 of the National Historic Preservation Act[2] and its implementing regulations,[3] to develop and execute a programmatic agreement for managing properties included in, or eligible for inclusion in, the National Register of Historic Places at the Marseilles Lock and Dam Project.

The programmatic agreement, when executed by the Commission and the Illinois SHPO, would satisfy the Commission's section 106 responsibilities for all individual undertakings carried out in accordance with the license until the license expires or is terminated (36 CFR 800.13[e]). The Commission's responsibilities, pursuant to section 106 for the Marseilles Lock and Dam Project, would be fulfilled through the programmatic agreement, which the Commission staff proposes to develop in consultation with the interested participants listed below. The executed programmatic agreement would be incorporated into any order issuance.

Marseilles Land and Water Company, as applicant for the Marseilles Lock and Dam Project, is invited to participate in the consultation to develop the programmatic agreement. For the purpose of commenting on the programmatic agreement, we propose to restrict the service list for the proposed project as follows:

John Fowler, Executive Director, Advisory Council on Historic Preservation, The Old Post Office Building, 1100 Pennsylvania Avenue, NW., Suite 803, Washington, DC 20004.

Anne Haaker, Deputy SHPO, Illinois Historic Preservation Agency, 1 Olde State Capitol Plaza, Springfield, IL 62701–1512.

Ronald Deiss, Rock Island District, U.S. Department of Army Corps of Engineers, Clock Tower Building, P.O. Box 2004, Rock Island, IL 61204–2002.

Lee W. Mueller, Vice President, Marseilles Land and Water Company, 4132 S. Rainbow Blvd., #247, Las Vegas, NV 89103.

Any person on the official service list for the above-captioned proceeding may request inclusion on the restricted service list, or may request that a restricted service list not be established, by filing a motion to that effect within 15 days of this notice date. In a request for inclusion, please identify the reason or reasons why there is an interest to be included. Also, please identify any concerns about historic properties, including properties of traditional religious and cultural importance to a Federally recognized Tribe or Tribal corporation that has an affiliation to the area. If historic properties are identified within the motion, please use a separate page, and label it **NON-PUBLIC INFORMATION**.

The original and eight copies of any such motion must be filed with Kimberly D. Bose, Secretary of the Commission, 888 First Street, NE., Washington, DC 20426, and must be served on each person whose name appears on the official service list. Please put the following on the first page: Marseilles Lock and Dam Project No. 13351–000. Motions may be filed electronically via the Internet in lieu of paper. The Commission strongly encourages electronic filings. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov*) under the "e-Filing" link.

If no such motions are filed, the restricted service list will be effective at the end of the 15 day period. Otherwise, a further notice will be issued ruling on any motion or motions filed within the 15-day period.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–15694 Filed 6–28–10; 8:45 am]

BILLING CODE 6717–01–P

[1] 18 CFR section 385.2010.

[2] 16 U.S.C. section 470 (2006) *et seq.*

[3] 36 CFR Part 800 (2009).

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2003–0120; FRL9169–4; EPA ICR Number 1765.06, OMB Control Number 2060–0353]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; National Volatile Organic Compound Emission Standards for Automobile Refinish Coatings (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request has been forwarded to the Office of Management and Budget for review and approval. This is a request to renew an existing approved collection. The Information Collection Request, which is abstracted below, describes the nature of the collection and the estimated burden and cost.

DATES: Additional comments may be submitted on or before July 29, 2010.

ADDRESSES: Submit your comments, referencing Docket ID Number EPA–HQ–OAR–2003–0120, to: (1) EPA on-line using *http://www.regulations.gov* (our preferred method), or by mail to EPA Docket Center (EPA/DC), Air and Radiation Docket Information Center, 1200 Pennsylvania Avenue, NW.; Mail Code: 28221T, Washington, DC 20460, and (2) Office of Management and Budget (OMB) at Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Ms. Kim Teal, Environmental Protection Agency, Office of Air and Radiation, Office of Air Quality Planning and Standards, Sector Policies and Programs Division, Natural Resources and Commerce Group (E143–03), Research Triangle Park, North Carolina 27711; telephone number: (919) 541–5580; fax number: (919) 541–3470; e-mail address: *teal.kim@epa.gov.*

SUPPLEMENTARY INFORMATION: EPA has submitted the following Information

Collection Request (ICR) to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On March 23, 2010 (75 FR 13759), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments. Any additional comments on this ICR should be submitted to EPA and OMB within 30 days of this notice.

EPA has established a public docket for this ICR under Docket ID Number EPA–HQ–OAR–2003–0120, which is available for public viewing on-line at *http://www.regulations.gov,* or in person viewing at the Air Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Avenue, NW., Washington, DC. The EPA Docket Center 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 Air Docket is (202) 566–1742.

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 on 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: National Volatile Organic Compound Emission Standards for Automobile Refinish Coatings (Renewal).

ICR Numbers: EPA ICR Number 1765.06, OMB Control Number 2060–0353.

ICR Status: This ICR is scheduled to expire on June 30, 2010. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in Title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, and displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: The EPA is required under section 183(e) of the Clean Air Act to regulate volatile organic compound emissions from the use of consumer and commercial products. Pursuant to section 183(e)(3), the EPA published a list of consumer and commercial products and a schedule for their regulation (60 FR 15264). Automobile refinish coatings were included on the list, and the standards for such coatings are codified at 40 CFR part 59, subpart B. The reports required under the standards enable EPA to identify all coating and coating component manufacturers and importers in the United States and to determine which coatings and coating components are subject to the standards, based on dates of manufacture.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average four hours per response. Burden means the total time, effort or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; 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: Manufacturers and importers of automobile refinish coatings and coating components.

Estimated Number of Respondents: 4.

Frequency of Response: On occasion.

Estimated Total Annual Hour Burden: 14.

Estimated Total Annual Cost: $1,038, includes $0 annualized capital or operations and maintenance costs.

Changes in the Estimates: There is no change in the total estimated burden currently identified in the OMB Inventory of Approved ICR Burdens.

Dated: June 23, 2010.

John Moses,

Director, Collection Strategies Division.

[FR Doc. 2010–15763 Filed 6–28–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9169–5]

Notice of Data Availability Concerning 2010 CAIR NO_X Annual Trading Program New Unit Set-aside Allowance Allocations Under the Clean Air Interstate Rule Federal Implementation Plan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of data availability (NODA).

SUMMARY: EPA is administering—under the Clean Air Interstate Rule (CAIR) Federal Implementation Plans (FIPs)—the CAIR NO_X Annual Trading Program (CAIRNOX) new unit set-aside allowance pools for Delaware and the District of Columbia. The CAIRNOX FIPs require the Administrator to determine each year by order the allowance allocations from the new unit set-aside for units in these jurisdictions whose owners and operators requested these allocations and to provide the public with the opportunity to object to the allocation determinations. In this NODA EPA is making available to the public the emissions data and other information upon which the allocations, or denial of allocations, are based and the CAIRNOX new unit set-aside allowance allocation (if any) for each individual unit.

DATES: Objections must be received by July 29, 2010.

ADDRESSES: Submit your objections by one of the following methods:

A. *E-mail: CAIR_NOx_Annual_NUSA@epamail.epa.gov.*

B. *Mail:* Robert L. Miller, U.S. Environmental Protection Agency, CAMD (6204J), *Attn:* 2010 CAIRNOX New Unit Set-aside, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

Instructions: If you submit an objection, include your name and other contact information in the body of your objection. If EPA is unable to read your objection and contact you for clarification due to technical difficulties, EPA may not be able to consider your objection. Electronic files should not have special characters and any form of encryption and should be free of any defects or viruses.

FOR FURTHER INFORMATION CONTACT: Questions concerning this action should

be addressed to Robert L. Miller, U.S. Environmental Protection Agency, CAMD (6204J), 1200 Pennsylvania Ave., NW., Washington, DC 20460, telephone (202) 343–9077, and e-mail *miller.robertl@epa.gov.* If mailing by courier, address package to Robert L. Miller, 1310 L St., NW., Room 254B, Washington, DC 20005.

SUPPLEMENTARY INFORMATION:

Outline

1. General Information.
2. What is the Purpose of this NODA?
3. What are the Requirements and Procedures for Requesting and Receiving 2010 CAIRNOX New Unit Set-Aside Allowances?
4. How is EPA Applying to Individual CAIRNOX Units the Requirements for Requesting and Receiving 2010 CAIRNOX New Unit Set-Aside Allowance Allocations?

1. General Information

Does this Action Apply to Me?

This NODA applies to CAIRNOX units in Delaware and the District of Columbia whose owners and operators requested on or before May 3, 2010 a 2010 CAIRNOX allowance allocation from the new unit set-aside.

What Should I Consider as I Prepare and Submit any Objections for EPA?

When preparing and submitting an objection, remember to:

(1) Identify the source (facility name, plant code) and unit identification number for which the objection is being made;

(2) Make sure to submit your objection by the deadline identified.

If you e-mail your objection, put "Objection for 2010 CAIRNOX New Unit Set-aside" in the subject line to alert the Administrator that an objection is included. If mailing by courier, address the package to Robert L. Miller, 1310 L St., NW., Room 254B, Washington, DC 20005. Clearly mark any portion of the information that you claim to be CBI. For CBI in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. Send or deliver information identified as CBI only to the following address: Robert L. Miller, EPA Headquarters, CAMD (6204J), 1200 Pennsylvania Avenue, NW., Washington DC 20460.

2. What Is the Purpose of This NODA?

The purpose of this NODA is to make all of the data upon which the allocations or denial of allocations are based available to the public for objection to ensure that the data on which the applicable determination for each unit is based are correct. Any person objecting to any of the data should explain the basis for his or her objection, provide alternative data and supporting documentation, and explain why the alternative data are the best available data. EPA will consider any substantive objections to the data.

The provisions of § 97.142(c)—which govern the submission of requests for CAIRNOX allowance allocations from the new unit set-aside and set forth the criteria for qualification for, and the methodologies for calculating, such allocations for each individual unit—are final and are described in this NODA solely for informational purposes and are not open for objection. However, objections may be submitted concerning whether EPA determined, in a manner consistent with these rule provisions, the CAIRNOX allowance allocation (if any) from the new unit set-aside for 2010 for any unit for which such an allowance allocation was requested. *See* 40 CFR 97.141(d).

3. What Are the Requirements for Requesting and Receiving CAIRNOX New Unit Set-Aside Allowances and the Procedures for Allocating Such Allowances?

EPA is administering the 2010 CAIRNOX new unit set-aside allowance pools for Delaware and the District of Columbia, which are comprised of a maximum of 208 allowances for Delaware and 7 allowances for the District of Columbia. Under §§ 97.142(c)(2) and 97.107(c), the owners and operators of any unit for which CAIRNOX new unit set-aside allowances were sought for 2010 had to submit to EPA a request for CAIRNOX new unit set-aside allowance allocations by May 3, 2010. Since May 1, which is the generally applicable submission date specified in § 97.142(c)(2), is Saturday this year, the submission deadline for 2010 is the next business day, *i.e.,* May 3, under § 97.107(c). The owners and operators of a CAIRNOX unit in Delaware or the District of Columbia could request a CAIRNOX new unit set-aside allowance allocation if (1) the unit is subject to the CAIRNOX, (2) the unit is not allocated any CAIRNOX allowances under § 97.142(b) because it lacks a baseline heat input or because all CAIRNOX allowances available under § 97.142(b) for the year have already been allocated, and (3) the owners and operators of the unit submitted a timely request by the May 3, 2010 deadline. If a unit meets these criteria, EPA determines the allocation amount by determining the 2009 NO_X mass emissions data reported under 40 CFR part 75 for the unit during the 2009 calendar year. Finally, EPA makes any necessary adjustments under § 97.142(c)(4) to each such unit's allocation amount in order to ensure that the total amount of CAIRNOX new unit set-aside allowances allocated for 2010 does not exceed the amount of allowances in the new unit set-aside for 2010.

4. How Is EPA Applying to Individual CAIRNOX Units the Requirements for Requesting and Receiving CAIRNOX New Unit Set-Aside Allowance Allocations?

On April 22, 2010 EPA sent an e-mail—to the designated representatives, alternate designated representatives, and their respective agents of CAIRNOX units in the District of Columbia and Delaware—that provided instructions on the proper submission of a request for a CAIRNOX allowance allocation from the new unit set-aside for 2010. The April 22, 2010 e-mail explained what data should be submitted with the request and reminded addressees of the May 3, 2010 deadline for such requests. Among the data elements for a request under § 97.142(c)(2) were the number of allowances requested in an amount no greater than the unit's NO_X emissions for the 2009 calendar year. EPA received timely requests for 2010 CAIRNOX new unit set-aside allowance allocations for 10 CAIRNOX units in Delaware; no requests were received for CAIRNOX units in the District of Columbia.

The detailed unit-by-unit data, allowance allocation determinations, and calculations are set forth in a technical support document, which is a single Excel spreadsheet titled "2010 CAIRNOX FIP New Unit Set-Aside Allocations Data" and is available on EPA's Web site at *http://www.epa.gov/airmarkets/cair/nox_annual_nusa/index.html.* EPA will publish a second NODA, after the 30-day period for submitting objections concerning this NODA, in order to address any objections and make any necessary adjustments to the data published in this NODA to ensure that EPA's allowance allocation determinations are in accordance with § 97.142(c). EPA will record, no later than December 1, 2010, CAIRNOX allowance allocations from the new unit set-aside for 2010 after publication of the second NODA. *See* 40 CFR 97.153(e).

Dated: June 22, 2010.

Brian McLean,

Director, Office of Atmospheric Programs.

[FR Doc. 2010–15765 Filed 6–28–10; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested

June 17, 2010.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995, 44 U.S.C. 3501 – 3520. Comments are requested concerning: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology, and (e) ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a currently valid OMB control number.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before [August 30, 2010 REGISTER]. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the FCC contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicholas A. Fraser, Office of Management and Budget, via fax at 202–395–5167 or via the Internet at Nicholas_A._Fraser@omb.eop.gov and to the Federal Communications Commission via email to PRA@fcc.gov.

FOR FURTHER INFORMATION CONTACT: Judith B. Herman, Office of Managing Director, (202) 418–0214. For additional information, contact Judith B. Herman, OMD, 202–418–0214, or email judith–b.herman@fcc.gov

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0192.

Title: Section 87.103, Posting Station License.

Form No.: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for–profit, not–for–profit institutions, and state, local or tribal government.

Number of Respondents and Responses: 43,896 respondents, 43,896 responses.

Estimated Time Per Response: .25 hours.

Frequency of Response: Recordkeeping requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in sections 47 U.S.C. 301 and 303.

Total Annual Burden: 10,974 hours.

Total Annual Cost: N/A.

Privacy Act Impact Assessment: N/A.

Nature and Extent of Confidentiality: There is no need for confidentiality.

Needs and Uses: The Commission will submit this expiring information collection to the Office of Management and Budget (OMB) after this comment period to obtain the full three year clearance from them. The Commission is requesting an extension (no change in the recordkeeping requirement). There is a 5,976 hour burden reduction adjustment which is due to fewer respondents subject to this requirement.

The recordkeeping requirement contained in Section 87.103 is necessary to demonstrate that all transmitters in the Aviation Service are properly licensed in accordance with the requirements of Section 301 of the Communications Act of 1934, as amended, No. 2020 of the International Radio Regulation, and Article 30 of the Convention on International Civil Aviation.

The information is used by FCC personnel during inspections and investigations to insure the particular station is licensed and operated in compliance with applicable rules, statutes, and treaties. In the case of aircraft stations, the information may be utilized for similar purposes by appropriate representatives of foreign governments when the aircraft is operated in foreign nations.

Federal Communications Commission.

Marlene H. Dortch,

Secretary,

Office of the Secretary,

Office of Managing Director.

[FR Doc. 2010–15733 Filed 6–28–10 8:45 am]

BILLING CODE 6712–01–S

FEDERAL MARITIME COMMISSION

Fact Finding Investigation No. 27; Potentially Unlawful, Unfair or Deceptive Ocean Transportation Practices Related to the Movement of Household Goods or Personal Property in U.S.-Foreign Oceanborne Trades; Order of Investigation

Pursuant to the Shipping Act of 1984, 46 U.S.C. 40101 *et seq.* ("Shipping Act"), the Federal Maritime Commission ("FMC" or "Commission") is charged with regulating the common carriage of goods by water in the foreign commerce of the United States ("liner service"). In doing so, the Commission must be mindful of the purpose of its regulation, which includes protecting the public from unlawful, unfair or deceptive ocean transportation practices and resolving shipping disputes in the movement of cargo in U.S.-foreign oceanborne trades.

Each year, the Commission receives a substantial number of complaints from individuals that have experienced various problems with their international household goods or personal property shipments. Between 2005 and 2009, the Commission received over 2,500 consumer complaints related to household goods moving companies transporting household goods or personal property between various locations in the United States and foreign destinations. Many of those complaints are filed by individuals who are first-time or very occasional users of international shipping services. This issue is a serious and substantial consumer protection problem within the Commission's area of responsibility.

Typical complaints allege failure to deliver the cargo and refusal to return the pre-paid ocean freight; loss of the cargo; significant delay in delivery; charges to the shipper for marine insurance that was never obtained; misinformation as to the whereabouts of the cargo; significantly inflated charges after the cargo was tendered and threats to withhold the shipment unless the increased freight was paid; or failure to pay the common carrier engaged by the company as another intermediary. In many cases, a shipper has been forced to pay another carrier or warehouse a

second time in order to have the cargo released.

Individuals and companies have held themselves out to perform ocean transportation to the public and accepted responsibility for the transportation of these shipments without obtaining an Ocean Transportation Intermediary ("OTI") license and providing required proof of financial responsibility to the FMC. In many cases, these individuals and corporations operate without publishing a tariff showing its rates and charges, and do not observe just and reasonable regulations and practices relating to or connected with receiving, handling, storing or delivering property.

Section 19 of the Shipping Act of 1984 ("the Act"), 46 U.S.C. 40901(a), prohibits any person from providing OTI services prior to being issued a license from the Commission and obtaining a bond, proof of insurance or other surety in a form and amount determined by the Commission to ensure financial responsibility. An OTI is defined as either a freight forwarder or a non-vessel-operating common carrier ("NVOCC"). 46 U.S.C. 40102(19). Any person operating as an NVOCC in the United States must provide evidence of financial responsibility in the amount of $75,000. 46 CFR 515.21(a)(2).

Furthermore, section 8(a) of the Act, 46 U.S.C. 40501(a), requires NVOCCs to maintain tariffs showing their rates, charges, classifications and practices. These tariffs must be open to the public for inspection in an automated tariff system. The Commission's regulations at 46 C.F.R. § 520.3 affirm this statutory requirement by directing each NVOCC to notify the Commission, prior to providing transportation services, of the location of its tariffs, as well as the publisher used to maintain those tariffs by filing a Form FMC–1. Section 10(b)(11) of the Act, 46 U.S.C. 41104(11), prohibits a common carrier from knowingly and willfully accepting cargo from or transporting cargo for the account of an OTI that does not have a tariff or a bond (an NVOCC). Finally, under section 10(d)(1), no common carrier or ocean transportation intermediary may fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing or delivering property. 46 U.S.C. 41102(c).

Therefore, consistent with its statutory duty, the Commission hereby *orders* a non-adjudicatory investigation to develop a record of the nature, scope and frequency of potentially unlawful, unfair or deceptive ocean transportation practices by household goods movers in the movement of cargo in U.S.-foreign oceanborne trades.

The Commission will use the information obtained in this investigation and recommendations of the Fact-Finding Officer ("FFO") to determine its policies with respect to compliance, consumer protection, and enforcement issues.

Specifically, the FFO named herein is to develop a record on the following:

> The nature and scope of the problem presented by potentially unfair, unlawful or deceptive practices in the shipping of household goods or personal property in U.S.-foreign oceanborne trades.

The FFO is to report to the Commission within the time specified herein, with recommendations for any further Commission action, including any policies, rulemaking proceedings, or other actions warranted by the factual record developed in this proceeding.

Interested persons are invited and encouraged to contact the FFO named herein, at (202) 523–5712 (telephone), (202) 275–0522 (facsimile), or by e-mail at *factfinding27@fmc.gov*, should they wish to provide testimony or evidence, or to contribute in any other manner to the development of a complete factual record in this proceeding.

Therefore, it is ordered, That, pursuant to 46 U.S.C. 41302, 40502 to 40503, 41101 to 41109, 41301 to 41309, and 40104, and 46 CFR 502.281 to 502.291, a non-adjudicatory investigation is hereby instituted into the nature, scope and frequency of potentially unlawful, unfair or deceptive ocean transportation practices related to the carriage of household goods or personal property in the oceanborne foreign commerce of the United States, in order to gather facts and establish a record related to the issues set forth above and to provide a basis for any subsequent action by the Commission;

It is further ordered, That, pursuant to 46 CFR 502.284 and 502.25, Commissioner Michael A. Khouri is designated as the FFO. The FFO shall have, pursuant to 46 CFR 502.281 to 502.291, full authority to hold public or non-public sessions, to resort to all compulsory process authorized by law (including the issuance of subpoenas *ad testifacandum* and *duces tecum*), to administer oaths, to require reports, and to perform such other duties as may be necessary in accordance with the laws of the United States and the regulations of the Commission. The FFO shall be assisted by staff members as may be assigned by the Commission's Managing Director, and the FFO is authorized to delegate any authority enumerated herein to any assigned staff member as the FFO determines to be necessary.

It is further ordered, That the FFO shall issue an interim report of findings and recommendations no later than November 15, 2010, a final report of findings and recommendations no later than February 15, 2011, and provide further interim reports if it appears that more immediate Commission action is necessary, such reports to remain confidential unless and until the Commission provides otherwise;

It is further ordered, That this proceeding shall be discontinued upon acceptance of the final report of findings and recommendations by the Commission, unless otherwise ordered by the Commission; and

It is futher ordered, That notice of this Order be published in the **Federal Register**.

By the Commission.

Karen V. Gregory,

Secretary.

[FR Doc. 2010–15724 Filed 6–28–10; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL TRADE COMMISSION

Agency Information Collection Activities; Proposed Collection; Comment Request

AGENCY: Federal Trade Commission ("FTC" or "Commission").

ACTION: Notice.

SUMMARY: The information collection requirements described below will be submitted to the Office of Management and Budget ("OMB") for review, as required by the Paperwork Reduction Act ("PRA"). The FTC seeks public comments on its proposal to extend through December 31, 2013 the current OMB clearance for information collection requirements contained in its Prescreen Opt-Out Disclosure Rule. That clearance expires on December 31, 2010.

DATES: Comments must be filed by August 30, 2010.

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: (*https://public.commentworks.com/ftc/prescreenoptoutPRA*) (and following the instructions on the web-based form). Comments filed in paper form should be mailed or delivered to the following address: Federal Trade Commission,

Office of the Secretary, Room H-135 (Annex J), 600 Pennsylvania Avenue, N.W., Washington, DC 20580, in the manner detailed in the **SUPPLEMENTARY INFORMATION** section below.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be addressed to Katherine Armstrong, Attorney, Division of Privacy and Identity Protction, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, DC 20580, (202) 326-3250.

SUPPLEMENTARY INFORMATION:

Request for Comments

Interested parties are invited to submit written comments. Comments should refer to "Prescreen Opt-Out Disclosure Rule: FTC File No. P075417" 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 "[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 matter 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).[1]

Because paper mail addressed to the FTC is subject to delay due to heightened security screening, please consider submitting your comments in electronic form. Comments filed in electronic form should be submitted using the following weblink

https://public.commentworks.com/ftc/prescreenoptoutPRA (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://public.commentworks.com/ftc/prescreenoptoutPRA*).

If this Notice appears at (*www.regulations.gov/search/index.jsp*), you may also file an electronic comment through that website. The Commission will consider all comments that regulations.gov forwards to it.

The FTC Act and other laws that 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 FTC 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*).

Under the PRA, 44 U.S.C. 3501-3521, federal agencies must obtain approval from OMB for each collection of information they conduct or sponsor. "Collection of information" means agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. 44 U.S.C. 3502(3); 5 CFR 1320.3(c). As required by section 3506(c)(2)(A) of the PRA, the FTC is providing this opportunity for public comment before requesting that OMB extend the existing paperwork clearance for the regulations noted herein.

The FTC invites comments on: (1) whether the required collection of information is necessary for the proper performance of the functions of the agency, including whether the information has practical utility; (2) the accuracy of the agency's estimate of the burden of the required collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including 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.

All comments should be filed as prescribed in the **ADDRESSES** section above, and must be received on or before August 30, 2010.

Background

Section 615(d) of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. 1681m(d)(1), requires that any person who uses a consumer report in order to make an unsolicited firm offer of credit or insurance to the consumer, shall provide with each written solicitation a clear and conspicuous statement that:

> (A) information contained in the consumer's consumer report was used in connection with the transaction; (B) the consumer received the offer of credit or insurance because the consumer satisfied the criteria for credit worthiness or insurability under which the consumer was selected for the offer; (C) if applicable, the credit or insurance may not be extended if, after the consumer responds to the offer, the consumer does not meet the criteria used to select the consumer for the offer or any applicable criteria bearing on credit worthiness or insurability or does not furnish any required collateral; (D) the consumer has a right to prohibit information contained in the consumer's file with any consumer reporting agency from being used in connection with any credit or insurance transaction that is not initiated by the consumer; and (E) the consumer may exercise the right referred to in subparagraph (D) by notifying a notification system established under section 604(e) [of the FCRA].

Section 615(d)(1) of the FCRA [15 U.S.C. 1681m(d)(1)].

The Fair and Accurate Credit Transactions Act of 2003, Pub. L. 108-159, 117 Stat. 1952 ("FACT Act") was signed into law on December 4, 2003. Section 213(a) of the FACT Act amended FCRA Section 615(d) to require that the statement mandated by Section 615(d) "be presented in such format and in such type size and manner as to be simple and easy to understand, as established by the Commission, by rule, in consultation with the Federal banking agencies and the National Credit Union Administration." The Commission published the Final Rule in the **Federal**

[1] 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).

Register on January 31, 2005 and the Rule became effective August 1, 2005.

The Rule adopted a "layered" notice approach that requires a short, simple, and easy-to-understand statement of consumers' opt-out rights on the first page of the prescreened solicitation, along with a longer statement containing additional details elsewhere in the solicitation. Specifically, the Rule required that a short notice be placed on the front side of the first page of the principal promotional document in the solicitation, or, if provided electronically, on the same page and in close proximity to the principal marketing message. The Rule specifies that the type size be larger than the type size of the principal text on the same page, but in no event smaller than 12-point type, or if provided by electronic means, then reasonable steps shall be taken to ensure that the type size is larger than the type size of the principal text on the same page. The Rule further provides that the long notice, that appears elsewhere in the solicitation, be in a type size that is no smaller than the type size of the principal text on the same page, but in no event smaller than 8-point type. The long notice shall begin with a heading in capital letters and underlined, and identifying the long notice as the "PRESCREEN & OPT-OUT NOTICE" in a type style that is distinct from the principal type style used on the same page and be set apart from other text on the page. The Rule also includes model notices in English and Spanish.

Burden Statement

Estimated total annual hours burden: 1,000 to 1,500 hours

As in the 2007 PRA burden analysis when the Commission last sought renewed clearance,[2] FTC staff estimates that between 500 and 750 entities make prescreened solicitations and will each spend approximately 2 hours to monitor compliance with the Rule. Accordingly, cumulative total annual burden is between 1,000 to 1,500 hours. Additionally, FTC staff assumes that in-house legal counsel will handle most of the compliance review, and at an estimated average hourly wage of $250/hour. Accordingly, cumulative labor cost for all affected entities would be between $250,000 and $375,000. Capital and other non-labor costs should be minimal, at most, since the Rule has been in effect several years, with covered entities now equipped to provide the required notice.

Willard K. Tom

General Counsel

[FR Doc. 2010–15720 Filed 6–28–10: 2:08 pm]

BILLING CODE 6750–01–S

[2] 72 FR 60672 (Oct. 25, 2007); 72 FR 42092 (Aug. 1, 2007). No comments were received in response to those notices.

FEDERAL TRADE COMMISSION

[File No. 051 0199]

Minnesota Rural Health Cooperative; Analysis of the Agreement Containing Consent Order to Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed Consent Agreement.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition. The attached Analysis to Aid Public Comment describes both the allegations in the draft complaint and the terms of the consent order — embodied in the consent agreement — that would settle these allegations.

DATES: Comments must be received on or before July 19, 2010.

ADDRESSES: Interested parties are invited to submit written comments electronically or in paper form. Comments should refer to"Minnesota Health, File No. 051 0199" to facilitate the organization of comments. Please note that your comment — including your name and your state — will be placed on the public record of this proceeding, including on the publicly accessible FTC website, at (*http://www.ftc.gov/os/publiccomments.shtm*).

Because comments will be made public, they should not include any sensitive personal information, such as an individual's Social Security Number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. Comments also should not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, comments should not include any "[t]rade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential. . . .," as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and Commission Rule 4.10(a)(2), 16 CFR 4.10(a)(2). Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled "Confidential," and must comply with FTC Rule 4.9(c), 16 CFR 4.9(c).[1]

Because paper mail addressed to the FTC is subject to delay due to heightened security screening, please consider submitting your comments in electronic form. Comments filed in electronic form should be submitted by using the following weblink: (*https://public.commentworks.com/ftc/mnhealth*) 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://public.commentworks.com/ftc/mnhealth*). If this Notice appears at (*http://www.regulations.gov/search/index.jsp*), you may also file an electronic comment through that website. The Commission will consider all comments that regulations.gov forwards to it. You may also visit the FTC website at (*http://www.ftc.gov/*) to read the Notice and the news release describing it.

A comment filed in paper form should include the "Minnesota Health, File No. 051 0199" 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 D), 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.

The Federal Trade Commission Act ("FTC Act") and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives, whether filed in paper or electronic form. Comments received will be available to the public on the FTC website, to the extent practicable, at (*http://www.ftc.gov/os/publiccomments.shtm*). As a matter of discretion, the Commission makes every effort to remove home contact information for individuals from the public comments it receives before

[1] 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).

placing those comments on the FTC website. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at (*http://www.ftc.gov/ftc/privacy.shtm*).

FOR FURTHER INFORMATION CONTACT: Bradley Albert (202-326-3670), Bureau of Competition, 600 Pennsylvania Avenue, NW, Washington, D.C. 20580.

SUPPLEMENTARY INFORMATION: Pursuant to section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46(f), and § 2.34 the Commission Rules of Practice, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for June 18, 2010), on the World Wide Web, at (*http://www.ftc.gov/os/actions.shtm*). A paper copy can be obtained from the FTC Public Reference Room, Room 130-H, 600 Pennsylvania Avenue, NW, Washington, D.C. 20580, either in person or by calling (202) 326-2222.

Public comments are invited, and may be filed with the Commission in either paper or electronic form. All comments should be filed as prescribed in the **ADDRESSES** section above, and must be received on or before the date specified in the **DATES** section.

Analysis of Agreement Containing Consent Order To Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a proposed consent order with the Minnesota Rural Health Cooperative (MRHC). The proposed consent order has been placed on the public record for 30 days to receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the agreement and the comments received and decide whether to withdraw from the agreement or make the proposed order final.

The purpose of this analysis is to facilitate public comment on the proposed order. The analysis is not intended to constitute an official interpretation of the agreement and proposed order or to modify their terms in any way. Further, the proposed order has been entered into for the settlement purposes only and does not constitute an admission by MRHC that it violated the law or that the facts alleged in the complaint (other than jurisdictional facts) are true.

I. The Complaint

The MRHC is a for-profit corporation of physicians and hospitals located in southwestern Minnesota. In addition, between early 2005 and late 2007, the MRHC also had pharmacy members. The complaint charges that the MRHC has violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by, among other things, orchestrating and implementing agreements among competing MRHC members to fix the price at which they contract with health plans and to refuse to deal except on collectively-determined price terms. The allegations of the complaint are summarized below.

A. Price fixing for hospital and physician services

The MRHC has approximately 25 hospital members, which constitute the vast majority of hospitals in the area of southwestern Minnesota in which the MRHC operates. The organization has approximately 70 physician members practicing in 41 clinics, who represent roughly half of the primary care physicians in southwestern Minnesota. The MRHC is controlled by a Board of Directors composed of physicians and hospitals elected by the members.

When providers join MRHC, they agree that MRHC will negotiate and contract with health plans on their behalf and agree to participate in all MRHC contracts. The Board oversees contract negotiations undertaken by a contracting committee of physician and hospital representatives and approves all contracts between MRHC and health plans.

The MRHC has negotiated prices and other competitively significant terms, on behalf of MRHC physician and hospital members, with numerous payers in Minnesota, including Blue Cross Blue Shield of Minnesota, HealthPartners, Medica Health Plans, MultiPlan, Inc., Preferred One, and America's PPO. After its Board of Directors approved, the MRHC entered into and administered each contract.

The MRHC has threatened to terminate these group contracts with payers to pressure them to increase prices for physician and hospital services. For example, during 2003 contract renewal negotiations with HealthPartners, the MRHC notified HealthPartners that it would terminate the contract unless HealthPartners agreed to higher reimbursement rates. HealthPartners acceded to the MRHC's demands, eventually agreeing to pay MRHC physician members 27 percent more than comparable non-MRHC physicians and to pay MRHC hospital members ten percent more than comparable non-MRHC hospitals. A similar tactic forced Preferred One to pay MRHC members higher rates than it paid comparable non-MRHC providers.

The MRHC informed payers that the MRHC "expect[s] our group to be accepted or rejected as a group." It told payers that resisted the MRHC's price demands that they would be unable to negotiate individually with MRHC members. When these payers attempted to contract directly with individual MRHC hospitals or physicians, the members referred the payers back to MRHC.

Through its collective negotiations and coercive tactics, the MRHC succeeded in obtaining higher payments to MRHC members by obtaining higher reimbursement rates than comparable providers, more favorable payment methods, and increased reimbursements for new MRHC members.

(1) *Higher Rates:* Five payers — HealthPartners, Medica, MultiPlan, Preferred One, and America's PPO — paid MRHC members more than they paid comparable rural hospitals and physicians elsewhere in Minnesota. Indeed, the MRHC told its members at the 2005 annual member meeting that improvements in its contract with Preferred One would be "worth $100,000s annually for MRHC members."

(2) *Favorable Payment Methods:* Two payers — Medica and Preferred One — pay MRHC hospital and physician members based on a percentage of billed charges, rather than a fixed fee for each service. This mechanism allows MRHC members to increase unilaterally their reimbursement, by increasing their billed charges up to the maximum specified in the contract.

(3) *Increased New Member Reimbursements:* The MRHC has forced payers to reimburse new MRHC members at the higher MRHC rates, even though these new members had existing contracts with the payer at lower rates. For example, Medica told the MRHC that "because of the Co-op relationship all of the clinics and hospitals, except Rice, are being paid higher reimbursement then they were prior to our Medica agreement with the Co-op."

B. Price fixing for pharmacy services

In 2004, after being approached by pharmacies, MRHC expanded its

membership to include pharmacies and began recruiting pharmacists for the purpose of collectively negotiating agreements with pharmacy benefit managers (PBMs). The MRHC encouraged pharmacies to join to increase the reimbursement levels they would receive under the new Medicare Part D prescription drug program. Between early 2005 and late 2007, the MRHC had approximately 70 pharmacist members.

The MRHC urged pharmacies not to deal individually with PBMs and instead to act together through MRHC. The MRHC repeatedly reminded pharmacies of the benefits of acting collectively, advising them to "stand together and speak with ONE voice to the PBMs." For example, in letters to members and prospective members, MRHC stated:

- "We have to stand together in this effort or once again the PBMs will intimidate us and pick us off one by one with contracts we don't want."
- "Do *NOT* sign and return your Medicare Part D PBM contracts. MRHC will review and negotiate these for you during the next few weeks. The contracting deadline is not until later this summer and our best leverage is to take our time to negotiate as a block. The bigger block the better [sic]."
- "We are asking all MRHC members *NOT* to sign and return their Medicare Part D PBM contracts. MRHC will review and negotiate these for them during the next couple of weeks. Our best leverage is to take our time to negotiate as a block, and the bigger block the better [sic]. . . . Don't sign contracts but notify the PBMs who will act as your agent – the MRHC!"

To "speed up" the PBMs' acceptance of the MRHC as the pharmacies' bargaining agent, the MRHC provided each pharmacy member with pre-printed labels stating that MRHC would act as the pharmacy's contracting agent. Many member pharmacies followed the MRHC's instructions to return contract offers from PBMs with these labels attached.

The MRHC negotiated with at least eight PBMs over Medicare Part D reimbursement levels and reached agreements on behalf of the MRHC establishing prices and other competitively significant terms with six of them. The MRHC terminated the pharmacist memberships in November 2007 and transferred management of these agreements to a pharmacy services administration organization in early 2008.

C. Lack of justification

Price agreements among competing sellers, as a general rule, are price fixing and are summarily condemned by the antitrust laws as *per se* illegal. But joint price setting by provider networks is not *per se* illegal if: (1) the participants have integrated their activities through the network (whether financially, clinically, or otherwise) in a way that is likely to produce significant efficiencies that benefit consumers; and (2) the price agreements are reasonably necessary to realize those efficiencies. The MRHC's price fixing for hospital, physician, and pharmacy services, however, was unrelated to any efficiency-enhancing integration of its members' clinical services.

1. Hospital and physician services

One form of efficiency-enhancing integration among otherwise competing health care providers involves arrangements in which the participants share with one another substantial financial risk for the services provided through the network. Such risk sharing occurs when mechanisms are in place that make the network providers as a group accountable for the total cost of defined services delivered to a group of covered individuals, so that the providers have incentives to cooperate in controlling costs and improving quality by managing the provision of services. The *Statements of Antitrust Enforcement Policy in Health Care* issued by the FTC and the Department of Justice provide several examples of types of arrangements through which participants can potentially share substantial financial risk.

MRHC's hospital and physician members have not shared, and do not share, substantial financial risk in the provision of patient care. MRHC considers only three of its contracts with payers to be "risk" contracts, and these contracts pertain only to physician services. Moreover, these contracts do not provide significant financial incentives for members to collaborate to improve the performance of the group as a whole.[2] For example, under two of the three "risk" contracts, the payers withheld a relatively modest portion of the payments owed to participating physicians (typically no more than 10 percent), and return of these sums did not depend on the group meeting cost containment or quality improvement performance targets. Instead, physicians merely had to participate in a quality improvement project in which they reported their compliance with clinical practice guidelines for treatment of a few specific conditions. These arrangements, while perhaps benefitting some physicians' individual delivery of health care, would thus be unlikely to create incentives to motivate MRHC physicians to work together to improve significantly group-wide care to patients. *Health Care Statements* at 68.

Arrangements among competing health care providers that do not involve the sharing of financial risk may also involve integration that has the potential to create significant efficiencies in the provision of health care services. The *Health Care Statements* discuss an example of such integration: a "clinically integrated" program, which involves "an active and ongoing program to evaluate and modify practice patterns by the network's physician participants and create a high degree of interdependence and cooperation among the physicians to control costs and ensure quality." *Health Care Statements* at 72-73.

The MRHC has not undertaken any integration regarding its members' provision of services, clinical or otherwise, that might justify its members' jointly negotiated fees with health plans. It verifies the qualifications of its members, conducts patient satisfaction surveys, collects patient complaints, and organizes meetings to discuss quality of care issues. In addition, it has a few programs that relate solely to physicians: quality improvement projects involving diabetes and preventative services and inspections of physician clinics. Although these activities may be beneficial, they do not involve any integration among MRHC members that could significantly improve the quality and efficiency of the services MRHC members provide.

First, the scope of these activities is very limited. The clinical programs most likely to improve the quality of patient care do not involve the hospital members at all, and the activities involving physicians are limited to just a few of the many medical conditions the physicians treat. Moreover, even in these limited areas, the programs do not create any collaborative activity or interdependence among the physician members. Although the activities may lead individual physicians to modify their behavior, none of the programs creates enforceable obligations for physicians to improve their clinical

[2] Even if MRHC were financially integrated for some contracts, that fact alone would not justify their jointly negotiating on behalf of their physicians for contracts where there was no financial integration. *See, e.g., North Texas Specialty Physicians v. FTC,* 528 F.3d 346, 368-70 (5th Cir. 2008) (existence of risk contract did not justify physician group's joint price setting for non-risk contracts).

operations or provides members with a shared stake in the performance of the group as a whole. Indeed, all of these activities are essentially informational and each physician clinic could engage in them on its own without any involvement from the other clinics. Finally, the challenged conduct — jointly negotiating with payors and agreeing on prices and other competitively sensitive terms — is unnecessary for members to engage in any of these activities.

2. Pharmacy services

Similarly, the MRHC's joint price setting for pharmacy services was not related to any integration among its members. The MRHC recruited pharmacies for the purpose of increasing the pharmacies' bargaining leverage in negotiations with PBMs. Aside from inviting pharmacists to attend continuing education programs that it was already providing for its non-pharmacist members, the MRHC's sole activity relating to its pharmacy members was negotiating and administering contracts.

In sum, MRHC's horizontal price fixing does not plausibly promote any efficiency-enhancing integration of its members services and so violates Section 5 of the FTC Act.

D. Lack of protection from the state action doctrine

The MRHC's anticompetitive conduct is not shielded by the state action doctrine because there was no active supervision of MRHC's conduct and Minnesota does not appear to have articulated a policy to immunize concerted refusals to deal or other forms of coercive conduct.

Since 1999,[3] Minnesota law has authorized health care provider cooperatives to contract with purchasers on a fee-for-service basis and specified that, with certain limitations, such contracts "are not contracts that unreasonably restrain trade."[4] Although state economic regulation can immunize private parties from federal antitrust liability, states may not simply authorize private parties to violate the antitrust laws.[5] Instead, a state must substitute its own control for that of the market. Thus, as the Supreme Court explained in *California Retail Liquor Dealers Assen v. Midcal Aluminum, Inc.*, private parties claiming the protection of the state action doctrine must demonstrate that their challenged conduct was both (1) undertaken pursuant to a clearly articulated state policy to displace competition with regulation and (2) actively supervised by state officials.[6]

First, it is undisputed that state officials did not supervise the MRHC's anticompetitive conduct. Active state supervision requires that state officials "exercise ultimate control over the challenged anticompetitive conduct."[7] A private party must therefore demonstrate that state officials have "exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties."[8] But, until recently, Minnesota law did not provide for state review and approval of health care provider cooperative contracting.[9] No review or approval of MRHC's anticompetitive conduct, or the prices that resulted from that conduct, took place during the relevant time period.

In 2009, Minnesota enacted a law establishing a process by which the state Department of Health is to review and approve or disapprove health care provider contracts with third-party payers.[10] The prospect of state review of MRHC's contracts in the future does not provide antitrust immunity for MRHC's prior unsupervised conduct, and the absence of state supervision by itself establishes that the conduct challenged in the complaint is not protected by the state action doctrine.[11]

Second, the Minnesota statute does not appear to articulate a policy to protect MRHC's activities insofar as they involved concerted refusals to deal or other forms of coercive conduct. The statutory provision declaring that health care provider cooperative contracts are not unreasonable restraints of trade is expressly limited, for it is made "[s]ubject to Section 62R.08," a provision entitled "Prohibited Practices" that bars certain types of conduct by provider cooperatives.[12] That provision, among other things, states:

> It shall be unlawful for any health care provider cooperative to engage in any acts of coercion, intimidation, or boycott of, or any concerted refusal to deal with, any health plan company seeking to contract with the cooperative on a competitive, reasonable, and nonexclusive basis.[13]

Thus, to successfully assert a state action defense, MRHC would have to demonstrate not only active state supervision, but also that the Minnesota Legislature expressed a policy to supplant competition with regulation with respect to all of MRHC's challenged conduct, including acts of "coercion." Given the express limitations placed on the state policy regarding health care provider contracting, the Minnesota legislature does not appear to have expressed such a broad policy.

II. The Proposed Order

The proposed order takes into account the change in Minnesota law that occurred during the pendency of the investigation.

A. Impact of the new statute

As noted above, the Minnesota Legislature in 2009 enacted legislation designed to provide state supervision of the contracts that health care provider cooperatives enter into with health plans. The Commission cannot, at this time, determine whether this new law will result in that state engaging in the detailed, substantive review that the Supreme Court has held is required for "active supervision." Determining whether the active supervision prong of the state action doctrine has been met will require a factual inquiry into the Departments of Health's actual

[3] Minnesota's original 1994 statute authorized contracting only "on a substantially capitated or similar risk-sharing basis." Minn. Laws 1994, c.625, art. 11, § 6, *available at* (*https://www.revisor.mn.gov/laws/?doctype=Chapter&year=1994&type=0&id=625*). A 1999 amendment permitted fee-for-service or other financial arrangements. Minn. Laws 1999, c. 245, art. 2, § 14, *available at* (*https://www.revisor.mn.gov/laws/?doctype=Chapter&year=1997&type=0&id=245*).

[4] Minn. Stat. § 62R.06, subd. 3 (2009) ("Subject to section 62R.08, a health care provider cooperative is not a combination in restraint of trade, and any contracts or agreements between a health care provider cooperative and its members regarding the price the cooperative will charge to purchasers of its services, or regarding the prices the members will charge to the cooperative, or regarding the allocation of gains or losses among the members, or regarding the delivery, quality, allocation, or location of services to be provided, are not contracts that unreasonably restrain trade.").

[5] *Federal Trade Commission v. Ticor Title Ins. Co.*, 504 U.S. 621, 633 (1992) ("a State may not confer antitrust immunity on private persons by fiat"); *Parker v. Brown*, 341 U.S. 351 (1943) ("a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or declaring that their action is lawful").

[6] 445 U.S. 97, 105 (1980).

[7] *Patrick v. Burget,* 486 U.S. 94, 100 (1988).

[8] *Ticor,* 504 U.S. at 634-35.

[9] From its inception, the Health Care Cooperative Act has required provider network cooperatives to file contracts with the state health department (*see* Minn. Stat.§ 62R.06),but until the 2009 amendments, the law did not require state officials to review and approve the contracts.

[10] Minn. Laws 2009, c. 97 § 2 (codified at Minn. Stat. § 62R.09), available at (*https://www.revisor.mn.gov/laws/?doctype=Chapter&year=2009&type=0&id=97*).

[11] But, as discussed below, the Commission has considered this legislative change in framing prospective relief in this case.

[12] *See* note 2, *supra.*

[13] Minn. Stat. § 62R.08(d).

implementation of its new authority in specific instances. Although there is no single prescribed method for a state to conduct an adequate review of private anticompetitive conduct, such as the price fixing by the MRHC, such review must include an assessment of the substantive merits of the pricing conduct, based on a factual record that enables the state to exercise "sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention."[14]

Although it is too early to assess the state's implementation of the new statute, the Commission believes the circumstances here make it appropriate to defer to Minnesota's expressed intention to actively supervise the contracts that result from the MRHC's price fixing.[15] The Commission has in the past taken a different remedial approach where state officials had authority to actively supervise private conduct but failed to exercise it.[16] Here Minnesota officials have only been recently granted that authority, and it is appropriate to allow them an opportunity to utilize that authority.

As a result, the proposed order does not bar collective price negotiations. At the same time, there is certain anticompetitive activity that the state will not supervise and would not be protected under the state action doctrine and the order prohibits such activity. The key prohibitions in the proposed order are aimed at preventing MRHC from using concerted refusals to deal or other coercive tactics to extract favorable contract terms from payers. This relief is appropriate because the new statute only authorizes the Department of Health to supervise the final contracts, not the negotiating process itself, which is where coercive tactics would occur. Further, the new statute does not authorize the Department of Health to reject a contract on the ground that it is the product of coercion. Thus the order is drafted to protect consumers from coercion by the MRHC. In addition, the proposed order provides a remedy for past conduct by requiring renegotiation of all existing contracts and their submission for state approval consistent with the recently enacted Minnesota statute.

B. Order provisions

Paragraph II.A bars MRHC from organizing or implementing agreements to refuse to deal, or to threaten to refuse to deal, with a payer over contract terms, as well as agreements not to deal individually with payers, or to deal only through the MRHC. Paragraph II.B prohibits the MRHC from submitting for state approval any payer contract that it negotiated using acts of coercion, intimidation, or boycott, or any concerted refusal to deal. The prohibitions apply to agreements for hospital, physician, or pharmacy services.

The remaining portions of Paragraph II prohibit conduct that would facilitate a violation of Paragraph II.A. Paragraph II.C bars information exchanges to further conduct that violates the core prohibitions of Paragraph II. Paragraphs II.D and II.E ban attempts and encouragement of such violations.

The order also includes a proviso designed to clarify the scope of the prohibitions in Paragraph II. First, it provides that the provisions of Paragraph II do not prohibit the MRHC, in exercising its business judgment, from rejecting a contract on behalf of its members, so long as there is no agreement between the MRHC and any of its members that the member will refuse to deal individually (or will deal only though the MRHC), with a payer whose contract the MRHC rejects. Second, the order does not prevent the MRHC from exchanging information when necessary to conduct joint payer contract negotiations on behalf of its members. Such information would not, however, ordinarily include whether an individual member is participating in a particular contract or the terms on which it is negotiating with a payer independently of the MRHC.

As this proviso reflects, nothing in the order prohibits the MRHC, in the exercise of its business judgment, from rejecting a contract on behalf of its members, so long as there is no agreement between the MRHC and any of its members that the members refuse to deal individually with the payor whose contract the MRHC rejected, or that the members will only deal with that payor through the MRHC. Additionally, the order does not address any actions taken by any individual MRHC member, acting alone in exercising its business judgment. Thus, for example, the order does not bar any member from unilaterally declining to contract with any payer.

Paragraph III.A requires MRHC to send a copy of the complaint and consent order to its members, its management and staff, and any payers who communicated with MRHC, or with whom MRHC communicated, with regard to any interest in contracting for physician services, at any time since January 1, 2001.

Paragraph III.B requires MRHC to terminate, without penalty, pre-existing payer contracts that it had entered into since 2001, at the earlier of (1) receipt by MRHC of a written request for termination by the payer; or (2) the termination date, renewal date, or anniversary date of the contract. This provision is intended to eliminate the effects of MRHC's past alleged illegal collective behavior. The payer can delay the termination for up to one year by making a written request to MRHC.

Paragraph III.D contains notification provisions relating to future contact with members, payers, management and staff. For three years after the date on which the consent order becomes final, MRHC is required to distribute a copy of the complaint and consent order to each member who begins participating in MRHC; each payer who contacts MRHC regarding the provision of member services; and each person who becomes an officer, director, manager, or employee. In addition, Paragraph III.D requires MRHC to publish a copy of the complaint and consent order, annually for three years, in any official publication that it sends to its participating members.

Paragraphs IV, V, and VI impose various obligations on MRHC to report or provide access to information to the Commission to facilitate the monitoring of compliance with the order.

Finally, Paragraph VII provides that the proposed order will expire in 20 years.

By direction of the Commission.

Donald S. Clark

Secretary.

[FR Doc. 2010–15745 Filed 6–28–10: 7:22 am]

BILLING CODE 6750–01–S

[14] *Ticor*, 504 U.S. at 634-35; *see also Kentucky Household Good Carriers Assn,* 139 F.T.C. 404, 426 (2005), *aff'd per curiam,* 2006 U.S. App. LEXIS 21864 (2006) (unpublished) (noting the importance of procedural mechanisms to ensure that "relevant facts — especially those that might contradict the proponent's contentions — are brought to the state decision-maker's attention").

[15] Engrossed version of SF 203, Section 2, Subdivision 1, (b)(1), *available at* (*https://www.revisor.mn.gov/laws/?id=97&doctype=chapter&year=2009&type=0*).

[16] *See Kentucky Household Good Carriers Assn*, at 26 (order prohibiting collective rate-making to remain in effect until the respondent demonstrates to the Commission that the state has implemented a program of active supervision).

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Toxicology Program (NTP); NTP Interagency Center for the Evaluation of Alternative Toxicological Methods (NICEATM); Availability of Interagency Coordinating Committee on the Validation of Alternative Methods Test Method Evaluation Reports on Two Nonradioactive Versions of the Murine Local Lymph Node Assay for Assessing Allergic Contact Dermatitis Hazard Potential of Chemicals and Products, and Expanded Uses of the Local Lymph Node Assay for Pesticide Formulations and Other Products; Notice of Transmittal to Federal Agencies

AGENCY: National Institute of Environmental Health Sciences (NIEHS), National Institutes of Health (NIH), HHS.

ACTION: Availability of Reports; Notice of Transmittal.

SUMMARY: NICEATM announces availability of Interagency Coordinating Committee on the Validation of Alternative Methods (ICCVAM) Test Method Evaluation Reports (TMERs) recommending two nonradioactive versions of the Local Lymph Node Assay (LLNA) for assessing allergic contact dermatitis (ACD) hazard potential of chemicals and products and expanded uses of the LLNA for pesticide formulations and other products. Related ICCVAM Test Method Recommendations in each report have also been transmitted to Federal agencies for their review and response to ICCVAM in accordance with the provisions of the ICCVAM Authorization Act of 2000. The LLNA: 5-Bromo-2′-deoxyuridine-Enzyme-Linked Immunosorbent Assay (BrdU-ELISA) and LLNA: Daicel Adenosine Triphosphate (DA) do not use radioactive reagents and therefore provide advantages in terms of reduced hazardous waste disposal and broader availability for use by laboratories that cannot use radioactive reagents. ICCVAM concludes that the accuracy and reliability of the LLNA: BrdU-ELISA and LLNA: DA support use of these test methods to identify substances as potential skin sensitizers or nonsensitizers. Based on an updated evaluation, ICCVAM is also recommending expanded use of the LLNA to evaluate the ACD hazard potential of pesticide formulations and other products.

FOR FURTHER INFORMATION CONTACT: Dr. William S. Stokes, Director, NICEATM, NIEHS, P.O. Box 12233, Mail Stop: K2–16, Research Triangle Park, NC, 27709, (telephone) 919–541–2384, (fax) 919–541–0947, (e-mail) *niceatm@niehs.nih.gov.* Courier address: NICEATM, NIEHS, Room 2034, 530 Davis Drive, Morrisville, NC 27560.

SUPPLEMENTARY INFORMATION:

Background

ICCVAM previously evaluated the validation status of the LLNA as a stand-alone alternative method to the guinea pig maximization test (GPMT) and the Buehler test (BT) for assessing the ACD hazard potential of products and chemicals (NIH Publication No. 99–4494; available at *http://iccvam.niehs.nih.gov/methods/immunotox/llna.htm*). Based on this evaluation, ICCVAM recommended the LLNA as a valid substitute for the guinea pig test methods for most testing situations in 1999. The Environmental Protection Agency, the Food and Drug Administration, and the U.S. Consumer Product Safety Commission (CPSC) subsequently accepted the method as a valid substitute for the GPMT and BT. The Organization for Economic Co-operation and Development (OECD) subsequently adopted the LLNA as OECD Test Guideline 429 in 2002. Using the LLNA instead of guinea pig tests reduces and refines (less pain and distress) animal use for ACD safety testing.

In 2007, the CPSC nominated several new versions and applications of the LLNA to ICCVAM for evaluation of their scientific validity (*http://iccvam.niehs.nih.gov/methods/immunotox/llnadocs/CPSC_LLNA_nom.pdf*). The nomination requested that ICCVAM assess (1) the validation status of the LLNA limit dose procedure (*i.e.,* the reduced LLNA); (2) the modified LLNA test method protocols that do not require the use of radioactive materials; (3) the use of the LLNA to test mixtures, aqueous solutions, and metals; and (4) the use of the LLNA to determine ACD potency categories for hazard classification. NICEATM published a **Federal Register** notice (72 FR 27815) requesting public comments on (1) the appropriateness and relative priority of the CPSC-nominated LLNA activities, (2) the nomination of scientists to serve on an international independent scientific peer review panel, and (3) the submission of data from LLNA testing that related to the CPSC-nominated LLNA activities as well as corresponding data from human and other animal studies. ICCVAM assigned these activities a high priority after considering comments from the public and endorsement from the Scientific Advisory Committee on Alternative Toxicological Methods (SACATM). NICEATM and ICCVAM compiled comprehensive draft background review documents (BRDs), released them for public comment in January 2008 (73 FR 1360), and convened a public meeting of the panel on March 4–6, 2008 to peer review the draft documents. The panel evaluated the information in the BRDs as to whether it supported draft ICCVAM test method recommendations for test method uses and limitations, updated standardized test method protocols, and proposed future studies. The panel considered public comments made at the meeting, as well as public comments submitted in advance of the meeting, before concluding their deliberations. The panel's report was made available in May 2008 (73 FR 29136) for public comment. The draft ICCVAM BRDs, draft ICCVAM test method recommendations, the panel's report, and all public comments were made available to SACATM for comment at its meeting on June 18–19, 2008 (73 FR 25754).

After considering the conclusions and recommendations of the panel, comments from SACATM, and public comments, ICCVAM forwarded final recommendations for the updated LLNA test method protocol, the reduced LLNA, and LLNA performance standards to Federal agencies in September 2009 (74 FR 50212). ICCVAM concluded that the updated LLNA test method protocol will further reduce animal use by 20% compared to the original version of the LLNA and also provide for more consistent and reliable results. The reduced LLNA will reduce animal use by 40% for each test compared to the traditional, multi-dose LLNA. ICCVAM also recommended LLNA test method performance standards that can be used to efficiently evaluate the validity of modified versions of the LLNA that are mechanistically and functionally similar to the traditional LLNA. Federal agencies subsequently responded with their support and concurrence with the ICCVAM recommendations. Agency responses are available on the NICEATM–ICCVAM Web site.

NICEATM subsequently obtained additional data and/or information and revised the draft documents for both the traditional and nonradioactive LLNA methods. ICCVAM released the revised draft documents to the public for comment and announced a second meeting of the panel (74 FR 8974). The panel reconvened in public session on April 28–29, 2009 to review the ICCVAM-revised draft documents and

finalize its conclusions and recommendations on the current validation status of the nonradioactive test methods and the expanded uses of the LLNA for pesticide formulations and other products. The panel's report was made available for public comment in June 2009 (74 FR 26242). The revised draft ICCVAM BRDs, revised draft ICCVAM test method recommendations, the panel's report, and all public comments were made available to SACATM for comment on June 25–26, 2009 (74 FR 19562). After considering the conclusions and recommendations of the panel, comments from SACATM, and public comments, along with the recommendations of an OECD Expert Consultation on the LLNA convened in October and December 2009, ICCVAM finalized and forwarded test method recommendations to Federal agencies for their consideration, in accordance with the ICCVAM Authorization Act of 2000 (42 U.S.C. 285l–3(e)(4)). Agency responses to the ICCVAM test method recommendations will be made available on the NICEATM–ICCVAM website as they are received.

The ICCVAM TMERs, *The LLNA: BrdU–ELISA, A Nonradioactive Alternative Test Method to Assess the Allergic Contact Dermatitis Potential of Chemicals and Products* (NIH Publication 10–7552), and *The LLNA: DA, A Nonradioactive Alternative Test Method to Assess the Allergic Contact Dermatitis Potential of Chemicals and Products* (NIH Publication 10–7551), describe ICCVAM's recommendations for using the LLNA: BrdU–ELISA and LLNA: DA for regulatory hazard identification purposes. The reports also provide ICCVAM-recommended LLNA: BrdU–ELISA and LLNA: DA test method protocols, the final BRDs, and the peer review reports of the panel. The ICCVAM-recommended LLNA: BrdU–ELISA test method protocol is based on the protocol developed by Takeyoshi et al. (2001). The ICCVAM-recommended LLNA: DA test method protocol is based on the protocol developed by Idehara et al. (2008). Both test method protocols incorporate all relevant aspects of the recently updated ICCVAM-recommended traditional LLNA test method protocol (ICCVAM, 2009). The protocols also include reduced LLNA: BrdU–ELISA and LLNA: DA procedures that should always be considered and used where determined appropriate in order to further reduce animal use.

The ICCVAM Test Method Evaluation Report, *Using the Murine Local Lymph Node Assay for Testing Pesticide Formulations, Metals, Substances in Aqueous Solutions, and Other Products* (NIH Publication 10–7512) provides ICCVAM's updated evaluation and recommendations for use of the LLNA to evaluate the ACD hazard potential of pesticide formulations, metals, substances in aqueous solutions, and other products. The evaluation considered new data that became available subsequent to the original ICCVAM LLNA evaluation in 1999. The report also includes the peer review reports of the panel.

ICCVAM's evaluation of the LLNA for skin sensitization potency categorization is currently nearing completion, and final ICCVAM recommendations will be forwarded to Federal agencies later this year.

Background Information on ICCVAM, NICEATM, and SACATM

ICCVAM is an interagency committee composed of representatives from 15 Federal regulatory and research agencies that require, use, generate, or disseminate toxicological information. ICCVAM conducts technical evaluations of new, revised, and alternative methods with regulatory applicability and promotes the scientific validation and regulatory acceptance of toxicological test methods that more accurately assess the safety and hazards of chemicals and products that refine, reduce, and replace animal use. The ICCVAM Authorization Act of 2000 established ICCVAM as a permanent interagency committee of the NIEHS under NICEATM (42 U.S.C 285l-3). NICEATM administers ICCVAM and provides scientific and operational support for ICCVAM-related activities. NICEATM and ICCVAM work collaboratively to evaluate new and improved test methods applicable to the needs of U.S. Federal agencies. NICEATM and ICCVAM welcome the public nomination of new, revised, and alternative test methods for both validation studies as well as technical evaluations. Additional information about ICCVAM and NICEATM can be found on the NICEATM–ICCVAM Web site (*http://iccvam.niehs.nih.gov).*

SACATM was established January 9, 2002, and is composed of scientists from the public and private sectors (67 FR 11358). SACATM provides advice to the Director of the NIEHS, ICCVAM, and NICEATM regarding the statutorily-mandated duties of ICCVAM and activities of NICEATM. Additional information about SACATM, including the charter, roster, and records of past meetings, can be found at *http://ntp.niehs.nih.gov/go/167.*

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Dated: June 16, 2010.

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Associate Director, National Toxicology Program.

[FR Doc. 2010–15777 Filed 6–28–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–10–09CJ]

Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these requests, call the CDC Reports Clearance Officer at (404) 639–5960 or send an e-mail to *omb@cdc.gov.* Send written comments to CDC Desk Officer, Office of Management and Budget, Washington, DC, or by fax to (202) 395–5806. Written comments should be received within 30 days of this notice.

Proposed Project

Promoting HIV Testing among Low Income Heterosexual Young Adult Black Men—New—National Center for HIV/AIDS, Viral Hepatitis, STD, and TB Prevention (NCHHSTP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The lifetime risk of acquiring HIV infection for black men is 1 in 16. Heterosexual transmission is the second highest category for HIV infection among black men, yet we know little about how to successfully access heterosexual black men with HIV prevention and testing messages. CDC is requesting OMB approval for 2 years to collect data for this 3-phase study. The data collection will take place in Queens and Brooklyn, New York.

The purpose of the proposed study is to elicit attitudes about HIV testing among a community-based sample of non-Hispanic black, heterosexual men, ages 18–25, who were recently arrested or who were recently released from jail/prison. The study will develop culturally-tailored and gender-specific educational materials that promote HIV testing among this population. The data collection process will take approximately 2 years.

There will be a screening for each phase, 30 respondents for the one-on-one, 300 respondents for the survey, and 40 for the focus group. In Phase 1, local investigators will conduct qualitative interviews with 20 non-Hispanic black, heterosexual men, ages 18–25, who were recently arrested or who were recently released from jail/prison and meet screening criteria. The interviews will identify their attitudes towards HIV testing, socio-cultural norms, and perceived behavioral control factors that influence HIV testing. The interviews will also elicit their opinions of how to promote HIV testing among their peers. Each interview will last approximately 1.5 hours. During Phase 2, the results from Phase I will be used to identify variables for a survey that will examine attitudes towards HIV testing, socio-cultural norms, and perceived behavioral control factors to HIV testing intentions and behaviors. The survey will include 250 non-Hispanic black heterosexual men, ages 18–25, who meet screening criteria. Each survey will last approximately 30 minutes.

During Phase 3, using Phase 1 and 2 results, educational materials promoting HIV testing among 24 non-Hispanic black heterosexual men will be developed and pilot tested in focus groups of young black men who meet screening criteria to evaluate the acceptability of the materials.

This study will provide important epidemiologic information useful for the development of HIV prevention interventions for young black men.

There is no cost to respondents except for their time. The estimated annualized burden hours are 265.

ESTIMATE OF ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondents	Average burden per responses (hours)
General public	Screener for one-on-one interviews	30	1	10/60
General public	One-on-one interviews	20	1	1.5
General public	Screener for surveys	300	1	10/60
General public	Surveys	250	1	30/60
General public	Screener for focus groups	40	1	10/60
General public	Focus groups	24	1	2

Dated: June 17, 2010.

Maryam I. Daneshvar,

Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. 2010–15782 Filed 6–28–10; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Agency Information Collection Activities: Proposed Collection; Comment Request

In compliance with Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 concerning opportunity for public comment on proposed collections of information, the Substance Abuse and Mental Health Services Administration will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the information collection plans, call the SAMHSA Reports Clearance Officer on (240) 276–1243.

Comments are invited on: (a) Whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection

of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Proposed Project: Evaluation of Pregnant and Postpartum Women (PPW) Program

The Substance Abuse and Mental Health Services Administration (SAMHSA), Center for Substance Abuse Treatment (CSAT), is funding 11 fiscal year (FY) 2009 Services Grants for the Residential Treatment for Pregnant and Postpartum Women (PPW) Program. The purpose of the PPW Program is to provide cost-effective, comprehensive, residential treatment services for pregnant and postpartum women who suffer from alcohol and other drug use problems, and for their infants and children impacted by the perinatal and environmental effects of maternal substance use and abuse.

Section 508 [290bb–1] of the Public Health Service Act mandates the evaluation and dissemination of findings of residential treatment programs for pregnant and postpartum women. This cross-site accountability assessment will assess project activities implemented for these services.

CSAT is requesting approval for a total of 8,404 burden hours for this new data collection. CSAT is requesting approval for a total of 23 instruments. Of these 23 instruments, 18 instruments are client-level tools and 5 instruments are process-level tools. To examine the effectiveness and impact of the PPW program, the current design includes both client-level outcomes and process evaluation components. The purpose of the outcome evaluation component is to examine the extent to which grantees accomplish the five core goals specified by the PPW program request for applications (RFA). These goals include:

- Decrease the use and/or abuse of prescription drugs, alcohol, tobacco, illicit and other harmful drugs (*e.g.,* inhalants) among pregnant and postpartum women;
- Increase safe and healthy pregnancies; improve birth outcomes; and reduce related effects of maternal drug abuse on infants and children;
- Improve the mental and physical health of the women and children;
- Improve family functioning, economic stability, and quality of life; and
- Decrease involvement in and exposure to crime, violence, sexual and physical abuse, and child abuse and neglect.

In order to help interpret client-level outcomes, the process evaluation will explore what grantees are actually doing, how well they are doing it, any challenges encountered, and strategies grantees used to address them.

Data collection instruments will be used to collect outcome and process data for this cross-site accountability evaluation, program and treatment planning, and local evaluations. For clients, data will be collected from women at four time points (intake, 6-months post-intake, discharge, and 6-months post-discharge), consistent with the GPRA data collection schedule. The schedule for collecting child data is similar to the mothers, with the addition of a 3-month post-intake time point. The following interview instruments will be used for women, fathers/mother's partner, and children:

Women Focused Tools

- BASIS–24® (psychological symptomology).
- Child Abuse Potential Inventory (overall risk for child physical abuse).
- Ferrans and Powers Quality of Life Index (quality of life measure).
- Family Support Scale (helpfulness of sources of support to parents raising a young child).
- Women's Discharge Tool (services received, length of stay, treatment goals achieved).
- Staff Completed Women's Items (pregnancy status, problems and outcomes).
- Items Administered to Women (children residing with mother in treatment, tobacco use, physical abuse and sexual abuse in the past year).

Father and Partner Focused Tools

- Ferrans and Powers Quality of Life Index (quality of life measure).

Child Focused Tools

- Brief Infant Toddler Social and Emotional Assessment (children 12–35 months; social and emotional assessment).
- Child Data Collection Tool (all children; descriptive biopsychosocial measure).
- Children's Discharge Tool (all children; services received, length of stay, treatment goals achieved, whether child lived in the facility).
- CRAFFT (children 11–17; adolescent substance use screen).
- Newborn's Medical Record Audit (childen birth-3 months; birth outcomes).
- Parenting Relationship Questionnaire (children 2–17 years; parent's relationship with child).
- Parenting Stress Index (children 1 month—12 years; parenting stress).
- Social Skills Improvement System (children 3–17 years; social skills).
- Trauma Symptom Checklist for Young Children (3–12 years; trauma symptoms).
- Staff Completed Child Items (children 0–17; prematurity, child's recent primary residence, whether child will reside in treatment with mother).
- Staff Completed Newborn Items (children 0–3 months; prematurity, length of stay in hospital, neonatal intensive care unit (NICU), and treatment for neononatal abstinence syndrome).

Note that all child focused tools are records reviews or administered as maternal interviews with the exception of CRAFFT, which is administered to the children directly.

Process Evaluation Tools

- Biannual Project Director Telephone Interview (interview with grantee project directors to clarify information reported in their biannual progress reports);
- Site Visit Protocol—Client Focus Group (focus groups with clients to gather information about their experience in the program);
- Site Visit Protocol—Clinical Director(s)/Supervisor(s) (interviews with both the director of clinical services for women and the director of clinical services for children to gather more specific information about clinical services);
- Site Visit Protocol—Counselor(s) (interviews with counselors to gather information related to daily treatment operations and their experience in providing services); and
- Site Visit Protocol—Program Director (interview with grantee program directors gather information about overall PPW programmatic issues).

All data will be collected using a combination of observation, records review, questionnaires, and personal interviews. CSAT will use this data for accountability reporting, and program monitoring to inform public policy, research, and programming as they relate to the provision of women's services. Data produced by this study will provide direction to the type of technical assistance that will be required by service providers of women's programming. In addition, the data will be used by individual grantees to support progress report efforts.

The total annualized burden to respondents for all components of the PPW program is estimated to be 8,404 hours. Table A–1 presents a detailed

breakdown of the annual burden for all data collection instruments for all respondents (*i.e.,* mother, child, project staff, partner/father (family members), medical staff, project director, clinical director, counselor, program director). The number of respondents for all child-focused tools is weighted, based on the percentage of children within the appropriate age bracket in the prior PPW evaluation. With the exception of the CRAFFT, all child-focused tools are completed for the child by the mother or project staff. The burden estimates, also summarized in Table A–2, are based on the reported experience of the 2006 cohort, proprietary instrument developer estimates and experience, pre-testing of the additional items completed by staff and administered to women, and pre-testing of process evaluation measures. There are no direct costs to respondents other than their time to participate.

TABLE A–1—DETAILED ANNUAL BURDEN FOR ALL INTERVIEWS AND SURVEYS

Interviews and surveys	Respondent	Number of respondents [1]	Responses per respondent	Total responses	Burden per resp. (hrs.)	Total burden (hrs.)
Child Focused Interviews						
CRAFFT (11–17 yrs) [2]	Child	70	5	350	0.08	28
Brief Infant Toddler Social and Emotional Assessment (12–35 mos) [3].	Mother	141	5	705	0.17	120
Child Data Collection Tool (0–17 yrs) [4]	Mother	440	2	880	0.75	660
Parenting Relationship Questionnaire (2–17 yrs) [5]	Mother	387	5	1,935	0.25	484
Parenting Stress Index (1 month–12 yrs) [6]	Mother	418	10	4,180	0.5	2,090
Social Skills Improvement System (3–17 yrs) [7]	Mother	326	5	1,630	0.42	685
Trauma Symptom Checklist for Young Children (3–12 yrs) [8].	Mother	290	5	1,450	0.33	479
Women Focused Interviews						
BASIS–24®	Mother	440	4	1,760	0.25	440
Child Abuse Potential Inventory	Mother	440	4	1,760	0.33	581
Family Support Scale	Mother	440	4	1,760	0.17	299
Ferrans and Powers Quality of Life Index (Women)	Mother	440	4	1,760	0.17	299
Items Administered to Women	Mother	440	4	1,760	0.17	299
Fathers and Partners Interview						
Ferrans and Powers Quality of Life Index (Partners)	Partner/Father	110	2	220	0.17	37
Staff Completed Items/Record Reviews at 11 Facilities						
Children's Discharge Tool (0–17 yrs) [9]	Project Staff	11	80	880	0.58	510
Women's Discharge Tool	Project Staff	11	40	440	0.58	255
Newborn's Medical Record Audit (0–3 mos) [10]	Medical Staff	11	25	275	0.08	22
Staff Completed Newborn Items	Medical Staff	11	25	275	0.25	69
Staff Completed Child Items (0–17 yrs) [11]	Project Staff	11	400	4,400	0.08	352
Staff Completed Women's Items [12]	Project Staff	11	160	1,760	0.17	299
Process Evaluation						
Biannual Project Director Telephone Interview	Project Director	11	2	22	1	22
Site Visit Protocol—Client Focus Group [13]	Mother	176	1	176	1.5	264
Site Visit Protocol—Clinical Director/Supervisor	Clinical Director/Supervisor.	22	1	22	2	44
Site Visit Protocol—Counselor(s)	Counselor	33	1	33	1	33
Site Visit Protocol—Program Director	Program Director.	11	1	11	3	33
Total		4,701		28,444		8,404

[1] Data will be collected from women at four time points (intake, 6-months post-intake, discharge, and 6-months post-discharge), consistent with the GPRA data collection schedule. Figures in this table are based on 40 mothers per site with 2 children and 0.25 father/partner per mother. The schedule for collecting child data is similar to the mother's with the addition of a 3-months post-intake time point with selected tools for a total of five time points. All child focused tools are completed by the mother of project staff, with the exception of CRAFFT. For fathers and partners, data will be collected at two points (intake and discharge).

[2] Based on 8% of 880 minor children ages 11 to 17 at intake, 3 months, 6 months, discharge, and 6-months post-discharge.

[3] Based on 16% of 880 minor children ages 12–35 months at intake, 3 months, 6 months, discharge, and 6-months post-discharge.

[4] Based on 440 mothers having 2 minor children at intake and/or delivery.

[5] Based on 44% of 880 minor children ages 2 to 17 at intake, 3 months, 6 months, discharge, and 6-months post-discharge.

[6] Based on 95% of 880 minor children ages 1 month to 12 years (n=836). For simplicity, this calculation assumes that 95% of mothers have two children in this age group and complete the tool for each child at intake, 3 months, 6 months, discharge, and 6-months post-discharge.

[7] Based on 37% of 880 minor children ages 3 to 17 at intake, 3 months, 6 months, discharge, and 6-months post-discharge.

[8] Based on 33% of 880 minor children ages 3 to 12 at intake, 3 months, 6 months, discharge, and 6-months post-discharge.

[9] Based on 1 staff member at each of the 11 programs completing the tool for 80 children at discharge.

[10] Based on 31% of 880 minor children ages 0–3 months at intake or delivery.

[11] Based on 80 minor children per site ages 0 to 17 at intake, 3 months, 6 months, discharge, and 6-months post-discharge.

[12] Based on 1 staff member at each of the 11 programs completing items for 40 women at intake, 6 months, discharge, and 6-months post-discharge.

[13] Based on 2 focus groups with 8 mothers at each site.

TABLE A–2—SUMMARY TOTAL ANNUAL RESPONDENT BURDEN

Respondent	Number of respondents	Responses per respondent	Total responses	Hours per response	Total hour burden
Mothers	440		19,756		6,700
Family Members	110		220		37
Children (11–17 yrs)	70		350		28
Medical Staff	11		550		91
Project Staff	11		7,480		1,416
Project Director	11		22		22
Clinical Director/Supervisor	22		22		44
Counselor	33		33		33
Program Director	11		11		33
Total	719		28,444		8,404

Note: Total number of respondents represents the number of each type of respondent that will be completing at least *one* tool across eleven sites over one year of data collection. The number of respondents (719) reported on this table differs from Table A–1 total number of respondents (4,701) which reflects completion of *all* tools across eleven sites over one year of data collection.

Send comments to Summer King, SAMHSA Reports Clearance Officer, Room 7–1044, 1 Choke Cherry Road, Rockville, MD 20850. Written comments should be received within 60 days of this notice.

Dated: June 22, 2010.

Elaine Parry,

Director, Office of Program Services.

[FR Doc. 2010–15722 Filed 6–28–10; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Agency Information Collection Activities: Submission for OMB Review; Comment Request

Periodically, the Substance Abuse and Mental Health Services Administration (SAMHSA) will publish a summary of information collection requests under OMB review, in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these documents, call the SAMHSA Reports Clearance Officer on (240) 276–1243.

Proposed Project: SAMHSA Application for Peer Grant Reviewers (OMB No. 0930–0255)—Extension

Section 501(h) of the Public Health Service (PHS) Act (42 U.S.C. 290aa) directs the Administrator of the Substance Abuse and Mental Health Services Administration (SAMHSA) to establish such peer review groups as are needed to carry out the requirements of Title V of the PHS Act. SAMHSA administers a large discretionary grants program under authorization of Title V, and, for many years, SAMHSA has funded grants to provide prevention and treatment services related to substance abuse and mental health.

In support of its grant peer review efforts, SAMHSA desires to continue to expand the number and types of reviewers it uses on these grant review committees. To accomplish that end, SAMHSA has determined that it is important to proactively seek the inclusion of new and qualified representatives on its peer review groups. Accordingly SAMHSA has developed an application form for use by individuals who wish to apply to serve as peer reviewers.

The application form has been developed to capture the essential information about the individual applicants. Although consideration was given to requesting a resume from interested individuals, it is essential to have specific information from all applicants about their qualifications. The most consistent method to accomplish this is through completion of a standard form by all interested persons which captures information about knowledge, education, and experience in a consistent manner from all interested applicants. SAMHSA will use the information provided on the applications to identify appropriate peer grant reviewers. Depending on their experience and qualifications, applicants may be invited to serve as either grant reviewers or review group chairpersons.

The following table shows the annual response burden estimate.

Number of respondents	Responses/respondent	Burden/responses (hours)	Total burden hours
500	1	1.5	750

Written comments and recommendations concerning the proposed information collection should be sent by July 29, 2010 to: SAMHSA Desk Officer, Human Resources and Housing Branch, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503; due to potential delays in OMB's receipt and processing of mail sent through the U.S. Postal Service, respondents are encouraged to submit comments by fax to: 202–395–5806.

Dated: June 22, 2010.

Elaine Parry,

Director, Office of Program Services.

[FR Doc. 2010–15721 Filed 6–28–10; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–10–10FB]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404–639–5960 and send comments to Maryam I. Daneshvar, Ph.D., CDC Reports Clearance Officer, 1600 Clifton Road, MS–D74, Atlanta, GA 30333 or send an e-mail to *omb@cdc.gov.*

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Written comments should be received within 60 days of this notice.

Proposed Project

Developing a Sexual consent Norms Instrument—New—National Center for Injury Prevention and Control (NCIPC), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Sexual violence prevention strategies are increasingly focusing on promoting positive behavioral norms such as safety, equality and respect in relationships, however psychometrically validated measures do not exist for programs to use in evaluating their strategies. This project provides an opportunity to significantly contribute to the literature base and fill a gap in evaluation tools by developing a measure specific to consent norms for use in three populations: college students, late adolescents (ages 15–18) and early adolescents (ages 11–14). Sound measures of sexual consent norms will improve program evaluation efforts and potentially contribute to understanding of effective prevention strategies as well as the etiology of sexual violence perpetration.

The development of these measures will occur in four phases. Phase one will consist of multiple two-hour focus groups of 8–10 participants: 1 with prevention educators, 8 with college students, 8 with late adolescents (ages 15–18) and 8 with early adolescents (ages 11–14). Samples of college students and adolescents will include Asian, Black and African American, Hispanic or Latino, and White students. Half of the college student focus groups will be conducted with students who grew up in the United States; the other half will be conducted with students who came to the United States within the last five years. Focus group participants will be asked to comment on the proposed instruments relevant to their group. Prevention educators will comment on all three instruments. Comments will be used to refine the measures.

In phase two, 200 Asian, Black and African American, Hispanic or Latino, and White college students and 100 Asian, Black and African American, Hispanic or Latino, and White adolescents will complete the revised instrument appropriate to age group, plus a set of existing instruments that assess related variables, using online data collection methods.

Phase three will consist of multiple two-hour focus groups of 8–10 participants: 2 with prevention educators, 1 with college students, 1 with late adolescents (ages 15–18) and 1 with early adolescents (ages 11–14). Samples of college students and adolescents will include Asian, Black and African American, Hispanic or Latino, and White students as well as students who grew up in the United States and students who came to the United States in the last five years. All focus group participants will be asked to comment on data collected with the revised instruments in their age group. Prevention educators will be asked to comment on data from all age groups. Comments will be used to refine the instrument again, before administering it to larger samples.

In phase four, the refined instruments plus a set of existing instruments that assess related variables will be administered to 500 Asian, Black and African American, Hispanic or Latino, and White college students and 400 Asian, Black and African American, Hispanic or Latino, and White adolescents (200 early adolescents and 200 late adolescents). Data collection will occur via an online survey. These data will be used to examine the psychometric properties of the new instruments.

Findings will be used to demonstrate the adequacy of new instruments for use in racially and ethnically diverse populations of college student and adolescents by sexual assault prevention programs funded through the Rape Prevention and Education Program. There is no cost to respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Respondents/form name	Number of respondents	Number of responses per respondent	Average burden per response (hours)	Total burden (in hrs)
Phase I: Focus Group of Prevention Educators	10	1	3	30
Phase I: Focus Group of College Students	10	1	2.5	25
Phase I: Focus Group of Late Adolescents	10	1	3	30
Phase I: Focus Group of Early Adolescents	10	1	3	30

ESTIMATED ANNUALIZED BURDEN HOURS—Continued

Respondents/form name	Number of respondents	Number of responses per respondent	Average burden per response (hours)	Total burden (in hrs)
Phase II: College Student Survey	200	1	2	400
Phase II: Late Adolescent Survey	50	1	2	100
Phase II: Early Adolescent Survey	50	1	1	50
Phase III: Follow-up Focus Group of Prevention Educators	20	1	3	60
Phase III: Follow-up Focus Group of College Students	10	1	2.5	25
Phase III: Follow-up Focus Group of Late Adolescents	10	1	3	30
Phase III: Follow-up Focus Group of Early Adolescents	10	1	3	30
Phase IV: Confirmatory Survey of College Students	500	1	2	1000
Phase IV: Confirmatory Survey of Late Adolescents	200	1	2	400
Phase IV: Confirmatory Survey of Early Adolescents	200	1	1	200
Total				2410

Dated: June 23, 2010.

Carol Walker,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. 2010–15780 Filed 6–28–10; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–D–0094]

Draft Guidance: The Judicious Use of Medically Important Antimicrobial Drugs in Food-Producing Animals; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a draft guidance (#209) entitled "The Judicious Use of Medically Important Antimicrobial Drugs in Food-Producing Animals." This draft guidance is intended to inform the public of FDA's current thinking on the use of medically important antimicrobial drugs in food-producing animals.

DATES: Although you can comment on any guidance at any time (see 21 CFR 10.115(g)(5)), to ensure that the agency considers your comment on this draft guidance before it begins work on the final version of the guidance, submit either electronic or written comments on the draft guidance by August 30, 2010.

ADDRESSES: Submit written requests for single copies of the guidance to the Communications Staff (HFV–12), Center for Veterinary Medicine, Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855. Send one self-addressed adhesive label to assist that office in processing your requests. Additional copies of this guidance are available from the Office of Communication, Outreach and Development (OCOD) (HFM–40), Food and Drug Administration, 1401 Rockville Pike, suite 200N, Rockville, MD 20852–1448, or by calling 1–800–835–4709 or 301–827–1800, or e-mail: *ocod@fda.hhs.gov*. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

Submit electronic comments on the draft guidance to *http://www.regulations.gov*. Submit written comments on the draft guidance to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: William T. Flynn, Center for Veterinary Medicine (HFV–1), Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855, 240–276–9084, e-mail: *william.flynn@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance (#209) entitled "The Judicious Use of Medically Important Antimicrobial Drugs in Food-Producing Animals." Antimicrobial drugs have been widely used in human and veterinary medicine for more than 50 years, with tremendous benefits to both human and animal health. The development of resistance to this important class of drugs, and the resulting loss of their effectiveness as antimicrobial therapies, poses a serious public health threat. Misuse and overuse of antimicrobial drugs creates selective evolutionary pressure that enables antimicrobial resistant bacteria to increase in numbers more rapidly than antimicrobial susceptible bacteria and thus increases the opportunity for individuals to become infected by resistant bacteria. Because antimicrobial drug use contributes to the emergence of drug resistant organisms, these important drugs must be used judiciously in both animal and human medicine to slow the development of resistance. Using these drugs judiciously means that unnecessary or inappropriate use should be avoided. Although efforts to assure judicious use should be directed at all uses of antimicrobial drugs, the focus of this document is on the use of medically important antimicrobial drugs in food-producing animals.

In regard to the use of antimicrobial drugs in animals, concerns have been raised by the public and components of the scientific and public health communities that a significant contributing factor to antimicrobial resistance is the use of medically important antimicrobial drugs in food-producing animals for production or growth-enhancing purposes. This document summarizes some of the key scientific reports on the use of antimicrobial drugs in animal agriculture and outlines FDA's current thinking on strategies for assuring that medically important antimicrobial drugs are used judiciously in food-producing animals in order to help minimize antimicrobial resistance development.

Based on a consideration of the available scientific information, FDA is making a number of recommendations regarding the appropriate or judicious use of medically important antimicrobial drugs in food-producing animals. These recommendations include phasing in such measures as follows: (1) Limiting medically important antimicrobial drugs to uses in food-producing animals that are considered necessary for assuring

animal health and (2) limiting such drugs to uses in food-producing animals that include veterinary oversight or consultation. Developing strategies for reducing antimicrobial resistance is critically important for protecting both public and animal health. Collaboration involving both the public and animal health communities on the development and implementation of such strategies is needed to assure that the public health is protected while also assuring that the health needs of animals are addressed.

This draft guidance discusses FDA's general public health concerns regarding the potential impact of certain uses of medically important antimicrobial drugs in food-producing animals on the development of antimicrobial resistance, and provides two broad recommendations regarding such use. The agency intends to issue further guidance in the near future to provide more specific information on approaches for implementing the recommendations outlined in this draft guidance.

II. Significance of Guidance

This level 1 draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the agency's current thinking on this topic. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

III. Paperwork Reduction Act of 1995

FDA concludes that there are no collections of information under the Paperwork Reduction Act of 1995.

IV. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) either electronic or written comments regarding this document. It is only necessary to send one set of comments. It is no longer necessary to send two copies of mailed comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

IV. Electronic Access

Persons with access to the Internet may obtain the draft guidance at either *http://www.fda.gov/AnimalVeterinary/default.htm* or *http://www.regulations.gov*.

Dated: June 10, 2010.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2010–15289 Filed 6–28–10; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Neuroendocrinology and Fetal Alcohol.

Date: July 13, 2010.

Time: 1 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Michael Selmanoff, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3134, MSC 7844, Bethesda, MD 20892, 301–435–1119, *mselmanoff@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Language and Communication.

Date: July 14, 2010.

Time: 2 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Dana Jeffrey Plude, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3176, MSC 7848, Bethesda, MD 20892, 301–435–2309, *pluded@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel; ARRA: Member Conflict in Cognition and Perception Competitive Revisions.

Date: July 14, 2010.

Time: 12 p.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Dana Jeffrey Plude, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3176, MSC 7848, Bethesda, MD 20892, 301–435–2309, *pluded@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Cancer Drug Development and Therapeutics.

Date: July 19–20, 2010.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road, NW., Washington, DC 20015.

Contact Person: Hungyi Shau, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6186, MSC 7804, Bethesda, MD 20892, 301–357–9099, *Hungyi.Shau@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: June 23, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–15784 Filed 6–28–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the National Cancer Institute Director's Consumer Liaison Group.

The meeting will be open to the public, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should

notify the Contact Person listed below in advance of the meeting.

Name of Committee: National Cancer Institute Director's Consumer Liaison Group.

Date: July 27–29, 2010.

Time: 2 p.m. to 1 p.m.

Agenda: Welcome, Challenges in Biospecimen Collection; Expert Panel on Innovative Approaches to Engaging the Community around Biospecimen Collection, Board Discussion About Innovative Approaches to Engaging the Community around Biospecimen Collection.

Place: Jackson Federal Building, 915 Second Ave, Room 440, Seattle, WA 98174.

Contact Person: Benjamin Carollo, MPA, Advocacy Relations Manager, Office Of Advocacy Relations, Building 31, Room 10A30, 31 Center Drive, MSC 2580, National Cancer Institute, NIH, DHHS, Bethesda, MD 20892–2580, 301–496–0307, *CAROLLOB@MAIL.NIH.GOV.*

Information is also available on the Institute's/Center's home page: *deainfo.nci.nih.gov/advisory/dclg/dclg.htm,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: June 23, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–15785 Filed 6–28–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–N–0001]

Science Board Advisory Committee; Notice of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public.

Name of Committee: Science Board to the Food and Drug Administration (Science Board).

General Function of the Committee: The Science Board provides advice primarily to the Commissioner of Food and Drugs and other appropriate officials on specific complex and technical issues, as well as emerging issues within the scientific community in industry and academia. Additionally, the Science Board provides advice to the agency on keeping pace with technical and scientific evolutions in the fields of regulatory science, on formulating an appropriate research agenda, and on upgrading its scientific and research facilities to keep pace with these changes. It will also provide the means for critical review of agency sponsored intramural and extramural scientific research programs.

Date and Time: The meeting will be held on Monday, August 16, 2010, from 8 a.m. to 3:30 p.m.

Location: Bethesda Marriott, 5151 Pooks Hill Rd., Bethesda, MD 20814.

Contact Person: Donna Mentch, Office of Medical and Scientific Programs, Office of the Commissioner, Food and Drug Administration, White Oak Bldg. 32, 10903 New Hampshire Ave., Silver Spring, MD 20993, 301–796–8523, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area), code 301–451–2603. Please call the Information Line for up-to-date information on this meeting. A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the agency's Web site and call the appropriate advisory committee hot line/phone line to learn about possible modifications before coming to the meeting.

Agenda: On August 16, 2010, the Science Board will hear about and discuss a final report from its subcommittee reviewing research at the Center for Food Safety and Applied Nutrition (CFSAN). The Science Board will hear about an interim report from the subcommittee to review the Pharmacovigilance Program at the Center for Drug Evaluation and Research (CDER). The Science Board will also hear about and discuss JANUS, FDA supported Data Standard Comparative Effectiveness Research, and FDA's nanotechnology research program.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its Web site prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's Web site after the meeting. Background material is available at *http://www.fda.gov/AdvisoryCommittees/Calendar/default.htm*. Scroll down to the appropriate advisory committee link.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before August 9, 2010. Oral presentations from the public will be scheduled between approximately 1 p.m. and 2 p.m. Those desiring to make formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before August 2, 2010. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by August 3, 2010.

Persons attending FDA's advisory committee meetings are advised that the agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Donna Mentch, at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at *http://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm111462.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: June 24, 2010.

Jill Hartzler Warner,

Acting Associate Commissioner for Special Medical Programs.

[FR Doc. 2010–15709 Filed 6–28–10; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health and Human Development; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Child Health and Human Development Special Emphasis Panel "STEM CELLS".

Date: July 20, 2010.

Time: 1 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6100 Executive Boulevard, Rockville, MD 20852. (Telephone Conference Call)

Contact Person: Dennis E. Leszczynski, PhD, Scientific Review Officer, Division of Scientific Review, Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, 6100 Executive Blvd., Room 5B01, Bethesda, MD 20892, 301–435–6884, *leszczyd@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: June 22, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–15787 Filed 6–28–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Eye Institute; Amended Notice of Meeting

Notice is hearby given of a chance in the meeting of the National Eye Institute Special Emphasis Panel, July 16, 2010, 8 a.m. to July 16, 2010, 5 p.m., Embassy Suites Hotel, Chevy Chase Pavilion, 4300 Military Road, NW., Washington, DC 20015 which was published in the **Federal Register** on June 14, 2010, Vol 75; Number 113.

The meeting will be held on July 19, 2010 at 8:30 a.m. The meeting is closed to the public.

Dated: *June 23, 2010.*

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–15781 Filed 6–28–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Fellowships: Cognition, Language and Perception.

Date: July 12, 2010.

Time: 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: InterContinental Mark Hopkins Hotel, 999 California Street, San Francisco, CA 94108.

Contact Person: Weijia Ni, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3184, MSC 7848, Bethesda, MD 20892, (301) 435–1507, *niw@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: June 22, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–15779 Filed 6–28–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Notice of Issuance of Final Determination Concerning Dimmer and Fan Speed Switch Controls

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of final determination.

SUMMARY: This document provides notice that U.S. Customs and Border Protection ("CBP") has issued a final determination concerning the country of origin of certain dimmer and fan speed switch controls which may be offered to the United States Government under a government procurement contract. Based upon the facts presented, in the final determination CBP concluded that Mexico is the country of origin of the dimmer and fan speed switch controls for purposes of U.S. Government procurement.

DATES: The final determination was issued on June 15, 2010. A copy of the final determination is attached. Any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of this final determination within July 29, 2010.

FOR FURTHER INFORMATION CONTACT: Karen S. Greene, Valuation and Special Programs Branch, Regulations and Rulings, Office of International Trade (202–325–0041).

SUPPLEMENTARY INFORMATION: Notice is hereby given that on June 15, 2010, pursuant to subpart B of part 177, Customs Regulations (19 CFR part 177, subpart B), CBP issued a final determination concerning the country of origin of certain dimmer and fan speed switch controls which may be offered to the United States Government under a government procurement contract. This final determination, in HQ H098417, was issued at the request of Pass & Seymour, Inc. under procedures set forth at 19 CFR part 177, subpart B, which implements Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. 2511–18). In the final determination, CBP concluded that, based upon the facts presented, certain articles will be substantially

transformed in Mexico. Therefore, CBP found that Mexico is the country of origin of the finished articles for purposes of U.S. Government procurement.

Section 177.29, Customs Regulations (19 CFR 177.29), provides that notice of final determinations shall be published in the **Federal Register** within 60 days of the date the final determination is issued. Section 177.30, CBP Regulations (19 CFR 177.30), provides that any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of a final determination within 30 days of publication of such determination in the **Federal Register**.

Dated: June 15, 2010.

George F. McCray,

Acting Executive Director, Office of Regulations and Rulings, Office of International Trade.

HQ H098417
June 15, 2010
OT:RR:CTF:VS H098417 KSG

Daniel B. Berman, Esq.
Hancock & Estabrook LLP
1500 AXA Tower I
100 Madison Street
Syracuse, NY 13202

Re: U.S. Government Procurement; Title III, Trade Agreements Act of 1979; Country of Origin of Titan dimmer and fan speed switch control; substantial transformation

Dear Mr. Berman:

This is in response to your letter, dated March 5, 2010, requesting a final determination on behalf of Pass & Seymour Inc., pursuant to subpart B of 19 CFR Part 177.

Under these regulations, which implement Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. 2511 et seq.) ("TAA"), CBP issues country of origin advisory rulings and final determinations as to whether an article is or would be a product of a designated country or instrumentality for the purposes of granting waivers of certain "Buy American" restrictions in U.S. law or practice for products offered for sale to the U.S. Government.

This final determination concerns the country of origin of certain dimmer and fan speed control switches that Pass & Seymour may sell to the U.S. Government. We note that Pass & Seymour is a party-at-interest within the meaning of 19 CFR 177.22(d)(1) and is entitled to request this final determination.

You also asked about the tariff classification for the components and the tariff classification and the country of origin marking requirements for the imported good. We have referred these questions to the Tariff Classification and Marking Branch of this office for their response directly to you.

Facts:

Pass & Seymour ("P & S") designs, manufactures and distributes dimmer and fan speed control switches in the U.S. for residential and commercial use in electrical circuits of less than 1,000 volts. This case involves two models: the Titan model dimmer and fan speed switch control and the Harmony dimmer.

Legrand, the French parent company of P & S, produces the subcomponents of the dimmers in Hong Kong. The subcomponents are then shipped to Mexico for assembly. The finished product is then imported into the U.S.

The processing in Mexico includes the following: (1) The assembly of the bare printed circuit board into a final printed circuit board ("PCB"), and the assembly of the PCB with other components into the finished product. The titan dimmer has a total of 34 components in addition to the PCB. The harmony dimmer contains a PCB in addition to 28 other components.

Issue:

What is the country of origin of the imported dimmer and fan switches described above for the purpose of U.S. government procurement?

Law and Analysis:

Pursuant to Subpart B of Part 177, 19 CFR § 177.21 et seq., which implements Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. § 2511 et seq.), CBP issues country of origin advisory rulings and final determinations as to whether an article is or would be a product of a designated country or instrumentality for the purposes of granting waivers of certain "Buy American" restrictions in U.S. law or practice for products offered for sale to the U.S. Government.

Under the rule of origin set forth under 19 U.S.C. 2518(4)(B):

An article is a product of a country or instrumentality only if (i) it is wholly the growth, product, or manufacture of that country or instrumentality, or (ii) in the case of an article which consists in whole or in part of materials from another country or instrumentality, it has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed. *See also* 19 CFR 177.22(a).

In determining whether the combining of parts or materials constitutes a substantial transformation, the determinative issue is the extent of operations performed and whether the parts lose their identity and become an integral part of the new article. *Belcrest Linens* v. *United States,* 573 F. Supp. 1149 (Ct. Int'l Trade 1983), *aff'd,* 741 F.2d 1368 (Fed. Cir. 1984). Assembly operations that are minimal or simple, as opposed to complex or meaningful, will generally not result in a substantial transformation. *See* C.S.D. 80–111, C.S.D. 85–25, C.S.D. 89–110, C.S.D. 89–118, C.S.D. 90–51, and C.S.D. 90–97. In C.S.D. 85–25, 19 Cust. Bull. 844 (1985), CBP held that for purposes of the Generalized System of Preferences ("GSP"), the assembly of a large number of fabricated components onto a printed circuit board in a process involving a considerable amount of time and skill resulted in a substantial transformation. In that case, in excess of 50 discrete fabricated components (such as resistors, capacitors, diodes, integrated circuits, sockets, and connectors) were assembled. Whether an operation is complex and meaningful depends on the nature of the operation, including the number of components assembled, number of different operations, time, skill level required, attention to detail, quality control, the value added to the article, and the overall employment generated by the manufacturing process.

In order to determine whether a substantial transformation occurs when components of various origins are assembled into completed products, CBP considers the totality of the circumstances and makes such determinations on a case-by-case basis. The country of origin of the item's components, extent of the processing that occurs within a country, and whether such processing renders a product with a new name, character, and use are primary considerations in such cases. No one factor is determinative.

CBP recently ruled in H047362, dated March 26, 2009, that a similar product of P & S, electrical components, were substantially transformed when Chinese parts were assembled in Mexico into the finished article. That case also involved the production of the PCB and the assembly of the PCB and 29 other parts in a process that took about 10 minutes into the finished product. We find that this case is very similar to H047362. The assembly in Mexico is sufficiently complex and the components are substantially transformed into a final product that has a new name, character and use. Therefore, the country of origin of the Titan dimmer and fan switch and the harmony dimmer for government procurement purposes is Mexico.

Holding:

Based on the facts of this case, the country of origin of the Titan dimmer and fan switch and the Harmony Dimmer is Mexico for purposes of U.S. Government procurement.

Notice of this final determination will be given in the Federal Register, as required by 19 CFR § 177.29. Any party-at-interest other than the party which requested this final determination may request, pursuant to 19 CFR § 177.31 that CBP reexamine the matter anew and issue a new final determination. Pursuant to 19 CFR § 177.30, any party-at-interest may, within 30 days after publication of the Federal Register Notice referenced above, seek judicial review of this final determination before the Court of International Trade.

Sincerely,

George F. McCray,

Acting Executive Director, Office of Regulations and Rulings, Office of International Trade.

[FR Doc. 2010–15710 Filed 6–28–10; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5376–N–56]

Mortgage Insurance Termination; Application for Premium Refund or Distributive Share Payment

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.

Mortgage Insurance Termination is used by servicing mortgagees to comply with HUD requirements for reporting termination of FHA mortgage insurance. This information is used whenever FHA mortgage insurance is terminated and no claim for insurance benefits will be filed. This information is submitted via the Internet or EDI and is used to directly pay eligible homeowners. This condition occurs when the form passes the criteria of certain system edits. As the result the system generates a disbursement to the eligible homeowner for the refund consisting of the unused portion of the paid premium. The collection information required is used to update HUD's Single Family Insurance System. The billing of mortgage insurance premiums are discontinued as a result of the transaction. Without this information the premium collection/monitoring function would be severely impeded and program data would be unreliable. Under streamline III when the form is processed but does not pass the series of edits, the system generates in these cases the Application for Premium Refund or Distributive Share Payment to the homeowner to be completed and returned to HUD for further processing for the refund. In general a Premium Refund is the difference between the amount of prepaid premium and the amount of the premium that has been earned by HUD up to the time the mortgage is terminated.

DATES: *Comments Due Date: July 29, 2010.*

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval Number (2502–0414) 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: Leroy McKinney, Jr., Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail Leroy McKinney, Jr. at *Leroy.McKinneyJr@hud.gov* or telephone (202) 402–5564. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Mr. McKinney.

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 Premium Refund or Distributive Share Payment.

OMB Approval Number: 2502–0414.

Form Numbers: HUD–27050–A and HUD–27050–B. HUD forms available at *http://HUD/program/offices/administration/hudclips/forms.*

Description of the Need for the Information and its Proposed Use: Mortgage Insurance Termination is used by servicing mortgagees to comply with HUD requirements for reporting termination of FHA mortgage insurance. This information is used whenever FHA mortgage insurance is terminated and no claim for insurance benefits will be filed. This information is submitted via the Internet or EDI and is used to directly pay eligible homeowners. This condition occurs when the form passes the criteria of certain system edits. As a result the system generates a disbursement to the eligible homeowner for the refund consisting of the unused portion of the paid premium. The collection information required is used to update HUD's Single Family Insurance System. The billing of mortgage insurance premiums are discontinued as a result of the transaction. Without this information the premium collection/monitoring function would be severely impeded and program data would be unreliable. Under streamline III when the form is processed but does not pass the series of edits, the system generates in these cases the Application for Premium Refund or Distributive Share Payment to the homeowner to be completed and returned to HUD for further processing for the refund. In general a Premium Refund is the difference between the amount of prepaid premium and the amount of the premium that has been earned by HUD up to the time the mortgage is terminated.

Frequency of Submission: On occasion.

	Number of respondents	Annual responses	×	Hours per response	=	Burden hours
Reporting Burden	56,000	12.946		0.0917		66,500

Total Estimated Burden Hours: 66,500.

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: June 23, 2010.

Leroy McKinney, Jr.,

Departmental Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2010–15712 Filed 6–28–10; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5376–N–55]

Green Retrofit Program of Title XII of the American Recovery and Reinvestment Act of 2009

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.

HUD's Office of Affordable Housing Preservation must collect certain data to administer the Green Retrofit Program (GRP) authorized by the Recovery Act. The legislation includes reporting requirements for all recipients of Recovery Act funds. The data being collected will track the progress of work funded under the GRP and report compliance with program requirements. Respondents will be loan and grant recipients (owners of eligible properties) and contractors hired by HUD to perform certain GRP activities.

DATES: *Comments Due Date:* July 29, 2010.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal.Comments should refer to the proposal by name and/or OMB approval Number (2502–0588) 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: Leroy McKinney Jr., Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail Leroy McKinney Jr. at *Leroy.McKinneyJr@hud.gov* or telephone (202) 402–5564. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Mr. McKinney.

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: Green Retrofit Program of Title XII of the American Recovery and Reinvestment Act of 2009.

OMB Approval Number: 2502–0588.

Form Numbers: None.

Description of the Need for the Information and Its Proposed Use: HUD's Office of Affordable Housing Preservation must collect certain data to administer the Green Retrofit Program (GRP) authorized by the Recovery Act. The legislation includes reporting requirements for all recipients of Recovery Act funds. The data being collected will track the progress of work funded under the GRP and report compliance with program requirements. Respondents will be loan and grant recipients (owners of eligible properties) and contractors hired by HUD to perform certain GRP activities.

Frequency of Submission: Weekly, Quarterly, other month.

	Number of respondents	Annual responses	×	Hours per response	=	Burden hours
Reporting Burden	200	63		0.777		9,800

Total Estimated Burden Hours: 9,800.

Status: Extension, without change of a currently approved collection

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: *June 23, 2010.*

Leroy McKinney, Jr.,

Departmental Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2010–15713 Filed 6–28–10; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5376–N–53]

Alaska Native/Native Hawaiian Institutions Assisting Communities (AN/NHAIC)

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.

Grants to Alaska Native/Native Hawaiian Institutions (AN/NH) of Higher Education to expand their role and effectiveness in addressing community development needs in their

localities, including neighborhood revitalization, housing, and economic development, principally for persons of low and moderate income.

DATES: *Comments Due Date:* July 29, 2010.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal.

Comments should refer to the proposal by name and/or OMB Approval Number (2528–0206) 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: Leroy McKinney Jr., Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail Leroy McKinney Jr. at *Leroy.McKinneyJr@hud.gov* or telephone (202) 402–5564. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Mr. McKinney.

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: Alaska Native/Native Hawaiian Institutions Assisting Communities (AN/NHAIC).

OMB Approval Number: 2528–0206.

Form Numbers: SF–424, SF–424 Supplement, SF–LLL, HUD 424–CB, HUD–2880, HUD–2993, HUD 96011, HUD–96010, and HUD–40077. HUD forms are available at *http://portal.hud.gov/portal/page/portal/HUD/programoffices/administration/hudclips/forms.*

Description of the Need for the Information and Its Proposed Use: Grants to Alaska Native/Native Hawaiian Institutions (AN/NH) of Higher Education to expand their role and effectiveness in addressing community development needs in their localities, including neighborhood revitalization, housing, and economic development, principally for persons of low and moderate income.

Frequency of Submission: Quarterly, Other Final.

	Number of respondents	Annual responses	×	Hours per response	=	Burden Hours
Reporting Burden	30	2		17.5		1,050

Total Estimated Burden Hours: 1,050.

Status: Reinstatement, with change, of previously approved collection for which approval has expired.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: June 23, 2010.

Leroy McKinney, Jr.,

Departmental Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2010–15714 Filed 6–28–10; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5376–N–54]

Maintenance Wage Rate Wage Recommendation and Maintenance Wage Survey; Report of Additional Classification and Wage Rate

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 information is used by HUD to determine or adopt prevailing wage rates for maintenance laborers and mechanics, and to approve or refer to the U.S. Department of Labor for approval, when needed, an employer's request for additional work classifications and wage rates.

DATES: *Comments Due Date:* July 29, 2010.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal.

Comments should refer to the proposal by name and/or OMB approval Number (2501–0011) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–5806.

FOR FURTHER INFORMATION CONTACT: Leroy McKinney Jr., Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail Leroy McKinney Jr. at *Leroy.McKinneyJr@hud.gov* or telephone (202) 402–5564. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Mr. McKinney.

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: Maintenance Wage Rate Wage Recommendation and Maintenance Wage Survey; Report of Additional Classification and Wage Rate.

OMB Approval Number: 2501–0011.

Form Numbers: HUD–4750, HUD–4751, HUD–4752 and HUD–4230–A. HUD forms are available at *http://HUD/program_offices/administration/hudclips/forms.*

Description of the Need for the Information and Its Proposed Use: The information is used by HUD to determine or adopt prevailing wage rates for maintenance laborers and mechanics, and to approve or refer to the U.S. Department of Labor for approval, when needed, an employer's request for additional work classifications and wage rates.

Frequency of Submission: Business or other for-profit, Federal Government, State, Local or Tribal Government.

	Number of respondents	Annual responses	×	Hours per response	=	Burden hours
Reporting Burden	5,700	1		5.394		30,750

Total Estimated Burden Hours: 30,750.

Status: Reinstatement, without change, of previously approved collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: June 23, 2010.

Leroy McKinney, Jr.,

Departmental Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2010–15715 Filed 6–28–10; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5396–N–03]

Notice of Availability: Notice of Funding Availability (NOFA) for HUD's Fiscal Year 2010 Sustainable Communities Regional Planning Grant Program

AGENCY: Office of Sustainable Housing and Communities, Office of the Deputy Secretary, HUD.

ACTION: Notice.

SUMMARY: Through this notice, HUD announces the availability on its Web site of the application information, submission deadlines, funding criteria, and other requirements for the Fiscal Year 2010 NOFA for the Sustainable Communities Regional Planning Grant. This NOFA makes approximately $98 million in assistance available to support metropolitan and multijurisdictional planning efforts that integrate housing, land use, economic and workforce development, transportation, and infrastructure investments in a manner that empowers jurisdictions to consider the interdependent challenges of: (1) Economic competitiveness and revitalization; (2) social equity, inclusion, and access to opportunity; (3) energy use and climate change; and (4) public health and environmental impact. The notice providing information regarding the application process, funding criteria and eligibility requirements is available on Grants.gov Web site at *http://www.grants.gov/search/*. A link to Grants.gov is also available on the HUD Web site at *http://www.hud.gov/offices/adm/grants/fundsavail.cfm.* The Catalogue of Federal Domestic Assistance (CFDA) number for the FY2010 Sustainable Communities Regional Planning Grant Program is 14.703. Applications must be submitted electronically through Grants.gov.

FOR FURTHER INFORMATION CONTACT: Specific questions regarding the Sustainable Communities Regional Planning Grant Program requirements should be directed to: *sustainablecommunities@hud.gov* or may be submitted through the *http://www.hud.gov/sustainability* Web site. Written questions may also be submitted to Office of Sustainable Housing and Communities, Department of Housing and Urban Development, 451 7th Street, SW., Room 10180, Washington, DC 20410.

Dated: June 23, 2010.

Shelley Poticha,

Director, Office of Sustainable Housing and Communities.

[FR Doc. 2010–15717 Filed 6–28–10; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

Notice of Proposed Information Collection for 1029–0030 and 1029–0049

AGENCY: Office of Surface Mining Reclamation and Enforcement.

ACTION: Notice and request for comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, the Office of Surface Mining Reclamation and Enforcement (OSM) is announcing its intention to request approval for the collections of information for 30 CFR 764—State Processes for Designating Areas Unsuitable for Surface Coal Mining Operations, and 30 CFR Part 822—Special Permanent Program Performance Standards Operations in Alluvial Valley Floors.

DATES: Comments on the proposed information collection must be received by August 30, 2010 to be assured of consideration.

ADDRESSES: Comments may be mailed to John A. Trelease, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Ave., NW., Room 202—SIB, Washington, DC 20240. Comments may also be submitted electronically to *jtrelease@osmre.gov* or by fax to (202) 219–3276.

FOR FURTHER INFORMATION CONTACT: To receive a copy of the information collection requests contact John Trelease, at (202) 208–2783 or by e-mail to *jtrelease@osmre.gov.*

SUPPLEMENTARY INFORMATION: The Office of Management and Budget (OMB) regulations at 5 CFR 1320, when implementing provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104–13), require that interested members of the public and affected agencies have an opportunity to comment on information collection and recordkeeping activities [see 5 CFR 1320.8(d)]. This notice identifies information collections that OSM will be submitting to OMB for extension. These collections are contained in 30 CFR part 764 and 30 CFR part 822.

OSM has revised burden estimates, where appropriate, to reflect current reporting levels or adjustments based on reestimates of burden or respondents. OSM will request a 3-year term of approval for these information collection activities.

Comments are invited on: (1) The need for the collection of information for the performance of the functions of

the agency; (2) the accuracy of the agency's burden estimates; (3) ways to enhance the quality, utility and clarity of the information collections; and (4) ways to minimize the information collection burden on respondents, such as use of automated means of collection of the information. A summary of the public comments will accompany OSM's submissions of the information collection requests to the Office of Management and Budget (OMB).

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.

This notice provides the public with 60 days in which to comment on the following information collection activities:

Title: 30 CFR 764—State Processes for Designating Areas Unsuitable for Surface Coal Mining Operations.

OMB Control Number: 1029–0030.

Summary: This part implements the requirement of section 522 of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), Public Law 95–87, which provides authority for citizens to petition States to designate lands unsuitable for surface coal mining operations, or to terminate such designation. The regulatory authority uses the information to identify, locate, compare and evaluate the area requested to be designated as unsuitable, or terminate the designation, for surface coal mining operations.

Bureau Form Number: None.

Frequency of Collection: Once.

Description of Respondents: Individuals, groups or businesses that petition the States, and the State regulatory authorities that must process the petitions.

Total Annual Respondents: 3.

Total Annual Burden Hours: 4,920.

Total Annual Non-wage Costs: $150.

Title: 30 CFR 822—Special Permanent Program Performance Standards—Operations in Alluvial Valley Floors.

OMB Control Number: 1029–0049.

Summary: Sections 510(b)(5) and 515(b)(10)(F) of the Surface Coal Mining and Reclamation Act of 1977 (the Act) protect alluvial valley floors from the adverse effects of surface coal mining operations west of the 100th meridian. Part 822 requires the permittee to install, maintain, and operate a monitoring system in order to provide specific protection for alluvial valley floors. This information is necessary to determine whether the unique hydrologic conditions of alluvial valley floors are protected according to the Act.

Bureau Form Number: None.

Frequency of Collection: Annually.

Description of Respondents: 21 coal mining operators who operate on alluvial valley floors and the State regulatory authorities.

Total Annual Responses: 42.

Total Annual Burden Hours: 2,300.

Total Annual Non-wage Costs: $0.

Dated: June 21, 2010.

John R. Craynon,

Chief, Division of Regulatory Support.

[FR Doc. 2010–15564 Filed 6–28–10; 8:45 am]

BILLING CODE M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLWO620000.L18200000.XH0000]

Reopening the Call for Nominations for Certain Resource Advisory Councils

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The purpose of this notice is to reopen the nomination period for certain Bureau of Land Management (BLM) Resource Advisory Councils (RAC). The RACs provide advice and recommendations to the BLM on land use planning and management of the National System of Public Lands within their geographic areas.

DATES: All nominations must be received no later than July 29, 2010.

ADDRESSES: *See* "**SUPPLEMENTARY INFORMATION**" for the address of BLM offices accepting nominations.

FOR FURTHER INFORMATION CONTACT: Allison Sandoval, Bureau of Land Management, Correspondence, International, and Advisory Committee Office, 1849 C Street, NW., MS–401 LS, Washington, DC 20240; (202) 912–7434.

SUPPLEMENTARY INFORMATION: The Federal Land Policy and Management Act of 1976 (FLPMA) (43 U.S.C. 1739) directs the Secretary of the Interior (Secretary) to involve the public in planning and issues related to management of lands administered by the BLM. Section 309 of FLPMA directs the Secretary to establish 10- to 15-member citizen-based advisory councils that are consistent with the Federal Advisory Committee Act (FACA). The rules governing RACs are found at 43 CFR subpart 1784. As required by FACA, RAC membership must be balanced and representative of the various interests concerned with the management of the public lands. These include three categories:

Category One—Holders of Federal grazing permits and representatives of organizations associated with energy and mineral development, timber industry, transportation or rights-of-way, developed outdoor recreation, off-highway vehicle use, and commercial recreation;

Category Two—Representatives of nationally or regionally recognized environmental organizations, archaeological and historic organizations, dispersed recreation activities, and wild horse and burro organizations; and

Category Three—Representatives of state, county, or local elected office; representatives and employees of a state agency responsible for management of natural resources; representatives of Indian tribes within or adjacent to the area for which the council is organized; representatives of academia who are employed in natural sciences; and the public-at-large.

Individuals may nominate themselves or others. Nominees must be residents of the state in which the RAC has jurisdiction. The BLM will evaluate nominees based on their education, training, experience, and knowledge of the geographical area of the RAC. Nominees should demonstrate a commitment to collaborative resource decision-making. The Obama Administration prohibits individuals who are currently federally registered lobbyists to serve on all FACA and non-FACA boards, committees, or councils. The following must accompany all nominations:

—Letters of reference from represented interests or organizations;

—A completed background information nomination form; and

—Any other information that addresses the nominee's qualifications.

Simultaneous with this notice, BLM state offices will issue press releases providing additional information for submitting nominations, with specifics about the number and categories of member positions available for each RAC in the state. If you have already submitted your nomination materials for 2010 you will not need to resubmit. Nominations for RACs should be sent to the appropriate BLM offices listed below:

Alaska

Alaska RAC

Ruth McCoard, Alaska State Office, BLM, 222 West 7th Avenue, #13, Anchorage, Alaska 99513, (970) 271–3322;

Alternate: Pam Eldridge, (970) 271–5555.

Arizona

Arizona RAC

Deborah Stevens, Arizona State Office, BLM, One North Central Avenue, Suite 800, Phoenix, Arizona 85004, (602) 417–9215.

California

Central California RAC

David Christy, Mother Lode Field Office, BLM, 5152 Hillsdale Circle, El Dorado Hills, California 95762, (916) 941–3146.

Northeastern California RAC

Jeff Fontana, Eagle Lake Field Office, BLM, 2950 Riverside Drive, Susanville, California 96130, (530) 252–5332.

Northwestern California RAC

Jeff Fontana, Eagle Lake Field Office, BLM, 2950 Riverside Drive, Susanville, California 96130, (530) 252–5332.

Idaho

Boise District RAC

MJ Byrne, Boise District Office, BLM, 3948 Development Avenue, Boise, Idaho 83705, (208) 384–3393.

Twin Falls District RAC

Heather Tiel-Nelson, Twin Falls District Office, BLM, 2536 Kimberly Road, Twin Falls, Idaho 83301, (208) 736–2352.

Montana and Dakotas

Dakotas RAC

Lonny Bagley, North Dakota Field Office, BLM, 99 23rd Avenue West, Suite A, Dickinson, North Dakota 58601, (701) 227–7703.

Eastern Montana RAC

Mark Jacobsen, Miles City Field Office, BLM, 111 Garryowen Road, Miles City, Montana 59301, (406) 233–2800.

Nevada

Sierra-Front Northwestern Great Basin RAC

Rochelle Francisco, Nevada State Office, BLM, 1340 Financial Boulevard, Reno, Nevada 89502, (775) 861–6588.

Oregon/Washington

Eastern Washington RAC; John Day-Snake RAC; Southeast Oregon RAC

Pam Robbins, Oregon State Office, BLM, 333 SW First Avenue, P.O. Box 2965, Portland, Oregon 97204, (503) 808–6306.

Utah

Utah RAC

Sherry Foot, Utah State Office, BLM, 440 West 200 South, Suite 500, P.O. Box 45155, Salt Lake City, Utah 84101, (801) 539–4195.

Certification Statement: I hereby certify that the BLM Resource Advisory Councils are necessary and in the public interest in connection with the Secretary's responsibilities to manage the lands, resources, and facilities administered by the BLM.

Robert V. Abbey,

Director.

[FR Doc. 2010–15775 Filed 6–28–10; 8:45 am]

BILLING CODE 4310–84–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R1–ES–2010–N072; 10120–1113–0000–C2]

Endangered and Threatened Wildlife and Plants; Recovery Plan for the Prairie Species of Western Oregon and Southwestern Washington

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of document availability.

SUMMARY: We, the U.S. Fish and Wildlife Service, announce the availability of the approved Recovery Plan for the Prairie Species of Western Oregon and Southwestern Washington. The recovery plan addresses three endangered and three threatened species. This plan includes recovery objectives and criteria, and specific recovery actions necessary to achieve downlisting and delisting of the species, and their removal from the Federal List of Endangered and Threatened Wildlife and Plants. The plan also supplements the existing recovery plan for one threatened species, providing recommendations for reintroducing it to its historical range.

ADDRESSES: An electronic copy of the recovery plan is available at *http://endangered.fws.gov/recovery/index.html#plans.* Copies of the recovery plan are also available by request from the U.S. Fish and Wildlife Service, Oregon Fish and Wildlife Office, 2600 SE 98th Avenue, Suite 100, Portland, OR 97266 (phone: 503–231–6179). Printed copies of the recovery plan will be available for distribution within 4 to 6 weeks.

FOR FURTHER INFORMATION CONTACT: Cat Brown, Fish and Wildlife Biologist, at the above Portland address and telephone number.

SUPPLEMENTARY INFORMATION: We announce the availability of the approved Recovery Plan (plan) for the Prairie Species of Western Oregon and Southwestern Washington. The plan addresses three endangered and three threatened species, and includes recovery objectives and criteria, and specific recovery actions necessary to achieve downlisting and delisting of the species and their removal from the Federal List of Endangered and Threatened Wildlife and Plants. The plan also supplements the existing recovery plan for one of the included threatened species, *Castilleja levisecta,* providing recommendations for reintroducing it to its historical range in the Willamette Valley.

The recovery plan addresses the following three species listed as endangered: Fender's blue butterfly (*Icaricia icairoides fenderi*), *Erigeron decumbens* var. *decumbens* (Willamette daisy), and *Lomatium bradshawii* (Bradshaw's lomatium). The plan addresses the following three threatened species: *Lupinus sulphureus ssp. kincaidii* (Kincaid's lupine), *Sidalcea nelsoniana* (Nelson's checker-mallow), and *Castilleja levisecta* (golden paintbrush).

Background

Recovery of endangered or threatened animals and plants is the primary goal of the Endangered Species Act (Act) (16 U.S.C. 1531 *et seq.*) and our endangered species program. Recovery means improvement of the status of listed species to the point at which listing is no longer required under the criteria set out in section 4(a)(1) of the Act and its implementing regulations at 50 CFR 424. Recovery plans describe actions considered necessary for the conservation of listed species, establish criteria for downlisting or delisting species, and estimate time and cost for implementing the measures needed for recovery.

The Act requires the development of recovery plans for endangered or threatened species unless such a plan would not promote the conservation of the species. Section 4(f) of the Act requires public notice, and an opportunity for public review and comment, during recovery plan

development. From September 22, 2008, through December 22, 2008, we provided the draft Recovery Plan for the Prairie Species of Western Oregon and Southwestern Washington to the public and solicited comments (*see* **Federal Register** notices 73 FR 54603 of September 22, 2008, and 73 FR 58975 of October 8, 2008). We considered information we received during the public comment period and comments from peer reviewers in our preparation of the recovery plan, and have summarized that information in Appendix F of the approved recovery plan. We welcome continuing public comment on this recovery plan, and we will consider all substantive comments on an ongoing basis to inform the implementation of recovery activities and future updates to the recovery plan.

The native prairies of western Oregon and southwestern Washington are among the most imperiled ecosystems in the United States. Six native prairie species in the region—one butterfly and five plants—have been added to the Federal List of Endangered and Threatened Wildlife and Plants since 1988. In this recovery plan, we elucidate our recovery strategies and objectives for Fender's blue butterfly (*Icaricia icairoides fenderi*), *Erigeron decumbens var. decumbens* (Willamette daisy), *Lomatium bradshawii* (Bradshaw's lomatium), *Lupinus sulphureus* ssp. *kincaidii* (Kincaid's lupine), *Sidalcea nelsoniana* (Nelson's checker-mallow), and *Castilleja levisecta* (golden paintbrush). This plan replaces and supersedes previously approved recovery plans for *Lomatium bradshawii* and *Sidalcea nelsoniana.* It also augments, but does not replace, the existing recovery plan for *Castilleja levisecta:* this new Prairie Species Recovery Plan provides recommendations for the reintroduction of *Castilleja levisecta* into its historical range in the Willamette Valley, consistent with this species' published recovery plan. In addition to recovery strategies for the six listed species, the plan recommends conservation strategies for one candidate species, Taylor's checkerspot butterfly (*Euphydryas editha taylori*), and six plant species of concern: *Delphinium leucophaeum* (pale larkspur), *Delphinium oreganum* (Willamette Valley larkspur), *Delphinium pavonaceum* (peacock larkspur), *Horkelia congesta* ssp. *congesta* (shaggy horkelia), *Sericocarpus rigidus* (white-topped aster), and *Sisyrinchium hitchcockii* (Hitchcock's blue-eyed grass). All of the species addressed in this recovery plan are threatened by the continued degradation, loss, and fragmentation of their native prairie ecosystems.

We developed the draft recovery plan in coordination with the Western Oregon and Southwestern Washington Prairie Species Recovery Team, which includes representatives from two Department of the Interior bureaus (U.S. Fish and Wildlife Service and Bureau of Land Management), two State agencies (Washington Department of Natural Resources and Oregon Department of Transportation), the Confederated Tribes of the Grande Ronde Community of Oregon, Washington State University, and the academic and private sectors.

Our recovery strategy for the species addressed in this recovery plan is to protect remaining fragments of upland and wet prairie habitats and to restore them to fully functioning prairie ecosystems. The recovery plan calls for viable populations of the listed prairie species to be protected in a series of recovery zones distributed across their historical ranges. Recovery actions will include habitat management, restoration of historical disturbance regimes, control of noxious nonnative plants, carefully planned reintroductions, population monitoring, active research, and public involvement and outreach. The recovery actions are designed to ameliorate threats and increase population sizes of Fender's blue butterfly, *Lupinus sulphureus* ssp. *kincaidii, Erigeron decumbens* var. *decumbens, Lomatium bradshawii, Sidalcea nelsoniana,* and *Castilleja levisecta* to achieve recovery goals, which, if successful, will allow their eventual delisting (removal from the List of Endangered and Threatened Wildlife and Plants).

The widespread loss and degradation of prairie habitats in western Oregon and southwestern Washington have been responsible for the decline of many other plant and animal species associated with these communities. We believe that a holistic ecosystem-management approach to the restoration of prairie habitats will not only contribute to the recovery of the listed prairie species, but that such management will also contribute to the protection of populations of the associated prairie species of concern discussed in this plan, as well as other native prairie species.

Authority: The authority for this action is section 4(f) of the Endangered Species Act, 16 U.S.C. 1533 (f).

Dated: June 7, 2010.

Carolyn A. Bohan,

Acting Regional Director, Region 1, U.S. Fish and Wildlife Service.

[FR Doc. 2010–15766 Filed 6–28–10; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLORP00000.L10200000.PI0000; HAG10–0304]

Notice of Public Meeting, John Day/Snake Resource Advisory Council

AGENCY: Bureau of Land Management, Interior.

ACTION: Meeting notice for the John Day/Snake Resource Advisory Council.

SUMMARY: Pursuant to the Federal Land Policy and Management Act and the Federal Advisory Committee Act, the U.S. Department of the Interior, Bureau of Land Management (BLM) John Day-Snake Resource Advisory Council (JDSRAC) will meet as indicated below:

DATES: The JDSRAC meeting will begin at 8 a.m. Pacific Daylight Time on July 20, 2010.

ADDRESSES: The JDSRAC will meet at the Malheur National Forest Headquarters located on 431 Patterson Road, John Day, OR 97845–0909. For a copy of material to be discussed or the conference call number, please contact the BLM, Prineville District; information below.

SUPPLEMENTARY INFORMATION: The JDSRAC will conduct a public meeting to discuss several topics, including the John Day Basin Resource Management Plan Alternatives for Grazing Decisions, Council response to the Blue Mountain Forest Plan Revision, the response to the Wild Horse & Burro Strategy presently open to public comment, and the North End Umatilla Sheep Plan. There will also be a presentation about collaborative management practices with The Nature Conservancy. Public comment is scheduled from 1 p.m. to 1:15 p.m. (Pacific Daylight Time) July 20, 2010. For a copy of the information distributed to the JDSRAC members, please contact BLM Prineville District Office by telephone at (541) 416–6700 or at the address listed below.

FOR FURTHER INFORMATION CONTACT: Christina Lilienthal, Public Affairs Specialist, 3050 NE Third, Prineville,

OR 97754, (541) 416–6889 or e-mail: *christina_lilienthal@blm.gov.*

Deborah Henderson-Norton,

District Manager, Prineville District Office.

[FR Doc. 2010–15692 Filed 6–28–10; 8:45 am]

BILLING CODE 4310–33–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLORC00000.L58820000.AL0000. LXRSCC990000.252W; HAG 10–0308]

Meetings; Coos Bay District Resource Advisory Committee

AGENCY: Bureau of Land Management, Interior.

ACTION: Meeting Notice for the Coos Bay District Resource Advisory Committee.

SUMMARY: Pursuant to the Federal Land Policy and Management Act and the Federal Advisory Committee Act, the U.S. Department of the Interior, Bureau of Land Management (BLM) Coos Bay District Resource Advisory Committee (CBDRAC) will meet as indicated below:

DATES: The CBDRAC meeting will begin at 9 a.m. PDT on July 6, 2010.

ADDRESSES: The CBDRAC will meet at the Coos Bay BLM District Office, 1300 Airport Lane, North Bend, Oregon 97459.

FOR FURTHER INFORMATION CONTACT: Glenn Harkleroad, BLM Coos Bay Assistant Field Manager, 1300 Airport Lane, North Bend, OR 97459, (541) 751–4361, or e-mail *glenn_harkleroad@blm.gov.*

SUPPLEMENTARY INFORMATION: The meeting agenda includes opportunities for members to review and recommend projects for funding and other matters as may reasonably come before the council. The public is welcome to attend all portions of the meeting and may make oral comments to the Council at 11 a.m. on July 6, 2010. Those who verbally address the CBDRAC are asked to provide a *written* statement of their comments or presentation. Unless otherwise approved by the CBDRAC Chair, the public comment period will last no longer than 15 minutes, and each speaker may address the CBDRAC for a maximum of five minutes. If reasonable accommodation is required, please contact the BLM's Coos Bay District at (541) 756–0100 as soon as possible. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: June 23, 2010.

Mark E. Johnson,

District Manager, Coos Bay District Office.

[FR Doc. 2010–15783 Filed 6–28–10; 8:45 am]

BILLING CODE 4310–33–P

DEPARTMENT OF THE INTERIOR

National Park Service

Official Trail Marker for the Captain John Smith Chesapeake National Historic Trail

AGENCY: National Parks Service, Interior.

ACTION: Official Insignia, Designation.

Authority: National Trails System Act, 16 U.S.C. 124(a) and 1246(c) and Protection of Official Badges, insignia, etc. in 18 U.S.C. 701.

SUMMARY: This notice issues the official trail marker insignias of the Captain John Smith Chesapeake National Historic Trail. The insignia for this trail was completed in August 2008. The National Park Service has officially used an earlier version of this insignia since the trail was designated in 2006. It has been slightly redesigned since then so that lettering and framing match other National Trail system markers. The earlier design, which is still in use along the Trail, is also protected from unauthorized uses by this notice. This publication accomplishes the official designation of the insignias in use by the National Park Service.

SUPPLEMENTARY INFORMATION: The primary author of this document is John Maounis, Superintendent, Captain John Smith Chesapeake National Historic Trail. The insignias depicted below are prescribed as the official trail markers for the Captain John Smith Chesapeake National Historic Trail, administered by the National Park Service, Chesapeake Bay Office, Annapolis, Maryland. Authorization for use of these trail markers is controlled by the administrator of the Trail.

In making this prescription, notice is hereby given that whoever manufactures, sells or possesses these insignias or any colorable imitation thereof, or photographs or prints or in any other manner makes or executes any engraving, photograph or print, or impression in the likeness of these insignias, or any colorable imitation thereof, without written authorization from the United States Department of the Interior is subject to the penalty provisions of section 701 of Title 18 of the United States Code.

FOR FURTHER INFORMATION CONTACT: John Maounis, Captain John Smith Chesapeake National Historic Trail, National Park Service, 410 Severn Avenue, Suite 314, Annapolis, MD 21403, 410–260–2473.

Dated: May 13, 2010.

John Maounis,

Superintendent, Captain John Smith Chesapeake National Historic Trail.

[FR Doc. 2010–15725 Filed 6–28–10; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE INTERIOR

National Park Service

Official Trail Marker for the Star-Spangled Banner National Historic Trail

AGENCY: National Parks Service, Interior.

ACTION: Official Insignia, Designation.

Authority: National Trails System Act, 16 U.S.C. 124(a) and 1246(c) and Protection of Official Badges, insignia, etc. in 18 U.S.C. 701.

SUMMARY: This notice issues the official trail marker insignia of the Star-Spangled Banner National Historic Trail. The insignia for this trail was completed in August 2008 after the Trail was designated. It first came into public use in 2008. The National Park Service uses this insignia to mark the Trail's route. This publication accomplishes the official designation of the insignia in use by the National Park Service.

SUPPLEMENTARY INFORMATION: The primary author of this document is John Maounis, Superintendent, Star-Spangled Banner National Historic Trail. The insignia depicted below is prescribed as the official trail marker for the Star-Spangled Banner National Historic Trail, administered by the National Park Service, Chesapeake Bay Office, Annapolis, Maryland. Authorization for use of this trail marker is controlled by the administrator of the Trail.

In making this prescription, notice is hereby given that whoever manufactures, sells or possesses these insignia or any colorable imitation thereof, or photographs or prints or in any other manner makes or executes any engraving, photograph or print, or impression in the likeness of this insignia, or any colorable imitation thereof, without written authorization from the United States Department of the Interior is subject to the penalty provisions of section 701 of Title 18 of the United States Code.

FOR FURTHER INFORMATION CONTACT: John Maounis, Star-Spangled Banner National Historic Trail, National Park Service, 410 Severn Avenue, Suite 314, Annapolis, MD 21403, 410–260–2473.

Dated: May 13, 2010.

John Maounis,

Superintendent, Star-Spangled Banner National Historic Trail.

[FR Doc. 2010–15727 Filed 6–28–10; 8:45 am]

BILLING CODE P

INTERNATIONAL TRADE COMMISSION

[USITC SE–10–023]

Government in the Sunshine Act Meeting Notice

AGENCY HOLDING THE MEETING: United States International Trade Commission.

TIME AND DATE: July 1, 2010 at 10 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. Nos. 701–TA–466 and 731–TA–1162 (Final)(Wire Decking from China)—briefing and vote. (The Commission is currently scheduled to transmit its determinations and Commissioners' opinions to the Secretary of Commerce on or before July 26, 2010.)
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: June 24, 2010.

William R. Bishop,

Hearings and Meetings Coordinator.

[FR Doc. 2010–15804 Filed 6–25–10; 11:15 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–337N]

Dispensing of Controlled Substances to Residents at Long Term Care Facilities

AGENCY: Drug Enforcement Administration (DEA), Department of Justice.

ACTION: Notice; solicitation of information.

SUMMARY: To analyze ongoing issues related to the dispensing of controlled substances to residents residing at long term care facilities (LTCFs), DEA is soliciting information on this subject from practitioners, pharmacists, LTCFs, nurses, residents and family of residents in long term care facilities, State regulatory agencies, and other interested members of the public. Specifically, DEA is exploring whether—while adhering to the framework of the Controlled Substances Act—any further revisions to the DEA regulations are feasible and warranted toward the goal of making it easier for residents of LTCFs to receive controlled substance medications. This notice recites the pertinent statutory considerations and contains a series of questions designed to elicit public comment that will assist DEA in making this evaluation.

DATES: Written comments must be postmarked and electronic comments must be submitted on or before August 30, 2010. Commenters should be aware that the electronic Federal Docket Management System will not accept comments after midnight Eastern Time on the last day of the comment period.

ADDRESSES: To ensure proper handling of comments, please reference "Docket No. DEA–337" on all written and electronic correspondence. Written comments being sent via regular or express mail should be sent to the Drug Enforcement Administration, Attention: DEA Federal Register Representative/ODL, 8701 Morrissette Drive, Springfield, VA 22152. Comments may be sent to DEA by sending an electronic message to *dea.diversion.policy@usdoj.gov.* DEA will accept attachments to electronic comments in Microsoft Word, WordPerfect, Adobe PDF, or Excel file formats only. DEA will not accept any file formats other than those specifically listed here.

Please note that DEA is requesting that electronic comments be submitted before midnight Eastern Time on the day the comment period closes because *http://www.regulations.gov* terminates the public's ability to submit comments at midnight Eastern Time on the day the comment period closes. Commenters in time zones other than Eastern Time may want to consider this so that their electronic comments are received. All comments sent via regular or express mail will be considered timely if postmarked on the day the comment period closes.

FOR FURTHER INFORMATION CONTACT: Mark W. Caverly, Chief, Liaison and Policy Section, Office of Diversion Control, Drug Enforcement Administration, 8701 Morrissette Drive, Springfield, VA 22152; telephone: (202) 307–7297.

SUPPLEMENTARY INFORMATION:

Posting of Public Comments: Please note that all comments received are considered part of the public record and made available for public inspection online at *http://www.regulations.gov* and in the Drug Enforcement Administration's public docket. Such information includes personal identifying information (such as your name, address, *etc.*) voluntarily submitted by the commenter.

If you want to submit personal identifying information (such as your name, address, *etc.*) as part of your comment, but do not want it to be posted online or made available in the public docket, you must include the phrase "PERSONAL IDENTIFYING INFORMATION" in the first paragraph of your comment. You must also place all the personal identifying information you do not want posted online or made available in the public docket in the first paragraph of your comment and identify what information you want redacted.

If you want to submit confidential business information as part of your comment, but do not want it to be posted online or made available in the public docket, you must include the phrase "CONFIDENTIAL BUSINESS INFORMATION" in the first paragraph of your comment. You must also prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted online or made available in the public docket.

Personal identifying information and confidential business information identified and located as set forth above will be redacted and the comment, in redacted form, will be posted online and placed in the Drug Enforcement Administration's public docket file. Please note that the Freedom of Information Act applies to all comments received. If you wish to inspect the agency's public docket file in person by appointment, please *see* the **FOR FURTHER INFORMATION CONTACT** paragraph.

Background

In enacting the Controlled Substances Act (CSA) in 1970, Congress recognized at the outset of the Act that while "[m]any of the drugs included with [the Act] have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people, * * * [t]he illegal * * * distribution, and possession and improper use of controlled substances have a substantial and detrimental impact on the health and general welfare of the American people." 21 U.S.C. 801. To minimize the likelihood that pharmaceutical controlled substances would be diverted into illicit channels, Congress established under the CSA a "closed system of drug distribution" for legitimate handlers of controlled substances. This system is comprised of a series of statutory provisions designed to ensure that all persons in the legitimate distribution chain are registered and keep records with respect to all transfers of controlled substances. Another key element of the CSA regulatory scheme is the requirement (first established under Federal law in 1914) that controlled substances only be dispensed for a legitimate medical purpose by DEA-registered practitioners acting in the usual course of their professional practice.

As the agency responsible for enforcing the CSA and administering the regulatory provisions of the Act, DEA has continually sought to reevaluate the regulations within the statutory framework. That is, any DEA regulation must maintain the statutory requirements of the CSA. Also, whenever DEA is evaluating whether to revise the regulations, the agency must take into account the dual aims of facilitating the delivery of controlled substance medications to patients for legitimate medical purposes and safeguarding against the diversion of these drugs into illicit channels.

Controlled Substances

DEA regulates controlled substances which account for between 10 percent and 11 percent of all prescriptions written in the United States. Controlled substances are drugs and other substances that have a potential for abuse and psychological and physical dependence; these include opioids, stimulants, depressants, hallucinogens, anabolic steroids, and drugs that are immediate precursors of these classes of substances. The CSA and implementing regulations at 21 CFR 1308 list controlled substances and place them in five schedules based on whether they have an accepted medical use in the United States and their relative abuse potential and likelihood of causing dependence when abused. The degree of restriction under the CSA depends upon the schedule of a given controlled substance. The intent of the statute and regulations is to protect the public health and safety by ensuring that there is a sufficient supply of controlled

substances for medical, scientific, and other legitimate purposes while preventing and deterring the diversion of controlled substances to illegal purposes.

Schedule I substances have a high potential for abuse and have no accepted medical use in treatment in the United States. 21 U.S.C. 812(b)(1). These substances may only be used for research, chemical analysis, or manufacture of other drugs. Schedule II controlled substances have accepted medical use in treatment in the United States while having a high potential for abuse and having the greatest potential for physical and psychological dependence of the FDA-approved pharmaceutical controlled substances. 21 U.S.C. 812(b)(2). For this reason, Schedule II controlled substances are subject to the highest levels of controls among FDA-approved controlled substances. Examples of schedule II narcotics include morphine, codeine, and opium. Some common brand names include hydromorphone (Dilaudid®), methadone (Dolophine®), meperidine (Demerol®), oxycodone (OxyContin®), and fentanyl (Sublimaze® or Duragesic®). Schedule II narcotics are commonly prescribed for the treatment of moderate to severe pain.

Controlled substances in Schedules III–V have an accepted medical use in the United States and have a lower dependence and abuse potential than Schedule II substances. 21 U.S.C. 812(b)(3), (4), (5). Thus, the statutory and regulatory restrictions on Schedule III–V substances, while significant, are not as extensive as those for Schedule II substances. Examples of schedule III narcotics include combination products containing less than 15 milligrams of hydrocodone per dosage unit (Vicodin®, Lorcet®, and Lortab®) and products containing not more than 90 milligrams of codeine per dosage unit (i.e., Tylenol with codeine®). Schedule III narcotics are commonly prescribed for moderate pain. Substances in this schedule have a lower potential for abuse relative to substances in Schedule II.

Examples of Schedule IV substances include propoxyphene (Darvon® and Darvocet-N 100®), alprazolam (Xanax®), clonazepam (Klonopin®), and triazolam (Halcion®). Examples of Schedule V substances are cough preparations containing not more than 200 milligrams of codeine per 100 milliliters or per 100 grams (Robitussin AC®, and Phenergan with Codeine®).

Long Term Care Facilities

With specific regard to nursing homes and other Long Term Care Facilities (LTCFs), DEA has made a number of revisions to the regulations over the years to make it easier for residents of these facilities to receive controlled substance medications, including the following:

- For schedule II controlled substances, a practitioner or a practitioner's agent may fax to a pharmacy a prescription written by the practitioner for a LTCF resident. 21 CFR 1306.11(f). This accommodation obviates the need to physically deliver a hard copy of the original written prescription to the pharmacy. It should be noted that allowance for faxing prescriptions for schedule II controlled substances is not permissible as a general rule in non-LTCF settings.
- Pharmacies may install at a LTCF (but in no other setting) an automated dispensing system (ADS). 21 CFR 1301.27. As with all dispensing of controlled substances by pharmacies, such dispensing must still be pursuant to valid prescription, but these machines can alleviate certain burdens in the LTCF setting by placing the supply of controlled substances directly on site for convenient dispensing to a resident. Once a pharmacy receives a valid prescription issued by the practitioner, the pharmacy initiates the release of the prescribed drugs from the automated dispensing system at the LTCF by remotely entering a code. Thereafter, a practitioner or authorized nurse at the LTCF enters another code that completes release of the drugs from the machine. In this manner, pharmacies may, in their discretion, dispense small amounts of the drugs (*e.g.,* daily doses) rather than the entire amount indicated on the prescription at one time. The automated dispensing systems may be used in both emergency and nonemergency situations. The automated dispensing systems thereby provide at least two benefits: (1) They allow for immediate dispensing of controlled substances in emergency situations and (2) they help to prevent accumulation of unused medications at the LTCF.
- The regulations make a special allowance in the LTCF setting for partial filling by pharmacists of prescriptions for schedule II controlled substances. 21 CFR 1306.13(b). Under this provision, where the patient is a resident of a LTCF (or is terminally ill), such partial filling may occur as long as the amount dispensed does not exceed the total prescribed and occurs within 60 days of the date that the prescription was written. This lessens the extent to which LTCFs accumulate unused controlled substances.
- Although the CSA prohibits the refilling of prescriptions for schedule II controlled substances (21 U.S.C. 829(a)), DEA has issued a regulation that allows practitioners to issue multiple sequential prescriptions authorizing a patient to receive up to a 90-day supply for these substances. 21 CFR 1306.12. This accommodation applies to all practitioners, not just those with patients in LTCFs, but it can be particularly useful in the LTCF setting where physicians sometimes visit the residents only once every 30 or 60 days.
- To facilitate the dispensing of controlled substances in emergencies, DEA has allowed pharmacies to place in LTCFs "emergency kits" that are routinely stocked with commonly dispensed controlled substances (45 FR 24128, April 9, 1980). These kits are considered extensions of the pharmacy and are controlled under the pharmacy's DEA registration. Again, the same requirement of a valid prescription delivered to the pharmacy prior to dispensing applies with respect to these kits; however, they provide an immediate supply of the drugs in emergencies and eliminate the need to wait for a delivery from the pharmacy in such circumstances.

DEA is continuing to evaluate whether further regulatory changes are warranted for the LTCF setting and is seeking public comment on this topic. As indicated, the dispensing of controlled substances to residents of LTCFs—as with the dispensing of controlled substances to patients in any other setting—must take place in accordance with the CSA. Thus, in order to consider what types of controlled substance dispensing practices might be permissible in a LTCF setting, and whether any revisions to the DEA regulations might be warranted to accommodate such practices, the provisions of the CSA governing the dispensing of controlled substances must be considered. The following is a brief summary of these provisions, which have remained consistent since the enactment of the CSA in 1970.

The registration requirement—As set forth in 21 U.S.C. 822(a), every person who dispenses any controlled substance must obtain a DEA registration issued in accordance with the agency regulations. The regulations governing registration are set forth in 21 CFR Part 1301. Persons registered with DEA are authorized to dispense controlled substances only to the extent authorized by their registration and in conformity with the CSA. 21 U.S.C. 822(b). In addition, to be eligible under the CSA to obtain a registration to dispense controlled substances, a practitioner—which could be an individual (such as

a physician), an institution (such as a hospital), or a pharmacy—must be licensed or otherwise authorized to dispense controlled substances under the laws of the State in which the practitioner practices. 21 U.S.C. 802(21), 823(f), 824(a)(3).

The recordkeeping requirement—As set forth in 21 U.S.C. 827(a), every registrant authorized to dispense controlled substances must maintain, on a current basis, a complete and accurate record of each such substance dispensed.

The prescription requirement—The requirement of a prescription is set forth in 21 U.S.C. 829. For schedule II controlled substances, this provision states, in pertinent part:

> Except when dispensed directly by a practitioner, other than a pharmacist, to an ultimate user, no controlled substance in schedule II, which is a prescription drug * * *, may be dispensed without the written prescription of a practitioner, except that in emergency situations * * *, such drug may be dispensed upon oral prescription in accordance with [21 U.S.C. 353(b)].

21 U.S.C. 829(a).

For schedule III and IV controlled substances, the pertinent part of the statute states:

> Except when dispensed directly by a practitioner, other than a pharmacist, to an ultimate user, no controlled substance in schedule III or IV, which is a prescription drug * * * may be dispensed without a written or oral prescription in conformity with [21 U.S.C. 353(b)].

21 U.S.C. 829(b).

Prescriptions are required to contain specific information including: patient name and address; drug name, strength, dosage form, quantity prescribed, directions for use; and name, address, and DEA number of the issuing practitioner. 21 CFR 1306.05(a). All prescriptions for controlled substances must be dated as of, and signed on, the day when issued.

Two aspects of these statutory provisions bear emphasis here. First, in those situations in which a controlled substance is *not* dispensed directly by a practitioner (*e.g.,* it is dispensed by a pharmacy), the dispensing must be pursuant to a prescription issued by a practitioner. Second, the prescription must be issued in writing by the practitioner if the drug is a schedule II controlled substance (except in an emergency, in which an oral prescription issued by the practitioner is permitted); whereas the prescription may be issued in writing or orally by the practitioner if the drug is a schedule III or IV controlled substance.

The requirement of a legitimate medical purpose in the usual course of professional practice—As the United States Supreme Court explained in *United States* v. *Moore,* 423 U.S. 122, 136–138 (1975), implicit in the CSA is the requirement that every prescription for a controlled substance must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice. As the Supreme Court stated in *Moore, id.,* this implicit requirement of the CSA is made explicit in a provision of the DEA regulations, 21 CFR 1306.04(a), which states:

> A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice. The responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner, but a corresponding responsibility rests with the pharmacist who fills the prescription. An order purporting to be a prescription issued not in the usual course of professional treatment or in legitimate and authorized research is not a prescription within the meaning and intent of [21 U.S.C. 829] and the person knowingly filling such a purported prescription, as well as the person issuing it, shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances.

The *Moore* decision also makes clear that, under the CSA, the requirement of a legitimate medical purpose in the usual course of professional practice is tied to the concept of registration. The Supreme Court stated, with respect to the prescribing and dispensing of controlled substances, "only the lawful acts of *registrants* are exempted" from the CSA's general prohibition on dispensing controlled substances. *Id.* at 131 (emphasis added). Further, the Court stated that the CSA was intended "to limit a registered physician's dispensing authority to the course of his 'professional practice' " and that the registration of a practitioner "is limited to the dispensing and use of drugs 'in the course of professional practice * * *.' " *Id.* at 140–141.

The foregoing aspects of the CSA, viewed collectively, can be reiterated as setting forth the following principles:

- To lawfully dispense a controlled substance to a patient, the dispenser must be in one of the following two categories: (1) A practitioner authorized to dispense controlled substances directly to patients (such as a physician or a hospital) or (2) a pharmacy or other entity authorized to dispense controlled substances pursuant to a prescription issued by a practitioner.
- For either of the foregoing two categories of dispensers, the dispenser must be licensed or otherwise authorized under State law to engage in such activity and also have a DEA registration authorizing such activity.
- Because controlled substances may only be dispensed for a legitimate medical purpose by a practitioner acting in the usual course of professional practice, and only a DEA-registered practitioner may make the determination there is such a legitimate medical purpose for a given instance of dispensing, a DEA registrant may *not* delegate to a subordinate the medical decision making that must underlie each instance of dispensing.

Accordingly, to be consistent with the CSA, any type of arrangement under which controlled substances would be dispensed to patients who reside in LTCFs must adhere to the foregoing principles.

Note Regarding Electronic Prescribing of Controlled Substances

DEA revised its regulations effective June 1, 2010 to provide practitioners with the option of writing prescriptions for controlled substances electronically. 75 FR 16236, March 31, 2010. The regulations also permit pharmacies to receive, dispense, and archive these electronic prescriptions. This rule provides another tool for practitioners to use when prescribing a controlled substance for their patients, including those who reside in a LTCF. This rule allows a practitioner to use a computer, laptop or personal digital assistant (PDA) to send a prescription to a pharmacy from a remote location instantaneously. The basic framework of the CSA outlined above remains in effect with respect to the issuance of electronic prescriptions.

Note Regarding Authority of Agents of Individual Practitioners

While a prescription for a controlled substance must always be issued by a DEA-registered practitioner (rather than the agent of a practitioner), an agent may, under certain circumstances, be involved in the transmission of the prescription to the pharmacy. The general statutory requirements, as implemented through regulations, are described below.

The CSA provides that—except in emergency situations—a controlled substance in schedule II may only be dispensed by a pharmacy pursuant to a written prescription signed by a practitioner. 21 U.S.C. 829(a). The written prescription generally must be directly, physically provided to the pharmacist.[1] Where the patient is a

[1] As stated above, DEA has recently issued regulations allowing for the electronic prescribing

resident of a LTCF, and the drug being dispensed is a schedule II controlled substance, the DEA regulations permit an individual practitioner, or his agent where a valid agency relationship exists, to transmit by facsimile to the pharmacy a written prescription that has been issued and signed by the practitioner. 21 CFR 1306.11(f).

As indicated, the CSA contains an exception that allows practitioners to issue oral prescriptions for schedule II controlled substances in an emergency. 21 U.S.C. 829(a). In this context, Congress assigned to the Secretary of HHS, in consultation with the Attorney General, responsibility for defining the term "emergency" by regulation. The Secretary delegated this responsibility to the Food and Drug Administration, which set forth the definition of "emergency" in 21 CFR 290.10. Assuming the situation constitutes a bona fide emergency within the meaning of the FDA regulation, and a practitioner determines that such emergency warrants the dispensing of a schedule II controlled substance, a pharmacy may dispense the medication upon receiving oral authorization from the practitioner in accordance with 21 CFR 1306.11(d). That regulation requires, among other things, that the quantity prescribed and dispensed be limited to the amount adequate to treat the patient during the emergency period, and that the practitioner follow up within 7 days with a written prescription to the dispensing pharmacy. 21 CFR 1306.11(d). The regulation further requires the pharmacy to make a reasonable effort to determine that the oral authorization came from the practitioner, which may include a callback to the practitioner using his phone number as listed in the telephone directory.

For controlled substances in schedules III–V, the CSA provides that a pharmacy may dispense pursuant to a "written or oral prescription." 21 U.S.C. 829(b). Where an oral prescription is permitted by the CSA, the DEA regulations also provide that a practitioner may transmit to the pharmacy a facsimile of a written, manually signed prescription in lieu of an oral prescription. 21 CFR 1306.21(a). As a result, a prescription issued by a practitioner for substance in schedules III–V may be transmitted to a pharmacy in the following ways: (1) By delivery to the pharmacy of the original, written prescription signed by the practitioner; (2) by the practitioner or his agent (where a valid agency relationship exists) faxing the written prescription signed by the practitioner; or (3) by the practitioner or his agent (where a valid agency relationship exists) orally transmitting the prescription to a pharmacy, where it is promptly reduced to writing by the pharmacist prior to dispensing. 21 CFR 1306.21(a) and 1306.03(b).

As previously discussed, the CSA does not permit the prescribing practitioner to delegate to an agent or any other person the practitioner's authority to issue a prescription for a controlled substance. Thus, the determination of a legitimate medical purpose must be made by the practitioner acting in the usual course of their professional practice; the determination may not be made by the agent. Likewise, the required elements of the prescription (set forth in 21 CFR Part 1306) must be specified by the prescribing practitioner—not the agent. The pharmacist who fills a prescription for a controlled substance has a corresponding responsibility to ensure that these requirements have been met. 21 CFR 1306.04(a), 1306.05(a).

Other Considerations Regarding State Licensure

As indicated, to be eligible for a DEA registration, a practitioner must be licensed or otherwise authorized by the State in which he practices to carry out the specific activity for which he seeks a registration. This typically entails a determination by the applicable State regulatory body that the practitioner meets certain qualifications. For example, to practice medicine, States generally require that a physician obtain a medical license issued by the State medical board, which typically requires the physician to demonstrate the completion of certain education and training, to pass an examination demonstrating competency to practice medicine, and to undergo a background check to verify professional competence, ethics, and character. To operate a hospital, States generally require, at a minimum, that the facility obtain a license from the State public health department, which typically requires the facility to demonstrate that it has appropriate levels of qualified healthcare professional staff (physicians, nurses, *etc.*) and facilities to provide a proper standard of hospital service to the community. As part of the licensure process, States may also require that the hospital demonstrate specific qualifications to provide particular types of services. In addition, some States may require hospitals to obtain accreditation and/or certification from public and private agencies. To operate a pharmacy, States generally require the pharmacy to obtain a license from the State board of pharmacy, which also typically requires a showing of properly qualified staff and facilities.

Thus, by requiring practitioners to obtain a State license or other State authorization as a prerequisite to obtaining a DEA registration, the CSA ensures that controlled substances are only dispensed by those persons who have appropriate professional qualifications and who follow professional standards.

Accordingly, to remain consistent with the CSA, if a LTCF were to be eligible to obtain a DEA registration, it would need to have the requisite State license or other State authorization that is commensurate with the extent of the qualifications of its staff and with its ability to adhere to applicable professional standards for dispensing controlled substances to patients.

Distinctions Between LTCFs and Hospitals

An important distinction between LTCFs and hospitals is that States authorize hospitals to have independent controlled substances authority and accordingly hospitals may register with DEA. This means, among other things, that hospitals are authorized to maintain common stocks of controlled substances for immediate dispensing or administration pursuant to a practitioner's medication order and are subject to DEA regulatory oversight and inspection. LTCFs, on the other hand, typically have no independent State controlled substances authority and accordingly are not eligible to become DEA registrants, as explained above. This means they may not maintain common stocks of controlled substances. Therefore, any prescribed controlled substance medication in a LTCF is deemed, for CSA purposes, to be possessed by the resident and not the facility. A further consequence of their lack of DEA registration is that LTCFs are not subject to direct DEA regulatory oversight and inspection, security and recordkeeping requirements, or administrative action (suspension or revocation of registration).

There are a variety of reasons that States may currently treat LTCFs differently than hospitals. For example, although LTCFs provide care for residents, the nature of their practice is not the same as that of a hospital. LTCF

of controlled substances. Where a practitioner issues an electronic prescription in accordance with these regulations, such a prescription constitutes a written prescription within the meaning of the CSA. When such an electronic prescription is used, the prescription information is conveyed electronically from the practitioner to the pharmacy, rather than through the delivery to the pharmacy of a hard copy of the prescription that was signed by the practitioner.

residents typically reside in these facilities for long periods of time and have health issues and disorders that require long-term medical attention. Generally, they do not receive daily care from an on-site physician; and, indeed, many facilities do not employ a physician as part of their staff 24 hours a day. Likewise, the extent to which registered nurses (rather than licensed practical nurses or nursing assistants) are involved in resident care is generally less in LTCFs than in hospitals. Also, in contrast to the length of stays of residents of LTCFs, patients in hospitals are typically there for short periods of time and are regularly monitored by their attending physician or hospital staff physicians.

Note Regarding Chart Orders

As explained above, because a DEA-registered hospital is a "practitioner" within the meaning of the CSA, it is permissible under the Act for such a hospital to dispense controlled substances directly to patients without a prescription. 21 U.S.C. 829(a), (b). Because of this, in a hospital setting, a hospital may dispense a controlled substance, for immediate administration to a patient, pursuant to an order for medication made by a physician (or other individual practitioner) who is an employee or agent of the hospital. 21 CFR 1306.11(c). This may occur, for example, through the issuance of a "chart order" by a hospital physician. In this context, the term "chart order" should be distinguished from the term "prescription." A prescription—unlike a chart order—must contain all the information specified in 21 CFR 1306.05 (including, among other things, the signature of the physician).[2]

It bears emphasis that regardless of whether the controlled substance is dispensed by a pharmacy pursuant to a prescription or hospital pursuant to a chart order, the person who issues the prescription or order must be authorized under the CSA to make the medical determination, while acting in the usual course of professional practice, that there is a legitimate medical purpose for the drugs to be dispensed to the patient. The CSA ensures this condition is satisfied by allowing only those practitioners who have obtained the requisite State licensure and DEA registration to make such medical determination and issue the corresponding prescription or chart order. Another point worth noting is that, in the hospital setting, where a physician issues a chart order for a controlled substance, the physician, as well as the nursing staff and hospital pharmacy staff who take certain steps in carrying out the order, are all acting as employees or agents of the DEA-registered hospital and thus are collectively viewed as the "practitioner" within the meaning of the CSA. The physician who issues the chart order is doing so under the hospital's DEA registration number in accordance with the requirements of 21 CFR 1301.22(c). The hospital is, therefore, responsible for ensuring that all such persons are acting in accordance with the CSA and DEA regulations, and any failure to do so may result in criminal or civil liability on the part of the hospital or loss of the hospital's DEA registration. These legal consequences are part of the fabric of the CSA that promotes compliance with the Act.

As indicated, most LTCFs are not licensed by the State as hospitals or other practitioners authorized to dispense controlled substances directly to patients, and thus they are not eligible under the CSA for registration as practitioners.

Other Federal Regulations Governing Long Term Care Facilities

For purposes of the CSA, DEA defines the term "long term care facility" (LTCF) as "a nursing home, retirement care, mental care, or other facility or institution which provides extended health care to resident patients." 21 CFR 1300.01(b)(25). The Secretary of Health and Human Services (HHS) applies more specific definitions for purposes of defining facilities eligible to participate in Medicare and Medicaid. 42 CFR 483.5.

HHS establishes requirements deemed necessary for the health and safety of individuals to whom services are furnished in nursing facilities participating in Medicare and Medicaid. 42 CFR 483.1. For example, basic resident rights and obligations are outlined along with certain basic responsibilities of the facility. Some of these responsibilities include facility organization such as requiring a medical director (42 CFR 483.5(b)(2)(iii)) and maintaining a quality assessment and assurance committee consisting of a physician, the director of nursing services and three others. 42 CFR 483.75(o). The facility must operate and provide services in compliance with all applicable Federal, State and local laws and professional standards. 42 CFR 483.75(b).

Other HHS requirements for LTCFs establish a level of care. For example, the facility must perform periodic assessments of a resident's needs (42 CFR 483.20(b), (c)) and must establish and follow nursing services standards. 42 CFR 483.30. Among requirements for physician care are:

- The facility must have physician orders for the resident's immediate care at the time each resident is admitted. 42 CFR 483.20(a).
- Each resident must remain under the care of a physician and there must be physician supervision when their attending physician is unavailable. 42 CFR 483.40(a).
- The facility must provide or arrange for the provision of physician services 24 hours a day, in case of an emergency. 42 CFR 483.40(d).
- The facility must provide or obtain laboratory services only when ordered by the attending physician. 42 CFR 483.75(j)(2)(i).
- A physician may not delegate a task when the regulations specify that the physician must perform it personally, or when the delegation is prohibited under State law or by the facility's own policies. 42 CFR 483.40(e)(2).

A few of the requirements with respect to medications are that:

- The facility must employ or obtain the services of a licensed pharmacist to establish a system of records of receipt and disposition of all controlled drugs and, among other responsibilities, to review the drug regimen of each resident at least monthly. 42 CFR 483.60(b), (c).
- The facility must establish minimal requirements for quality of care, including that a resident's drug regimen must be free from unnecessary drugs as defined in 42 CFR 483.25(l).
- The facility must also provide separately locked, permanently affixed compartments for storage of controlled drugs listed in Schedule II and other drugs subject to abuse unless the facility uses single unit package drug distribution systems in which the quantity stored is minimal and a missing dose can be readily detected. 42 CFR 483.60(e)(2).
- Among the standards required for the provision of hospice-related inpatient care in a participating Medicare/Medicaid facility is the hospice's responsibility to provide "drugs necessary for the palliation of pain and symptoms associated with the terminal illness and related conditions." 42 CFR 418.112(c)(6).

As an element of certification and enforcement, HHS utilizes different

[2] If a physician wrote all the elements of a prescription specified in 21 CFR 1306.05(a) on a patient's chart, including the signature on the date when issued, this would be considered a valid "prescription" within the meaning of the CSA and DEA regulations, and such document containing all the required elements could be delivered to a pharmacy for dispensing in accordance with 21 U.S.C. 829.

"surveys" of a given facility. These various surveys gather periodic, resident-centered information about the quality of service furnished in a facility to determine compliance with the requirements for participation in Medicare and Medicaid. 42 CFR 488.301.

Solicitation of Information

Within the foregoing statutory framework, DEA is hereby seeking input from interested members of the public regarding the types of lawful controlled substance dispensing practices currently taking place in the LTCF setting or which might take place if appropriate amendments to the DEA regulations were issued that comported with the CSA. Along similar lines, DEA is seeking comment on the types of controlled substance licensing authorities that States currently provide to LTCFs, or which States might be willing to provide in the future. To facilitate the gathering of relevant information, DEA has specific questions that appear below. These questions are separated into general issues. Commenters are encouraged to reference the question number enumerated below in their response.

A. Definitions

The terminology used to describe and classify facilities that DEA considers to be LTCFs varies between agencies and from State to State.

1. The definitions of facilities for Medicare reimbursement purposes are different in many respects from the terms used in DEA regulations. The DEA regulations define a LTCF as "a nursing home, retirement care, mental care or other facility or institution which provides extended health care to resident patients." How do State regulators/licensing authorities define facilities that DEA would consider LTCFs?

2. Are all LTCFs Medicare/Medicaid facilities? If not, what differentiates a facility that is not a Medicare/Medicaid facility from one that is?

3. What does the term "prescription" mean as used in a LTCF?

4. What does the term "chart order" mean as used in a LTCF?

5. What does the term "standing order" mean as used in a LTCF?

B. Scope

6. For how many residents does your LTCF provide care? Of those, what percentage require controlled substance medications?

7. Approximately what percentage of those residents requiring controlled substance medications receive such medications on a daily basis? Further, of those who receive controlled substances on a daily basis, what percentage receive Schedule II controlled substances?

8. When a person comes to a LTCF, does the person bring their own already-dispensed medications?

9. What, if any, State requirements impact a person's ability to bring medication into a LTCF?

10. If a person arrives at the facility without any medication information, how does the facility obtain any needed medications?

11. If a person is moving from an acute care facility to a LTCF, what factors impact the acute care practitioner's ability and willingness to provide written prescriptions to the person?

12. If a person arrives at a facility without medication and without prescriptions, what steps does the facility take to assess the person's medication needs?

13. What are the current practices for obtaining controlled substance prescriptions for residents at a LTCF? How do these practices differ between Schedule II controlled substances and Schedule III–V controlled substances? How do these practices differ between an emergency situation and a non-emergency situation?

14. What types of emergency situations arise at a LTCF that would necessitate the use of controlled substances?

15. What are the standard operating procedures to address emergencies? What are the procedures in a LTCF for obtaining controlled substance medications for residents in an emergency situation? Is the process different for Schedule II as opposed to Schedule III–V controlled substances?

16. Has your facility experienced delays in obtaining controlled substance medications for residents? If so, why have these delays occurred? At what steps in the prescribing process have these delays occurred? Please specify whether the delay was with a Schedule II controlled substance or with a substance in Schedule III through V.

17. Have any residents at your facility experienced problems caused by delays in obtaining prescriptions for controlled substances? If so, what was the reason for the delay? How often have such problems occurred? Did the delays occur with Schedule II controlled substances or with substances in Schedule III through V?

18. Does your facility send residents to the hospital to receive controlled substance medications because they were unable to receive the medications at your facility in a timely manner? If so, how many times did this occur in the last 12 months?

C. Communication

19. How often are practitioners contacted by LTCFs regarding requests for changes in residents' medications generally? How often does this occur for controlled substance prescriptions specifically?

20. How does communication currently occur among the practitioner, the LTCF and the pharmacy, *e.g.* phone, fax, other? Do you expect the new DEA regulations providing the option of electronic prescriptions will be used by practitioners and pharmacies in your LTCF setting? If so, do you anticipate that the use of electronic prescriptions will alleviate delays you may have experienced in providing controlled substances to residents?

21. Does the LTCF or practitioner communicate other information to the pharmacy, such as changes in the resident's practitioner or the change in status of a resident?

22. Would practitioners have any interest in designating certain persons at LTCFs as their agents solely for the purpose of communicating controlled substance prescription information to the pharmacy, understanding that the agent would be working under the prescriber's DEA registration and that the prescriber would be responsible for the agent's actions, which must be consistent with the CSA?

D. Pharmacy Service

23. Would your LTCF be amenable to having a pharmacy on site as an integral element of the LTCF? If so, would you seek to have the pharmacy operate under a registration granted to the LTCF or operate independently at the LTCF under its own pharmacy registration?

24. Does your State allow pharmacies to install and operate automated dispensing systems at LTCFs? If not, is your State considering allowing them to do so?

E. Chart Orders

Additional information about the current use of chart orders for other than controlled substances would be helpful.

25. In current practice, when must a practitioner acknowledge a chart order by signing it? Do State laws/regulations, HHS regulations, or other standards (*e.g.* Joint Commission) define the time period within which the practitioner must sign the chart order for any care setting (hospital, clinic, or LTCF)?

26. Currently, are chart orders (in hospitals or in LTCFs for non-controlled substances) required to have an

"expiration" date, at which time they must be either reauthorized or closed? LTCFs differ from hospitals in that residents in LTCFs by definition stay for a longer period. Because of this, should chart orders in LTCFs "expire" at some time after issuance? If so, what time period would be appropriate?

27. If certain persons at the LTCF were designated to act as agents of individual practitioners (to the extent authorized by the CSA) to communicate controlled substance information from the individual practitioner to the pharmacy, how would this change current practices at your facility for obtaining controlled substance medications for residents? What safeguards should be required?

F. State Regulatory Authorities

28. What authority does your State currently give LTCFs for handling and managing controlled substances? Which agency is responsible for such authority?

29. What controlled substance activities, if any, are authorized, e.g. prescribing, administering, or dispensing? In what schedules? How many LTCFs apply for any such authorization and how many receive such authorization?

30. What State requirements are there pertaining to the storage of controlled substances at LTCFs?

31. Is your State considering giving/increasing LTCFs' authority to handle/dispense controlled substances? If so, is your State considering creating a new type of registration just for LTCFs or would your State consider allowing LTCFs to register as institutional practitioners like hospitals?

32. What changes in State pharmacy and LTCF laws/regulations would be necessary for pharmacies to operate in LTCFs under a registration granted to the LTCF or to operate independently at the LTCF under its own pharmacy registration?

33. Do State laws or regulations specify or limit access to emergency kits or to controlled substances in LTCFs?

34. Do State inspectors check the records and stock of emergency kits? If so, how often?

G. Certification/Accreditation

To be eligible for Medicare or Medicaid reimbursement, nursing facilities and skilled nursing facilities must be inspected by State officials for compliance with HHS requirements. HHS regulations, for instance, impose staffing requirements and requirements regarding the safekeeping of drugs.

35. How often do State regulators inspect LTCFs? What is the legal requirement in your State for frequency of inspection, and what is the actual timing?

36. Has your LTCF sought accreditation by the Joint Commission or other non-governmental accrediting organization? What do LTCFs see as the advantages and disadvantages of seeking such accreditation?

H. Staff

37. Does the Medical Director of your facility also serve as Medical Director for other locations or facilities? If so, for how many?

38. Is the Medical Director of your facility also an attending physician?

39. Is your Medical Director registered with DEA as a practitioner?

40. If your LTCF is a Medicare or Medicaid approved facility, what barriers, if any, has your facility faced in assuring the provision of physician services 24 hours a day in case of an emergency?

41. As a LTCF, does your facility have a physician on site during regular business hours?

42. How does your facility communicate with a resident's practitioner?

43. How frequently is a physician on site at your facility? Do most physicians treat multiple residents at a single facility?

44. Does your facility have a registered nurse on duty for more than 8 hours a day, 7 days a week? Less?

45. When a registered nurse is not on duty at your facility, how are procedures relating to medications different?

46. What are the State education and continuing education requirements for licensed nurses other than registered nurses (LPNs, *etc*)? Does the State require a criminal background check prior to licensing?

47. What role do nurses' aides have in helping residents get their medications?

48. What are the State education and continuing education requirements for nurses' aides? Does your State license nurses' aides?

49. What personnel/job descriptions have access to emergency kits in your facility?

50. What personnel/job descriptions have access to controlled substance storage in your facility? Are temporary employees or volunteers given access?

51. What personnel/job descriptions have authority to contact the pharmacy to relay a noncontrolled substance prescription/drug order for a resident?

I. Emergency Kits

52. Does your facility have an emergency kit that contains controlled substances? If so, what controlled substances does your emergency kit contain?

53. If your facility has an emergency kit that contains controlled substances, how are those controlled substances procured and dispensed?

54. What are the current controlled substance inventory protocols for any emergency kit and/or automated dispensing system at your LTCF?

55. What records document receipt and dispensing of controlled substances to and from this kit?

56. How often in the last two years have controlled substances been lost or stolen from an emergency kit at your facility?

Please submit written comments no later than August 30, 2010 using the address information provided at the beginning of this document.

Dated: June 24, 2010

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control.

[FR Doc. 2010–15757 Filed 6–28–10; 8:45 am]

BILLING CODE 4410–09–P

NATIONAL CREDIT UNION ADMINISTRATION

Sunshine Act; Notice of Agency Meeting

TIME AND DATE: 11 a.m., Wednesday, June 30, 2010.

PLACE: Board Room, 7th Floor, Room 7047, 1775 Duke Street, Alexandria, VA 22314–3428.

STATUS: Closed.

Matter To Be Considered

1. Consideration of Supervisory Activities. Closed pursuant to Exemptions (8), (9)(A)(ii) and (9)(B).

FOR FURTHER INFORMATION CONTACT: Mary Rupp, Secretary of the Board, Telephone: 703–518–6304.

Board Secretary,

Mary Rupp.

[FR Doc. 2010–15957 Filed 6–25–10; 4:15 pm]

BILLING CODE P

NATIONAL TRANSPORTATION SAFETY BOARD

Sunshine Act Meeting

TIME AND DATE: 9:30 a.m., Tuesday, July 13, 2010.

PLACE: NTSB Conference Center, 429 L'Enfant Plaza SW., Washington, DC 20594.

STATUS: The ONE item is open to the public.

Matter To Be Considered

8081A Aircraft Accident Report—Runway Side Excursion During Attempted Takeoff in Strong and Gusty Crosswind Conditions, Continental Airlines Flight 1404, Boeing 737–500, N18611, Denver, Colorado, December 20, 2008.

News Media Contact: Telephone: (202) 314–6100.

The press and public may enter the NTSB Conference Center one hour prior to the meeting for set up and seating.

Individuals requesting specific accommodations should contact Rochelle Hall at (202) 314–6305 by Friday, July 9, 2010.

The public may view the meeting via a live or archived webcast by accessing a link under "News & Events" on the NTSB home page at *http://www.ntsb.gov.*

FOR FURTHER INFORMATION CONTACT: Candi Bing, (202) 314–6403.

Friday, June 25, 2010.

Candi R. Bing,

Federal Register Liaison Officer.

[FR Doc. 2010–15910 Filed 6–25–10; 4:15 pm]

BILLING CODE 7533–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2010–0232]

Biweekly Notice; Applications and Amendments to Facility Operating Licenses Involving No Significant Hazards Considerations

I. Background

Pursuant to section 189a. (2) of the Atomic Energy Act of 1954, as amended (the Act), the U.S. Nuclear Regulatory Commission (the Commission or NRC) is publishing this regular biweekly notice. The Act requires the Commission publish notice of any amendments issued, or proposed to be issued and grants the Commission the authority to issue and make immediately effective any amendment to an operating license upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person.

This biweekly notice includes all notices of amendments issued, or proposed to be issued from June 3, 2010 to June 16, 2010. The last biweekly notice was published on June 15, 2010 (75 FR 33839).

Notice of Consideration of Issuance of Amendments to Facility Operating Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The Commission has made a proposed determination that the following amendment requests involve no significant hazards consideration. Under the Commission's regulations in Title 10 of the *Code of Federal Regulations* (10 CFR), Section 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. The basis for this proposed determination for each amendment request is shown below.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of 60 days after the date of publication of this notice. The Commission may issue the license amendment before expiration of the 60-day period provided that its final determination is that the amendment involves no significant hazards consideration. In addition, the Commission may issue the amendment prior to the expiration of the 30-day comment period should circumstances change during the 30-day comment period such that failure to act in a timely way would result, for example in derating or shutdown of the facility. Should the Commission take action prior to the expiration of either the comment period or the notice period, it will publish in the **Federal Register** a notice of issuance. Should the Commission make a final No Significant Hazards Consideration Determination, any hearing will take place after issuance. The Commission expects that the need to take this action will occur very infrequently.

Written comments may be submitted by mail to the Cindy Bladey, Chief, Rules, Announcements and Directives Branch (RADB), TWB–05–B01M, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and should cite the publication date and page number of this **Federal Register** notice. Written comments may also be faxed to the RADB at 301–492–3446. Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room (PDR), located at One White Flint North, Public File Area O1F21, 11555 Rockville Pike (first floor), Rockville, Maryland.

Within 60 days after the date of publication of this notice, any person(s) whose interest may be affected by this action may file a request for a hearing and a petition to intervene with respect to issuance of the amendment to the subject facility operating license. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's "Rules of Practice for Domestic Licensing Proceedings" in 10 CFR Part 2. Interested person(s) should consult a current copy of 10 CFR 2.309, which is available at the Commission's PDR, located at One White Flint North, Public File Area O1F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/doc-collections/cfr/.* If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or a presiding officer designated by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the Chief Administrative Judge of the Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order.

As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements: (1) The name, address, and telephone number of the requestor or petitioner; (2) the nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the requestor's/petitioner's interest. The petition must also identify the specific contentions which the requestor/

petitioner seeks to have litigated at the proceeding.

Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the requestor/petitioner shall provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the requestor/petitioner intends to rely in proving the contention at the hearing. The requestor/petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the requestor/petitioner intends to rely to establish those facts or expert opinion. The petition must include sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the requestor/petitioner to relief. A requestor/petitioner who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment. If the final determination is that the amendment request involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E-Filing rule (72 FR 49139, August 28, 2007). The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least ten (10) days prior to the filing deadline, the participant should contact the Office of the Secretary by e-mail at *hearing.docket@nrc.gov,* or by telephone at (301) 415–1677, to request (1) a digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a request or petition for hearing (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html.* System requirements for accessing the E-Submittal server are detailed in NRC's "Guidance for Electronic Submission," which is available on the agency's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* Participants may attempt to use other software not listed on the Web site, but should note that the NRC's E-Filing system does not support unlisted software, and the NRC Meta System Help Desk will not be able to offer assistance in using unlisted software.

If a participant is electronically submitting a document to the NRC in accordance with the E-Filing rule, the participant must file the document using the NRC's online, Web-based submission form. In order to serve documents through EIE, users will be required to install a Web browser plug-in from the NRC Web site. Further information on the Web-based submission form, including the installation of the Web browser plug-in, is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.*

Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* A filing is considered complete at the time the documents are submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The E-Filing system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically using the agency's adjudicatory E-Filing system may seek assistance by contacting the NRC Meta System Help Desk through the "Contact Us" link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html*, by e-mail at *MSHD.Resource@nrc.gov,* or by a toll-free call at (866) 672–7640. The NRC Meta System Help Desk is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland, 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the

document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at *http://ehd.nrc.gov/EHD_Proceeding/home.asp,* unless excluded pursuant to an order of the Commission, or the presiding officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

Petitions for leave to intervene must be filed no later than 60 days from the date of publication of this notice. Non-timely filings will not be entertained absent a determination by the presiding officer that the petition or request should be granted or the contentions should be admitted, based on a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)–(viii).

For further details with respect to this license amendment application, see the application for amendment which is available for public inspection at the Commission's PDR, located at One White Flint North, Public File Area O1F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the ADAMS Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html.* Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the NRC PDR Reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr.resource@nrc.gov.*

Dominion Energy Kewaunee, Inc. Docket No. 50–305, Kewaunee Power Station, Kewaunee County, Wisconsin

Date of amendment request: April 13, 2010.

Description of amendment request: The licensee proposed to revise Section 3.1.a.1.C, "Reactor Coolant Pumps," Section 3.1.a.3, "Pressurizer Safety Valves," and Section 3.1.b, "Heatup and Normal Cooldown Limit Curves for Normal Operation," of the Technical Specifications (TS). Specifically, the proposed amendment would replace the heatup and cooldown pressure-temperature (P–T) limit curves with new ones, and specifying a higher low temperature overpressure protection (LTOP) enabling temperature.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration (NSHC) analysis. The NRC staff reviewed the licensee's NSHC analysis and has prepared its own as follows:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The purpose of the P–T limits curves and LTOP is to ensure that the reactor vessel is operated within its material design limits. As such, the subject specifications specify the pressure limits inside the reactor vessel under different temperature conditions for normal operation. No conditions of operation within the approved P–T limits were postulated to be initiators of accidents previously analyzed in the Kewaunee Final Safety Analysis Report. Furthermore, the consequences of the analyzed accidents were not postulated to be exacerbated by normal operation within approved P–T limits. Accordingly, the probability of occurrence and the consequences of the previously analyzed accidents would not be affected in any way by the proposed P–T limits changes.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed change does not involve any physical alteration of the plant (no new or different type of equipment will be installed) nor does it change methods and procedures governing plant operation. The proposed change will not impose any new or eliminate any old requirements. Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The proposed change will not reduce a margin of safety because it has no effect on any safety analysis methods, scenarios, or assumptions. Therefore, the proposed change does not involve a significant reduction in a margin of safety.

Based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the proposed amendment involves no significant hazards consideration.

Attorney for licensee: Lillian M. Cuoco, Senior Counsel, Dominion Resources Services, Inc., Counsel for Dominion Energy Kewaunee, Inc., 120 Tredegar Street, Richmond, VA 23219.

NRC Branch Chief: Robert J. Pascarelli.

Energy Northwest, Docket No. 50–397, Columbia Generating Station, Benton County, Washington

Date of amendment request: April 28, 2010.

Description of amendment request: The proposed change revises the Final Safety Analysis Report and Emergency Plan to support U.S. Department of Energy non-intrusive surveillance and characterization activities within the 618–11 Waste Burial Ground.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

(1) Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

Normal and postulated activities at the 618–11 site do not serve as initiators of any Columbia [Generating Station] accident previously evaluated, nor do they require reassessment of the previously evaluated accidents. The accident probabilities are unaffected and the outcomes remain unchanged.

Therefore there is no significant increase in the probability or consequences of an accident previously evaluated.

(2) Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously analyzed?

Response: No.

The only hazard postulated beyond the 618–11 site and onto the Columbia facility is a release of 44.5 mrem [millirem] at 100 m [meters]. This level of exposure does not impact the design function or operation of any Columbia SSCs [structures, systems, or components]. The protected area of the facility that encloses the safety related SSCs is greater than 300 m from the postulated release point. The calculated dose at 300 m is 3 mrem. This level of exposure does not cause any new or different kind of accident.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

(3) Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

The only hazard postulated beyond the 618–11 site and onto the Columbia facility is a release of 44.5 mrem at 100 m. This level of exposure does not impact the design function or operation of any Columbia SSCs. The protected area of the facility that encloses the safety related SSCs is greater than 300 m from the postulated release point. The calculated dose at 300 m is 3 mrem. This level of exposure does not impact the equipment qualification of SSCs and is well within the mild environment range for SSCs. It does not exceed or alter a design safety limit.

Therefore, the proposed change does not involve a significant reduction in the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: William A. Horin, Esq., Winston & Strawn, 1700 K Street, NW., Washington, DC 20006–3817.

NRC Branch Chief: Michael T. Markley.

Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc., Docket No. 50–271, Vermont Yankee Nuclear Power Station, Vernon, Vermont

Date of amendment request: April 13, 2010.

Description of amendment request: The proposed amendment would revise Technical Specification (TS) to institute a requirement to perform a Logic System Functional Test of the Control Rod Block actuation instrumentation trip functions once every Operating Cycle.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The change does not impact the function of any structure, system or component that affects the probability of an accident or that supports mitigation or consequences of an accident previously evaluated. The proposed change adds a requirement to perform additional testing of the control rod block instrumentation. The proposed change does not affect reactor operations or accident analysis and there is no change to the radiological consequences of a previously analyzed accident. The operability requirements for accident mitigation systems remain consistent with the licensing and design basis.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed change does not involve any physical alteration of plant equipment and does not change the method by which any safety-related system performs its function. The proposed change involves the addition of a requirement to perform a logic system functional test of plant instrumentation. This test is within the design capability of the system and does not create the possibility of a different kind of accident. No new or different types of equipment will be permanently installed. Operation of existing installed equipment is unchanged. The methods governing plant operation and testing remain consistent with current safety analysis assumptions.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

These changes do not change any existing design or operational requirements and do not adversely affect existing plant safety margins or the reliability of the equipment assumed to operate in the safety analysis. The proposed change only affects the testing of the control rod block instrumentation. As such, there are no changes being made to safety analysis assumptions, safety limits or safety system settings that would adversely affect plant safety as a result of the proposed change.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Mr. William C. Dennis, Assistant General Counsel, Entergy Nuclear Operations, Inc., 400 Hamilton Avenue, White Plains, NY 10601.

NRC Branch Chief: Nancy Salgado.

Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc., Docket No. 50–271, Vermont Yankee Nuclear Power Station, Vernon, Vermont

Date of amendment request: April 13, 2010.

Description of amendment request: The proposed amendment would revise the Technical Specifications (TSs) to update the Table of Contents and the Applicability and Objective portions of TS 4.12 as a result of changes made by License Amendments 230 and 239, and to revise wording in TS 3.7.A.8. The proposed changes are considered administrative in nature and do not materially change any technical requirement.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration which is presented below:

1. *The operation of Vermont Yankee Nuclear Power Station (VY) in accordance with the proposed amendment will not involve a significant increase in the probability or consequences of an accident previously evaluated.*

The proposed changes are administrative in nature and do not involve any physical changes to the plant. The changes do not revise the methods of plant operation which could increase the probability or consequences of accidents. No new modes of operation are introduced by the proposed changes such that a previously evaluated accident is more likely to occur or more adverse consequences would result.

Therefore, the proposed changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. *The operation of VY in accordance with the proposed amendment will not create the possibility of a new or different kind of accident from any accident previously evaluated.*

The proposed changes are administrative in nature and do not affect the operation of any systems or equipment, nor do they involve any potential initiating events that would create any new or different kind of accident. There are no changes to the design assumptions, conditions, configuration of the facility, or manner in which the plant is operated and maintained. The changes do not affect assumptions contained in plant safety analyses or the physical design and/or modes of plant operation. Consequently, no new failure mode is introduced.

Therefore, the proposed changes do not create the possibility of a new or different kind of accident from any previously evaluated.

3. *The operation of VY in accordance with the proposed amendment will not involve a significant reduction in a margin of safety.*

There are no changes being made to the Technical Specification (TS) safety limits or safety system settings. The operating limits and functional capabilities of systems, structures and components are unchanged as a result of these administrative changes. These changes do not affect any equipment involved in potential initiating events or plant response to accidents. There is no change to the basis for any TS related to the establishment, or maintenance of, a nuclear safety margin. The proposed changes do not impact any safety limits, safety settings or safety margins.

Therefore, operation of VY in accordance with the proposed amendment will not involve a significant reduction in the margin to safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Mr. William C. Dennis, Assistant General Counsel, Entergy Nuclear Operations, Inc., 400 Hamilton Avenue, White Plains, NY 10601.

NRC Branch Chief: Nancy Salgado.

Entergy Operations, Inc., Docket No. 50–368, Arkansas Nuclear One, Unit No. 2, Pope County, Arkansas

Date of amendment request: March 31, 2010.

Description of amendment request: The proposed amendment would implement an alternative source term (AST) for Arkansas Nuclear One, Unit 2 (ANO–2). The proposed amendment would modify Technical Specification (TS) 3.4.8, "Specific Activity," and 6.5.12, "Control Room Habitability Program," and associated definitions as related to the use of an AST associated with accident offsite and control room dose consequences.

Basis for proposed no significant hazards consideration determination: As required by Title 10 of the *Code of Federal Regulations* (10 CFR) Section 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The use of an AST is recognized in 10 CFR 50.67. RG [Regulatory Guide] 1.183 provides guidance for implementation of an AST. The AST involves quantities, isotopic composition, chemical and physical characteristics, and release timing of radioactive material for use as inputs to accident dose analyses. As such, the AST cannot affect the probability of occurrence of a previously evaluated accident. In addition, the increase in the DEX [Dose Equivalent Xenon-133] activity limit and the terminology/reference changes proposed for the ANO–2 TSs are unrelated to accident initiators. No facility equipment, procedure, or process changes are required in conjunction with implementing the AST that could increase the likelihood of a previously analyzed accident. The proposed changes in the source term and the methodology for the dose consequence analyses follow the guidance of RG 1.183. As a result, there is no increase in the likelihood of existing event initiators.

Regarding accident consequences, the increase in the DEX activity limit acts to support the analysis results given the application of an AST. The proposed limit was utilized as an assumption in the AST analysis and determined to be acceptable. The results of accident dose analyses using the AST are compared to TEDE [Total Effective Dose Equivalent] acceptance criteria that account for the sum of deep dose equivalent (for external exposure) and committed effective dose equivalent (for internal exposure). Dose results were previously compared to separate limits on whole body, thyroid, and skin doses as appropriate for the particular accident analyzed. The results of the revised dose consequences analyses demonstrate that the regulatory acceptance criteria are met for each analyzed event. The proposed TS terminology/reference changes are consistent with the analysis and adoption of an AST. Implementing the AST involves no facility equipment, procedure, or process changes that could affect the radioactive material actually released during an event. Subsequently, no conditions have been created that could significantly increase the consequences of any of the events being evaluated.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of any of the events being evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The AST involves quantities, isotopic composition, chemical and physical characteristics, and release timing of radioactive material for use as inputs to accident dose analyses. As such, the AST cannot create the possibility of a new or different kind of accident. In addition, the increased DEX activity limit and proposed terminology/reference changes within the TSs are unrelated to accident initiators and are supported by AST adoption.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

Implementing the AST is relevant only to calculated accident dose consequences. The results of the revised dose consequences analyses demonstrate that the regulatory acceptance criteria are met for each analyzed event. In addition, the increased DEX activity limit and proposed terminology/reference changes within the TSs support adoption of the AST methodologies, have been determined to result in acceptable dose consequence and do not result in a significant impact to any margin of safety. The AST does not affect the transient behavior of non-radiological parameters (e.g., RCS [Reactor Coolant System] pressure, Containment pressure) that are pertinent to a margin of safety.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Joseph A. Aluise, Associate General Counsel—Nuclear, Entergy Services, Inc., 639 Loyola Avenue, New Orleans, Louisiana 70113.

NRC Branch Chief: Michael T. Markley.

Exelon Generation Company, LLC, Docket Nos. 50–373 and 50–374, LaSalle County Station, Units 1 and 2, LaSalle County, Illinois

Date of amendment request: April 19, 2010.

Description of amendment request: The proposed amendments would revise Technical Specification 3.4.11, "RCS Pressure and Temperature (P/T) Limits," to incorporate revised P/T curves that are valid for up to 32 effective full power years of operation.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed change revises Technical Specification (TS) Section 3.4.11 to replace the existing P/T curves with revised curves that are valid up to 32 EFPY. The revised curves were developed using the methodology of General Electric (GE) Topical Report NEDC–32983P, "General Electric Methodology for Reactor Pressure Vessel Fast Neutron Flux Evaluations." The NEDC–32983P methodology has been approved by the NRC for use by licensees. The P/T limits are not derived from design basis accident analyses. They are prescribed during normal operation to avoid encountering pressure, temperature, and temperature rate of change conditions that might cause undetected flaws to propagate and cause non-ductile failure of the reactor coolant pressure boundary, a condition that is unanalyzed. Since the P/T limits are not derived from any design basis accident, there are no acceptance limits related to the P/T limits. Rather, the P/T limits are acceptance limits themselves since they preclude operation in an unanalyzed condition.

Thus, the proposed changes do not have any affect on the probability of an accident previously evaluated.

The P/T curves are used as operational limits during heatup or cooldown maneuvering, when the pressure and temperature indications are monitored and compared to the applicable curve to determine that operation is within the allowable region. The P/T curves provide assurance that station operation is consistent with a previously evaluated accident. Thus, the radiological consequences of any accident previously evaluated are not increased.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed change does not change the response of plant equipment to transient conditions. The proposed change does not introduce any new equipment, modes of system operation, or failure mechanisms.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The proposed change adopts P/T curves that have been developed using the methodology of GE Topical Report NEDC–32983P. The NEDC–32983P methodology adheres to the guidance in NRC Regulatory Guide 1.190, "Calculation and Dosimetry methods for Determining Pressure Vessel Neutron Fluence," dated March 2001. In a letter dated September 14, 2001, the NRC approved NEDC–32983P for use by licensees. The proposed change does not alter the manner in which safety limits, limiting safety system settings, or limiting conditions for operation are determined. The setpoints at which protective actions are initiated are not altered by the proposed change.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the requested amendments involve no significant hazards consideration.

Attorney for licensee: Mr. Bradley J. Fewell, Associate General Counsel, Exelon Nuclear, 4300 Winfield Road, Warrenville, IL 60555.

NRC Branch Chief: Stephen J. Campbell.

PSEG Nuclear LLC, Docket No. 50–354, Hope Creek Generating Station, Salem County, New Jersey

Date of amendment request: March 29, 2010, as supplemented on May 28, 2010.

Description of amendment request: The proposed amendment would revise the Technical Specifications (TSs) to extend the allowed outage time (AOT) for the "A" and "B" emergency diesel generators (EDGs) from 72 hours to 14 days.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The emergency diesel generators are safety related components which provide backup electrical power supply to the onsite Safeguards Distribution System. The emergency diesel generators are not accident initiators; the EDGs are designed to mitigate the consequences of previously evaluated accidents including a loss of offsite power [LOOP]. Extending the AOT for a single EDG would not affect the previously evaluated accidents since the remaining EDGs supporting the redundant Engineered Safety Features (ESF) systems would continue to be available to perform the accident mitigation functions.

Thus allowing an emergency diesel generator to be inoperable for an additional 11 days for performance of maintenance or testing does not increase the probability of a previously evaluated accident.

Deterministic and probabilistic risk assessments evaluated the effect of the proposed Technical Specification changes on the availability of an electrical power supply to the plant emergency safeguards features systems. These assessments concluded that the proposed Technical Specification changes do not involve a significant increase in the risk of power supply unavailability.

There is incremental risk associated with continued operation for an additional 11 days with one emergency diesel generator inoperable; however, the calculated impact on risk is very small and is consistent with the acceptance guidelines contained in Regulatory Guides 1.174 and 1.177. This risk is judged to be reasonably consistent with the risk associated with operations for 72 hours with one emergency diesel generator inoperable as allowed by the current Technical Specifications. Specifically, the remaining operable emergency diesel generators and paths are adequate to supply electrical power to the onsite Safeguards Distribution System. An emergency diesel generator is required to operate only if both offsite power sources fail and there is an event which requires operation of the plant emergency safeguards features such as a design basis accident. The probability of a design basis accident occurring during this period is low.

The consequences of previously evaluated accidents will remain the same during the proposed 14 day AOT as during the current 72 hour AOT. The ability of the remaining TS required EDG to mitigate the consequences of an accident will not be affected since no additional failures are postulated while equipment is inoperable within the TS AOT. The standby power supply for each of the four safety-related load groups consists of one EDG complete with its auxiliaries, which include the cooling water, starting air, lubrication, intake and exhaust, and fuel oil systems. The sizing of the EDGs and the loads assigned among them is such that any combination of three out of four of these EDGs is capable of shutting down the plant safely, maintaining the plant in a safe shutdown condition, and mitigating the consequences of accident conditions.

Thus, this change does not involve a significant increase in the probability or consequences of a previously analyzed accident.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed Technical Specification changes do not involve a change in the plant design, system operation, or procedures involved with the emergency diesel generators. The proposed changes allow an emergency diesel generator to be inoperable for additional time. Equipment will be operated in the same configuration and manner that is currently allowed and designed for. There are no new failure modes or mechanisms created due to plant operation for an extended period to perform emergency diesel generator maintenance or testing. Extended operation with an inoperable emergency diesel generator does not involve any modification in the operational limits or physical design of plant systems. There are no new accident precursors generated due to the extended AOT.

Therefore, the proposed changes do not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

Currently, if an inoperable emergency diesel generator is not restored to operable status within 72 hours, Technical Specification 3.8.1.1 ACTION b requires the unit be in at least HOT SHUTDOWN within the next 12 hours and in COLD SHUTDOWN within the following 24 hours. The proposed Technical Specification changes will allow steady state plant operation at 100% power for an additional 11 days.

Deterministic and probabilistic risk assessments evaluated the effect of the proposed Technical Specification changes on the availability of an electrical power supply to the plant emergency safeguards features systems. These assessments concluded that the proposed Technical Specification changes do not involve a significant increase in the risk of power supply unavailability.

The EDGs continue to meet their design requirements; there is no reduction in capability or change in design configuration. The EDG response to LOOP, LOCA [loss-of-

coolant accident], SBO [station blackout], or fire is not changed by this proposed amendment; there is no change to the EDG operating parameters. In the extended AOT, as in the existing AOT, the remaining operable emergency diesel generators and paths are adequate to supply electrical power to the onsite Safeguards Distribution System. The proposed change does not alter a design basis or safety limit; therefore it does not significantly reduce the margin of safety. The EDGs will continue to operate per the existing design and regulatory requirements.

Therefore, based on the considerations given above, the proposed changes do not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Vincent Zabielski, PSEG Nuclear LLC—N21, P.O. Box 236, Hancocks Bridge, NJ 08038.

NRC Branch Chief: Harold K. Chernoff.

Wolf Creek Nuclear Operating Corporation, Docket No. 50–482, Wolf Creek Generating Station, Coffey County, Kansas

Date of amendment request: April 13, 2010, as supplemented by letter dated June 1, 2010.

Description of amendment request: The proposed amendment to Renewed Facility Operating License No. NPF–42 would revise the approved fire protection program, as described in the Wolf Creek Generating Station Updated Safety Analysis Report, by removing the high/low pressure interface designation of the pressurizer power-operated relief valves (PORVs) and their associated block valves.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The design function of structures, systems and components are not impacted by the proposed change. This amendment classifies the pressurizer PORVs and their associated block valves based on the guidance in Regulatory Guide 1.189, "Fire Protection for Nuclear Power Plants," Revision 2, and Nuclear Energy [Institute] (NEI) 00–01, "Guidance for Post-Fire Safe-Shutdown Circuit Analysis," Revision 2, Appendix C. The classification change only affects the post fire safe shutdown (PFSSD) analysis methodology for the PORVs and block valves. Reclassification of the PORVs and block valves will not impact the use of the valves to depressurize the Reactor Coolant System (RCS) to recover from certain transients if normal pressurizer spray is not available.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

There are no changes in the method by which any safety related plant system performs its safety function, and the normal manner of plant operation is unaffected. No new accident scenarios, transient precursors, failure mechanisms, or limiting single failures are introduced as a result of this change. There will be no adverse effect or challenges imposed on any safety related system as a result of this change. The classification change only affects the PFSSD analysis methodology for the PORVs and block valves.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

There will be no effect on the manner in which safety limits or limiting safety system settings are determined nor will there be any effect on those plant systems necessary to ensure the accomplishment of protection functions. There will be no impact on departure from nuclear boiling [ratio] (DNBR) limits, heat flux hot channel factor ($F_Q(Z)$) limits, nuclear enthalpy rise hot channel factor ($F^N\Delta_H$) limits, peak centerline temperature (PCT) limits, peak local power density or any other margin of safety.

Therefore, this change does not involve a significant reduction in the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Jay Silberg, Esq., Pillsbury Winthrop Shaw Pittman LLP, 2300 N Street, NW., Washington, DC 20037.

NRC Branch Chief: Michael T. Markley.

Notice of Issuance of Amendments to Facility Operating Licenses

During the period since publication of the last biweekly notice, the Commission has issued the following amendments. The Commission has determined for each of these amendments that the application complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendment.

Notice of Consideration of Issuance of Amendment to Facility Operating License, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing in connection with these actions was published in the **Federal Register** as indicated.

Unless otherwise indicated, the Commission has determined that these amendments satisfy the criteria for categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for these amendments. If the Commission has prepared an environmental assessment under the special circumstances provision in 10 CFR 51.22(b) and has made a determination based on that assessment, it is so indicated.

For further details with respect to the action see (1) The applications for amendment, (2) the amendment, and (3) the Commission's related letter, Safety Evaluation and/or Environmental Assessment as indicated. All of these items are available for public inspection at the Commission's Public Document Room (PDR), located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management System (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html.* If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the PDR Reference staff at 1 (800) 397–4209, (301) 415–4737 or by e-mail to *pdr.resource@nrc.gov.*

Energy Northwest, Docket No. 50–397, Columbia Generating Station, Benton County, Washington

Date of application for amendment: August 17, 2009, as supplemented by letter dated January 21, 2010.

Brief description of amendment: The amendment modified (1) Technical Specification (TS) 3.8.3, "Diesel Fuel Oil, Lube Oil, and Starting Air," to relocate specific numerical values for fuel oil and lube oil storage volumes

from the TS to the TS Bases, (2) TS 3.8.1, "AC [Alternating Current] Sources—Operating," to relocate specific values for the day tank fuel oil volumes from the TS to the TS Bases, and (3) TS 5.5.9, "Diesel Fuel Oil Testing Program," to relocate the specific standard for particulate concentration testing of fuel oil from the TS to the TS Bases.

Date of issuance: May 27, 2010.

Effective date: As of its date of issuance and shall be implemented within 90 days from the date of issuance.

Amendment No.: 215.

Facility Operating License No. NPF–21: The amendment revised the Facility Operating License and Technical Specifications.

Date of initial notice in **Federal Register**: November 3, 2009 (74 FR 56884). The supplemental letter dated January 21, 2010, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the staff's original proposed no significant hazards consideration determination as published in the **Federal Register**.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated May 27, 2010.

No significant hazards consideration comments received: No.

Entergy Nuclear Operations, Inc., Docket No. 50–255, Palisades Nuclear Plant, Van Buren County, Michigan

Date of application for amendment: March 31, 2010, supplemented by letter dated May 13, 2010.

Brief description of amendment: The amendment adds a new license condition 2.C (4) to Palisades Nuclear Plant, renewed facility license No. DPR–20. This license condition would state that performance of Technical Specification (TS) surveillance requirement (SR) 3.1.4.3 is not required for control rod drive 22 through cycle 21 or until the next entry into Mode 3. The amendment consists of changes to TS by addition of a note in SR 3.1.4.3, stating:

"Not required to be performed or met for control rod 22 during cycle 21 provided control rod 22 is administratively declared immovable, but trippable and Condition D is entered for control rod 22."

Date of issuance: June 2, 2010.

Effective date: As of the date of issuance and shall be implemented within 15 days.

Amendment No.: 239.

Facility Operating License No. DPR–20: Amendment revised the Technical Specifications and license.

Public comments requested as to proposed no significant hazards consideration (NSHC): The notice provided an opportunity to submit comments on the Commission's proposed NSHC determination. No comments have been received. The notice also provided an opportunity to request a hearing by June 13, 2010, which is within 60 days of the individual notice published on April 14; but indicated that if the Commission makes a final NSHC determination, any such hearing would take place after issuance of the amendment.

Date of initial individual notice in **Federal Register**: April 14, 2010 (75 FR 19428), followed by the repeat biweekly notice in the **Federal Register** on May 4, 2010 (75 FR 23818).

The Commission's related evaluation of the amendment, state consultation, and final NSHC determination are contained in a Safety Evaluation dated June 2, 2010.

Attorney for licensee: Mr. William Dennis, Assistant General Counsel, Entergy Nuclear Operations, Inc., 440 Hamilton Ave., White Plains, NY 10601.

NRC Branch Chief: Robert J. Pascarelli.

PSEG Nuclear LLC, Docket Nos. 50–272 and 50–311, Salem Nuclear Generating Station, Unit Nos. 1 and 2, Salem County, New Jersey

Date of application for amendments: September 14, 2009, as supplemented on April 12, 2010.

Brief description of amendments: The amendments make miscellaneous administrative and editorial changes to the Technical Specifications (TSs) and the Facility Operating Licenses (FOLs) including correction of typographical and format errors, correction of administrative differences between units, and deletion of historical requirements that have expired.

Date of issuance: June 15, 2010.

Effective date: As of the date of issuance, to be implemented within 60 days.

Amendment Nos.: 295 and 278.

Facility Operating License Nos. DPR–70 and DPR–75: The amendments revised the TSs and the FOLs.

Date of initial notice in **Federal Register**: November 17, 2009 (74 FR 59262). The letter dated April 12, 2010, provided clarifying information that did not change the initial proposed no significant hazards consideration determination or expand the application beyond the scope of the original **Federal Register** notice.

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated June 15, 2010.

No significant hazards consideration comments received: No.

Dated at Rockville, Maryland, this 18th day of June 2010.

For the Nuclear Regulatory Commission.

Robert A. Nelson,

Deputy Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2010–15439 Filed 6–28–10; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2010–0002]

Sunshine Federal Register Notice

AGENCY HOLDING THE MEETINGS: Nuclear Regulatory Commission.

DATE: Weeks of June 28, July 5, 12, 19, 26, August 2, 2010.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

Week of June 28, 2010

There are no meetings scheduled for the week of June 28, 2010.

Week of July 5, 2010—Tentative

Thursday, July 8, 2010

1:30 p.m. Briefing on Proposed Rule on Part 35 Medical Events Definitions—Permanent Implant Brachytherapy (Public Meeting).

(*Contact:* Andrew Carrera, 301–415–1078).

This meeting will be webcast live at the Web address—*http://www.nrc.gov.*

Week of July 12, 2010—Tentative

Tuesday, July 13, 2010

9:30 a.m. Briefing on the Radiation Source Protection and Security Task Force Report (Closed—Ex. 9).

Week of July 19, 2010—Tentative

There are no meetings scheduled for the week of July 19, 2010.

Week of July 26, 2010—Tentative

There are no meetings scheduled for the week of July 26, 2010.

Week of August 2, 2010—Tentative

There are no meetings scheduled for the week of August 2, 2010.

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* The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings, call (recording)—(301) 415–1292. Contact person for more information: Rochelle Bavol, (301) 415–1651.

* * * * *

The NRC Commission Meeting Schedule can be found on the Internet at: *http://www.nrc.gov/about-nrc/policy-making/schedule.html.*

* * * * *

The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings, or need this meeting notice or the transcript or other information from the public meetings in another format (*e.g.,* braille, large print), please notify Angela Bolduc, Chief, Employee/Labor Relations and Work Life Branch, at 301–492–2230, TDD: 301–415–2100, or by e-mail at *angela.bolduc@nrc.gov. mailto:dlc@nrc.gov.mailto:aks@nrc.gov.* Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

* * * * *

This notice is distributed electronically to subscribers. If you no longer wish to receive it, or would like to be added to the distribution, please contact the Office of the Secretary, Washington, DC 20555 (301–415–1969), or send an e-mail to *darlene.wright@nrc.gov.*

Dated: June 24, 2010.

Rochelle C. Bavol,

Policy Coordinator, Office of the Secretary.

[FR Doc. 2010–15879 Filed 6–25–10; 4:15 pm]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[EA–10–073; Project No. 0769; NRC–2010–0207]

In the Matter of NuScale Power, Inc. and All Other Persons; Who Seek or Obtain Access to Safeguards Information Described Herein; Order Imposing Safeguards Information Protection Requirements for Access to Safeguards Information (Effective Immediately)

I

NuScale Power, Inc. (NuScale) has submitted a letter of intent to the U.S. Nuclear Regulatory Commission (NRC) for a design certification application in 2012.

In June 2009, the Commission published a rulemaking in the **Federal Register** (74 FR 28112) requiring applicants for a variety of licensing activities, including nuclear power plant designers, to perform a design-specific assessment of the effects of the impact of a large, commercial aircraft and to incorporate design features and functional capabilities into the nuclear power plant design to provide additional inherent protection with reduced use of operator actions. A discussion of the specific requirements for applicants for new nuclear power reactors can be found in Section V of the **Federal Register** notice. To assist designers in completing this assessment, the Commission has decided to provide the detailed aircraft impact characteristics that should be used as reasonable inputs for reactor vendors and architect/engineers who have the need to know and who meet the NRC's requirements for the disclosure of such information to use in the required aircraft impact assessments.

The NRC derived these characteristics from agency analyses performed on operating reactors to support, in part, the development of a broadly effective set of mitigation strategies to combat fires and explosions from a spectrum of hypothetical aircraft impacts. Although these detailed characteristics were not selected as a basis for designing new reactors, the staff is suggesting them as a starting point for aircraft impact assessments. On July 10, 2009, the NRC issued a draft regulatory guide (DG)–1176, "Guidance for the Assessment of Beyond-Design-Basis Aircraft Impacts." The agency did not receive any comments on the document. The staff is currently working to finalize the regulatory guide and intends to include these aircraft impact characteristics in the safeguards information (SGI) version of its final regulatory guide. In addition, the staff recognizes that no national or international consensus has been reached on the selection of appropriate characteristics for such analyses. Therefore, the information should be considered preliminary and subject to authorized stakeholder comment. The detailed aircraft characteristics that are the subject of this Order are hereby designated as SGI,[1] in accordance with Section 147 of the Atomic Energy Act of 1954, as amended (AEA).

On October 24, 2008, the NRC revised Title 10 of the *Code of Federal Regulations* 10 CFR part 73, section 73.21, "Protection of Safeguards Information: Performance Requirements," to include applicants in the list of entities required to protect SGI (73 FR 63546). The NRC is issuing this order to NuScale to impose requirements for the protection of SGI in addition to the requirements set forth in 10 CFR 73.21. These additional requirements include nomination of a reviewing official, restrictions on storage of SGI, and access to SGI by certain individuals.

To implement this Order, NuScale must nominate an individual who will review the results of the Federal Bureau of Investigation (FBI) criminal history records check to make SGI access determinations. This individual, referred to as the "reviewing official," must be someone who seeks access to SGI. Based on the results of the FBI criminal history records check, the NRC staff will determine whether this individual may have access to SGI. If the NRC determines that the individual may not be granted access to SGI, the enclosed order prohibits that individual from obtaining access to any SGI. Once the NRC approves a reviewing official, that reviewing official, and only that reviewing official, can make SGI access determinations for other individuals who have been identified by NuScale as having a need to know SGI, and who have been fingerprinted, have had a criminal history records check and a background check, in accordance with this order. The reviewing official can only make SGI access determinations for other individuals, but cannot approve other individuals to act as reviewing officials. Only the NRC can approve a reviewing official. Therefore, if NuScale wishes to have a new or additional reviewing official, the NRC must approve that individual before he or she can act in that capacity.

II

The Commission has broad statutory authority to protect and prohibit the unauthorized disclosure of SGI. Section 147 of the AEA grants the Commission explicit authority to issue such orders, as necessary, to prohibit the unauthorized disclosure of SGI. To provide assurance that NuScale is continuing to implement appropriate measures to ensure a consistent level of protection to prohibit unauthorized disclosure of SGI, and to comply with the fingerprinting, criminal history records check, and background check requirements for access to SGI, NuScale shall implement the requirements for the protection of SGI as set forth in 10 CFR 73.21, 10 CFR 73.22, and this Order.

Certain categories of individuals are relieved by rule from the fingerprinting requirements under 10 CFR 73.59, "Relief from Fingerprinting, Identification and Criminal History Records Checks and Other Elements of Background Checks for Designated Categories of Individuals." Those individuals include Federal, State, and

[1] SGI is a form of sensitive, unclassified, security-related information that the Commission has the authority to designate and protect under Section 147 of the AEA.

local law enforcement personnel; Agreement State inspectors who conduct security inspections on behalf of the NRC; members of Congress; certain employees of members of Congress or congressional committees who have undergone fingerprinting for a prior U.S. Government criminal history check; and representatives of the International Atomic Energy Agency or certain foreign government organizations. In addition, individuals who have had a favorably-decided U.S. Government criminal history check within the last 5 years, or individuals who have active Federal security clearances (provided in either case that they make available the appropriate documentation), have already been subjected to fingerprinting and criminal history checks and, thus, have satisfied the fingerprinting requirement.

In addition, pursuant to 10 CFR 2.202, ''Orders,'' I find that in light of the matters identified above, which warrant the issuance of this Order, the public health, safety, and interest require that this Order be effective immediately.

III

Accordingly, pursuant to Sections 147, 149, 161b, 161i, 161o, 182, and 186 of the AEA, and the Commission's regulations in 10 CFR 2.202 and 10 CFR Part 73, ''Physical Protection of Plants and Materials,'' *it is hereby ordered, effective immediately, that NuScale and all other persons who seek or obtain access to safeguards information as described herein shall comply with the requirements set forth in 10 CFR 73.21, 10 CFR 73.22, and this order.*

A. 1. No person may have access to any SGI if the NRC, when making an SGI access determination for a nominated reviewing official, has determined, based on fingerprinting and an FBI identification and criminal history records check, that the person nominated may not have access to SGI.

2. NuScale shall store SGI designated by this Order only in the facility or facilities specifically approved in writing by the NRC for storage of SGI designated by this Order. NuScale may request, in writing, NRC approval of additional facilities for the storage of the SGI designated by this Order that the NRC will consider on a case-by-case basis.

3. NuScale may provide SGI designated by this Order to individuals (such as foreign nationals, U.S. citizens living in foreign countries, or individuals under the age of 18) for whom fingerprinting and an FBI criminal history records check is not reasonably expected to yield sufficient criminal history information to form the basis of an informed decision on granting access to SGI, provided that the individual satisfies the requirements of this Order, and that NuScale has implemented measures, in addition to those set forth in this Order, to ensure that the individual is suitable for access to the SGI designated by this Order. Such additional measures must include, but are not limited to, equivalent criminal history records checks conducted by a local, State, or foreign governmental agency, and/or enhanced background checks including employment and credit history. The NRC must review these additional measures and approve them in writing.

B. No person may provide SGI to any other person except in accordance with Section III.A. above. Before providing SGI to any person, a copy of this Order shall be provided to that person.

C. NuScale shall comply with the following requirements:

1. NuScale shall, within 20 days of the date of this Order, submit the fingerprints of one individual whom (a) NuScale nominates as the ''reviewing official'' for determining access to SGI by other individuals and (b) has an established need to know the information. The NRC will determine whether this individual (or any subsequent reviewing official) may have access to SGI and, therefore, will be permitted to serve as NuScale's reviewing official.[2] NuScale may, at the same time or later, submit the fingerprints of other individuals to whom NuScale seeks to grant access to SGI. Fingerprints shall be submitted and reviewed in accordance with the procedures described in the attachment to this Order.

2. NuScale shall, in writing, within 20 days of the date of this Order, notify the Commission: (1) If it is unable to comply with any of the requirements described in the Order, including the attachment; or (2) if compliance with any of the requirements is unnecessary in its specific circumstances.

The notification shall provide NuScale's justification for seeking relief from, or variation of, any specific requirement.

NuScale shall submit responses to C.1. and C.2 above to the Director, Office of New Reactors, U.S. Nuclear Regulatory Commission, Washington, DC 20555. In addition, NuScale shall mark its responses as "Security-Related Information—Withhold Under 10 CFR 2.390."

Except for the requirements for fingerprinting, the Director, Office of New Reactors, may, in writing, relax or rescind any of the above conditions upon demonstration of good cause by NuScale.

IV

In accordance with 10 CFR 2.202, NuScale must, and any other person adversely affected by this Order may, submit an answer to this Order and may request a hearing with regard to this Order, within 20 days of the date of this Order. Where good cause is shown, the NRC will consider extending the time to request a hearing. A request for extension of time in which to submit an answer or request a hearing must be made in writing to the Director, Office of New Reactors, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and include a statement of good cause for the extension. The answer may consent to this Order. Unless the answer consents to this Order, the answer shall, in writing and under oath or affirmation, specifically set forth the matters of fact and law by which NuScale or other entities adversely affected rely, and the reasons as to why the NRC should not have issued this Order. Any answer or request for a hearing shall be submitted to the Secretary, Office of the Secretary, U.S. Nuclear Regulatory Commission, ATTN: Rulemakings and Adjudications Staff, Washington, DC 20555. Copies shall also be sent to the Director, Office of New Reactors, U.S. Nuclear Regulatory Commission, Washington, DC 20555, to the Assistant General Counsel for Materials Litigation and Enforcement at the same address, and to NuScale, if the answer or hearing request is by an entity other than NuScale. Because of possible delays in delivery of mail to U.S. Government offices, the agency asks that answers and requests for hearing be transmitted to the Secretary of the Commission, either by means of facsimile transmission to (301) 415–1101 or via e-mail to *hearingdocket@nrc.gov,* and also to the Office of the General Counsel either through facsimile transmission to (301) 415–3725 or via e-mail to *OGCMailCenter@nrc.gov.* If an entity other than NuScale requests a hearing, that entity shall set forth, with particularity, the manner in which this Order adversely affects its interest and shall address the criteria set forth in 10 CFR 2.309, "Hearing Requests, Petitions to Intervene, Requirements for Standing, and Contentions."

If NuScale, or a person whose interest is adversely affected, requests a hearing, the Commission will issue an order

[2] The NRC's determination of this individual's access to SGI in accordance with the process described in Enclosure 3 to the transmittal letter of this order is an administrative determination that is outside the scope of this order.

designating the time and place of any hearing. If a hearing is held, the issue to be considered at such hearing shall be whether this Order should be sustained.

Pursuant to 10 CFR 2.202(c)(2)(i), NuScale may, in addition to demanding a hearing, at the time the answer is filed or sooner, move the presiding officer to set aside the immediate effectiveness of the order on the grounds that the order, including the need for immediate effectiveness, is not based on adequate evidence, but on mere suspicion, unfounded allegations, or error. In the absence of any request for hearing, or written approval of an extension of time in which to request a hearing, the provisions as specified above in Section III shall be final 20 days from the date of this Order without further order or proceedings.

If the agency approves an extension of time for requesting a hearing, the provisions, as specified above in Section III, shall be final when the extension expires, if a hearing request has not been received.

An answer or a request for hearing shall not stay the immediate effectiveness of this order.

Dated at Rockville, Maryland, this 2nd day of June 2010.

For the Nuclear Regulatory Commission.

Michael R. Johnson,

Director, Office of New Reactors.

Guidance for Evaluation of Access to Safeguards Information With the Inclusion of Criminal History Records (Fingerprint) Checks

When a licensee or other person [3] submits fingerprints to the Nuclear Regulatory Commission (NRC) pursuant to an NRC Order, it will receive a criminal history summary of information, provided in federal records, since the individual's eighteenth birthday. Individuals retain the right to correct and complete information and to initiate challenge procedures described in Enclosure 3. The licensee will receive the information from the criminal history records check for those individuals requiring access to Safeguards Information (SGI), and the reviewing official will evaluate that information using the guidance below. Furthermore, the requirements of all Orders, which apply to the information and material to which access is being granted, must be met.

The licensee's reviewing official is required to evaluate all pertinent and available information in making a determination of access to SGI, including the criminal history information pertaining to the individual as required by the NRC Order. The criminal history records check is used when determining whether an individual has a record of criminal activity that indicates that the individual should not have access to SGI. Each determination of access to SGI, which includes a review of criminal history information, must be documented to include the basis for the decision that is made.

(i) If negative information is discovered that was not provided by the individual, or which is different in any material respect from the information provided by the individual, this information should be considered, and decisions made based on these findings, must be documented.

(ii) Any record containing a pattern of behaviors which indicates that the behaviors could be expected to recur or continue, or recent behaviors which cast questions on whether an individual should have access to SGI, should be carefully evaluated prior to any authorization of access to SGI.

It is necessary for a licensee to resubmit fingerprints only under two conditions:

(1) The FBI has determined that the fingerprints cannot be classified due to poor quality in the mechanics of taking the initial impressions; or

(2) the initial submission has been lost.

If the FBI advises that six sets of fingerprints are unclassifiable based on conditions other than poor quality, the licensee may submit a request to the NRC for alternatives. When those search results are received from the FBI, no further search is necessary.

Process To Challenge NRC Denials or Revocations of Access to Safeguards Information

1. Policy

This policy establishes a process for individuals whom the Nuclear Regulatory Commission (NRC) licensees or other person [4] nominate as reviewing officials to challenge and appeal NRC denials or revocations of access to Safeguards Information (SGI). Any individual nominated as a licensee reviewing official whom the NRC has determined may not have access to SGI shall, to the extent provided below, be afforded an opportunity to challenge and appeal the NRC's determination. This policy shall not be construed to require the disclosure of SGI to any person, nor shall it be construed to create a liberty or property interest of any kind in the access of any individual to SGI.

2. Applicability

This policy applies solely to those employees of licensees who are nominated as a reviewing official, and who are thus considered, by the NRC, for initial or continued access to SGI in that position.

3. SGI Access Determination Criteria

Determinations for granting a nominated reviewing official access to SGI will be made by the NRC staff. Access to SGI shall be denied or revoked whenever it is determined that an individual does not meet the applicable standards. Any doubt about an individual's eligibility for initial or continued access to SGI shall be resolved in favor of the national security and access will be denied or revoked.

4. Procedures To Challenge the Contents of Records Obtained From the FBI

a. Prior to a determination by the NRC Facilities Security Branch Chief that an individual nominated as a reviewing official is denied or revoked access to SGI, the individual shall:

(i) Be provided the contents of records obtained from the FBI for the purpose of assuring correct and complete information. If, after reviewing the record, an individual believes that it is incorrect or incomplete in any respect and wishes to change, correct, or update the alleged deficiency, or to explain any matter in the record, the individual may initiate challenge procedures. These procedures include either direct application by the individual challenging the record to the agency (*i.e.,* law enforcement agency) that contributed the questioned information, or direct challenge as to the accuracy or completeness of any entry on the criminal history record to the Assistant Director, Federal Bureau of Investigation, Identification Division, Washington, DC 20537–9700 (as set forth in 28 CFR 16.30 through 16.34). In the latter case, the FBI will forward the challenge to the agency that submitted the data and request that agency to verify or correct the challenged entry. Upon receipt of an official communication directly from the agency that contributed the original information, the FBI Identification Division makes any necessary changes in accordance with the information supplied by that agency.

(ii) Be afforded ten (10) days to initiate an action challenging the results

[3] As used herein, ''licensee'' means any licensee or other person who is required to conduct fingerprinting.

[4] As used herein, ''licensee'' means any licensee or other person who is required to conduct fingerprinting.

of an FBI criminal history records check (described in (i), above) after the record is made available for the individual's review. If such a challenge is initiated, the NRC Facilities Security Branch Chief may make a determination based upon the criminal history record only upon receipt of the FBI's ultimate confirmation or correction of the record.

5. Procedures To Provide Additional Information

a. Prior to a determination by the NRC Facilities Security Branch Chief that an individual nominated as a reviewing official is denied or revoked access to SGI, the individual shall:

(i) Be afforded an opportunity to submit information relevant to the individual's trustworthiness and reliability. The NRC Facilities Security Branch Chief shall, in writing, notify the individual of this opportunity, and any deadlines for submitting this information. The NRC Facilities Security Branch Chief may make a determination of access to SGI only upon receipt of the additional information submitted by the individual, or, if no such information is submitted, when the deadline to submit such information has passed.

6. Procedures To Notify an Individual of the NRC Facilities Security Branch Chief Determination To Deny or Revoke Access to SGI

a. Upon a determination by the NRC Facilities Security Branch Chief that an individual nominated as a reviewing official is denied or revoked access to SGI, the individual shall be provided a written explanation of the basis for this determination.

7. Procedures To Appeal an NRC Determination To Deny or Revoke Access to SGI

a. Upon a determination by the NRC Facilities Security Branch Chief that an individual nominated as a reviewing official is denied or revoked access to SGI, the individual shall be afforded an opportunity to appeal this determination to the Director, Division of Facilities and Security. The determination must be appealed within twenty (20) days of receipt of the written notice of the determination by the Facilities Security Branch Chief, and may either be in writing or in person. Any appeal made in person shall take place at the NRC's headquarters, and shall be at the individual's own expense. The determination by the Director, Division of Facilities and Security, shall be rendered within sixty (60) days after receipt of the appeal.

8. Procedures To Notify an Individual of the Determination by the Director, Division of Facilities and Security, Upon an Appeal

a. A determination by the Director, Division of Facilities and Security, shall be provided to the individual in writing, and include an explanation of the basis for this determination. A determination by the Director, Division of Facilities and Security, to affirm the Facilities Branch Chief's determination to deny or revoke an individual's access to SGI is final and not subject to further administrative appeals.

General Requirements

Licensees and other persons who are required to conduct fingerprinting shall comply with the requirements of this enclosure.[5]

A. The licensee shall notify the U.S. Nuclear Regulatory Commission (NRC) of any desired change in reviewing officials, in compliance with C.1 of the subject Order. The NRC will determine whether the individual nominated as the new reviewing official may have access to safeguards information (SGI) based on a previously-obtained or new criminal history check and, therefore, will be permitted to serve as the licensee's reviewing official.

Procedures for Processing Fingerprint Checks

For the purpose of complying with this order, licensees shall, using an appropriate method listed in Title 10 of the *Code of Federal Regulations* (10 CFR) part 73, section 4, submit to the NRC's Division of Facilities and Security, Mail Stop T–6E46, one completed, legible standard fingerprint card (Form FD–258, ORIMDNRCOOOZ) or, where practicable, other fingerprint records for each individual seeking access to SGI, to the Director of the Division of Facilities and Security, marked for the attention of the Division's Criminal History Check Section. Copies of these forms may be obtained by writing the Office of Information Services, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, by calling (301) 415–5877, or by e-mail to *forms@nrc.gov.* Practicable alternative formats are set forth in 10 CFR 73.4. The licensee shall establish procedures to ensure that the quality of the fingerprints taken results in minimizing the rejection rate of fingerprint cards due to illegible or incomplete cards.

The NRC will review submitted fingerprint cards for completeness. Any Form FD–258 fingerprint record containing omissions or evident errors will be returned to the licensee for corrections. The fee for processing fingerprint checks includes one re-submission if the initial submission is returned by the Federal Bureau of Investigations (FBI) because the fingerprint impressions cannot be classified. The one free re-submission must have the FBI Transaction Control Number reflected on the re-submission. If additional submissions are necessary, they will be treated as initial submittals and will require a second payment of the processing fee.

Fees for processing fingerprint checks are due upon application. Licensees shall submit payment with the application for processing fingerprints by corporate check, certified check, cashier's check, money order, or electronic payment, made payable to "U.S. NRC." [For guidance on making electronic payments, contact the Facilities Security Branch, Division of Facilities and Security, at (301) 415–7404.] Combined payment for multiple applications is acceptable. The application fee (currently $36) is the sum of the user fee charged by the FBI for each fingerprint card or other fingerprint record submitted by the NRC on behalf of a licensee, and an NRC processing fee, which covers administrative costs associated with NRC handling of licensee fingerprint submissions. The Commission will directly notify licensees who are subject to this regulation of any fee changes.

The Commission will forward to the submitting licensee all data received from the FBI as a result of the licensee's application(s) for criminal history records checks, including the FBI fingerprint record.

Right To Correct and Complete Information

Prior to any final adverse determination, the licensee shall make available to the individual the contents of any criminal records obtained from the FBI for the purpose of assuring correct and complete information. Written confirmation by the individual of receipt of this notification must be maintained by the licensee for a period of one (1) year from the date of the notification. If, after reviewing the record, an individual believes that it is incorrect or incomplete in any respect and wishes to change, correct, or update the alleged deficiency, or to explain any matter in the record, the individual may initiate challenge procedures. These procedures include either direct

[5] As used herein, A"licensee" means any licensee or other person who is required to conduct fingerprinting in accordance with these requirements.

application by the individual challenging the record to the agency (*i.e.,* law enforcement agency) that contributed the questioned information, or direct challenge as to the accuracy or completeness of any entry on the criminal history record to the Assistant Director, Federal Bureau of Investigation, Identification Division, Washington, DC 20537–9700 (as set forth in 28 CFR 16.30 through 16.34). In the latter case, the FBI forwards the challenge to the agency that submitted the data and requests that agency to verify or correct the challenged entry. Upon receipt of an official communication directly from the agency that contributed the original information, the FBI Identification Division makes any changes necessary in accordance with the information supplied by that agency. The licensee must provide at least ten (10) days for an individual to initiate an action challenging the results of an FBI criminal history records check after the record is made available for his/her review. The licensee may make a final SGI access determination based upon the criminal history record only upon receipt of the FBI's ultimate confirmation or correction of the record. Upon a final adverse determination on access to SGI, the licensee shall provide the individual its documented basis for denial. Access to SGI shall not be granted to an individual during the review process.

Protection of Information

1. Each licensee who obtains a criminal history record on an individual pursuant to this Order shall establish and maintain a system of files and procedures for protecting the record and the personal information from unauthorized disclosure.

2. The licensee may not disclose the record or personal information collected and maintained to persons other than the subject individual, his/her representative, or to those who have a need to access the information in performing assigned duties in the process of determining access to Safeguards Information. No individual authorized to have access to the information may re-disseminate the information to any other individual who does not have a need-to-know.

3. The personal information obtained on an individual from a criminal history record check may be transferred to another licensee if the licensee holding the criminal history record check receives the individual's written request to re-disseminate the information contained in his/her file, and the current licensee verifies information such as the individual's name, date of birth, social security number, sex, and other applicable physical characteristics for identification purposes.

4. The licensee shall make criminal history records, obtained under this section, available for examination by an authorized representative of the NRC to determine compliance with the regulations and laws.

5. The licensee shall retain all fingerprint and criminal history records received from the FBI, or a copy if the individual's file has been transferred, for three (3) years after termination of employment or determination of access to SGI (whether access was approved or denied). After the required three (3) year period, these documents shall be destroyed by a method that will prevent reconstruction of the information in whole or in part.

[FR Doc. 2010–15730 Filed 6–28–10; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2010–0209]

Request for Comments on the Draft Policy Statement on the Protection of Cesium-137 Chloride Sources and Notice of Public Meeting

AGENCY: Nuclear Regulatory Commission (NRC).

ACTION: Request for public comment and notice of public meeting.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is considering adopting a statement of policy on the protection of cesium-137 chloride (CsCl) sources. This statement would provide the Commission's policy regarding secure uses of these sources at the present and express the Commission's potential actions in the event that changes in the threat environment necessitate these actions. The purpose of this policy statement is to delineate the Commission's expectations for security and safety of these sources. This draft policy statement is being issued for public comment.

Additionally, the NRC is conducting a public meeting to solicit public input on major issues associated with the draft policy statement regarding the current use of certain forms of Cs-137 sources used by NRC- and Agreement State-licensees. Furthermore, the NRC is requesting names of individuals to participate at the public meeting in separate roundtable panel discussions of the issues identified in Sections III and IV of this notice.

DATES: 1. Comments on the draft policy statement should be submitted by December 17, 2010. Comments received after this date will be considered if it is practical to do so, but the NRC is able to assure consideration only for comments received on or before this date.

2. Nominations for participation in the roundtable discussions of the public meeting should be submitted by October 8, 2010. For expeditious handling of the nominations, the NRC established a dedicated e-mail address. The nominations should be sent to the following NRC e-mail address: *CesiumDraftPolicy@nrc.gov.*

3. Other participants, who wish to attend the public meeting, could also pre-register at the dedicated e-mail address: *CesiumDraftPolicy@nrc.gov.* The Commission will appreciate pre-registration in order to properly plan for the conference facilities. However, pre-registration is not required and pre-registration is open until the opening day of the public meeting.

Public Meeting Dates: The NRC will take public comments on the issues raised in this document at a public meeting on November 16–17, 2010. The location of the public meeting has not been finalized. However, the location is planned to be near the NRC Headquarters in the Rockville, Maryland, area. The location and the agenda of the public meeting will be posted at the dedicated Web site *http://www.nrc.gov/materials/miau/licensing.html#cc,* as soon as this information is finalized. Please refer to the **SUPPLEMENTARY INFORMATION** section for additional information.

ADDRESSES: Please include Docket ID NRC–2010–0209 in the subject line of your comments. For instructions on submitting comments and accessing documents related to this action, see Section I, "Submitting Comments and Accessing Information" in the **SUPPLEMENTARY INFORMATION** section of this document. You may submit comments by any one of the following methods.

Federal Rulemaking Web Site: Go to *http://www.regulations.gov* and search for documents filed under Docket ID NRC–2010–0209. Address questions about NRC dockets to Carol Gallagher, telephone (301) 492–3668; e-mail *Carol.Gallagher@nrc.gov.*

Mail comments to: Cindy Bladey, Chief, Rules, Announcements and Directives Branch, Office of Administration, MS: TWB–5 B1M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

FOR FURTHER INFORMATION CONTACT: Dr. John P. Jankovich, Office of Federal and State Materials and Environmental Management Programs, telephone (301) 415–7904, e-mail *john.jankovich@nrc.gov,* or Dr. Cynthia G. Jones, Office of Nuclear Security and Incident Response, telephone (301) 415–0298, e-mail *cynthia.jones@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Submitting Comments and Accessing Information

Comments submitted in writing or in electronic form will be posted on the NRC Web site and on the Federal rulemaking Web site *http://www.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.

You can access publicly available documents related to this document, including the following documents, 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, Room O–1F21, 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 or 301–415–4737, or by e-mail to *PDR.Resource@nrc.gov.*

Federal Rulemaking Web Site: Public comments and supporting materials related to this document can be found at *http://www.regulations.gov* by searching on Docket ID NRC–2010–0209.

II. Background

Certain radioactive sources, including CsCl sources, have been identified by the International Atomic Energy Agency (IAEA) *Code of Conduct on the Safety and Security of Radioactive Sources* (Code of Conduct) (*see http://www-pub.iaea.org/MTCD/publications/PDF/Code-2004_web.pdf*) as sources that may pose a significant risk to individuals, society, and the environment if improperly handled or used in a malicious act. Consequently, the NRC considers it prudent to express its views on the safe and secure use of these sources. CsCl sealed sources are used in many applications, most commonly in irradiators, calibrators, and in devices for biological and medical research. To develop its draft policy statement, the NRC initiated and completed a number of initiatives. A significant element of these initiatives was an Issue Paper which was published in the **Federal Register** on July 31, 2008 (73 FR 44780), and discussed with stakeholders in a public workshop held on September 29–30, 2008. The NRC also received numerous written comments on the issues. The oral and written comments as well as the transcript of the workshop, along with other relevant information, are accessible at *http://www.nrc.gov/materials/miau/licensing.html#cesium.*

The NRC is seeking public input on the major issues associated with its policy involving CsCl to reduce the risk to individuals, society, and the environment. As a first step, the NRC has prepared a draft policy statement, contained in Section III of this document, which describes issues related to safety and security associated with IAEA Category 1 and 2 CsCl sources.[1] The intent of this document is to foster discussion about these issues and to solicit comments on the draft policy statement. The NRC will also use a public Web site, *http://www.nrc.gov/materials/miau/licensing.html#cc* to make documents, relevant to the draft policy statement and to the public meeting, accessible. This public Web site will be continually updated as new information becomes available. The exact location and the agenda of the public meeting will also be posted at this site as soon as they become finalized.

[1] An IAEA Category 1 cesium-137 source contains a minimum of 3000 Ci (100 TBq) and a Category 2 source contains a minimum of 30 Ci (1 TBq). *See http://www-pub.iaea.org/MTCD/publications/PDF/Code-2004_web.pdf.*

III. Draft Policy Statement of the U.S. Nuclear Regulatory Commission on the Protection of Cesium-137 Chloride Sources

The NRC's Role in Ensuring Security for Radioactive Materials

The NRC has the responsibility to license and regulate the civilian use of radioactive materials for commercial, industrial, academic, and medical purposes in a manner that protects public health and safety and promotes the common defense and security. The NRC and its predecessor, the Atomic Energy Commission, have regulated the use of radioactive materials since 1946. The use of radioactive materials is regulated by the NRC and 37 states, known as Agreement States. Agreement States enter into agreements with the NRC under Section 274 of the Atomic Energy Act to license and regulate the use of byproduct material within their borders.

The security and control of radiation sources is an essential part of the NRC's mission. The NRC's efforts in this regard continue to be effective, and there have been no security incidents involving risk-significant radiation sources. After September 11, 2001, the NRC imposed additional security requirements. In addition, the National Nuclear Security Administration (NNSA) has initiated a program to enhance security voluntarily beyond these requirements. One type of radioactive source, cesium-137 chloride (CsCl), has been the focus of increased attention in the U.S. because these sources are extensively used in a wide range of applications in medicine, industry, and research and, while unlikely, due to the physical and chemical characteristics of CsCl, these sources could be used by terrorists in a radiological dispersal device or "dirty bomb."

The NRC supports and implements the recommendations of the international community regarding the safe use and protection of radioactive materials. In 2004, the International Atomic Energy Agency (IAEA) issued *the Code of Conduct for the Safety and Security of Radioactive Sources* (the Code), which prescribes a legislative framework, regulatory programs, and import/export provisions to achieve and maintain a high level of safety and security of radioactive sources. The U.S. Government is committed to the implementation of the Code. The Code applies to all radioactive sources that could pose a significant risk to individuals, society, and the environment. The Code establishes five categories of radioactive sources based on their potential to cause severe

deterministic health effects if not managed in a safe and secure manner. Consistent with the Code, the NRC and the Agreement States have established national requirements for the enhanced security for Category 1 and 2 quantities of radioactive material, which, if misused, could pose a significant risk to individuals, society, and the environment.

To maintain security of sources, the Energy Policy Act of 2005 (EPAct) directed the NRC to establish and lead the Radiation Source Protection and Security Task Force (Task Force) to evaluate and provide recommendations to the President and Congress periodically relating to the security of radiation sources in the U.S. from potential terrorist threats, including acts of sabotage, theft, or use of a radiation source in a radiological dispersal device. The EPAct named 12 Federal agencies to the Task Force. In addition to the named agencies, the NRC invited the U.S. Department of Health and Human Services and the White House Office of Science and Technology Policy to participate. To accomplish the mission in view of the regulatory responsibilities divided in the U.S. between the NRC and the Agreement States, the Task Force also invited a representative of the Organization of Agreement States and the Conference of Radiation Control Program Directors to participate as a non-voting member. NRC has coordinated with these partners consistent with its regulatory role, to enhance the security of sources, including CsCl. The Task Force issued its first report in 2006,[2] and is scheduled to issue another report in 2010. The NRC's security requirements for radioactive sources are aligned with the recommendations of the first Task Force report.

Statement of Policy

It is the policy of the Commission that its mission of ensuring adequate protection of public health and safety, common defense and security, and the environment while enabling the use of radioactive materials for beneficial civilian purposes is best accomplished with respect to CsCl by implementing or promoting the following principles:

- The safety and security of risk significant sources is an essential part of the NRC's mission;
- Licensees have the primary responsibility to securely manage and to protect sources in their possession from misuse, theft, and radiological sabotage;
- Adequate protection of public health and safety is maintained if CsCl sources are managed in accordance with the security requirements of the NRC and the Agreement States. These requirements are based on vulnerability assessments of the various sources and follow the principles of the Code of Conduct on the Safety and Security of Radioactive Sources of the International Atomic Energy Agency;
- While these sources are adequately protected under the current NRC requirements, design improvements could be made that further mitigate or minimize the radiological consequences;
- The development and use of alternative forms of cesium-137, while not required for adequate protection, is prudent and the NRC intends to monitor these developments closely. In addition, the NRC recognizes that measures to verify effectiveness of the alternatives for solubility and dispersibility must be established to support future decision-making on this matter;
- CsCl enables three specific classes of applications that benefit society: (a) Blood irradiation, (b) bio-medical and industrial research, and (c) calibration of instrumentation and dosimetry;
- The NRC recognizes that currently there is no disposal capability for such commercial sources. The NRC considers it imperative to develop a pathway for the long term storage and disposal of these sources whether or not there are alternatives developed; and
- The NRC monitors the threat environment and maintains awareness of international and domestic security efforts. In the event that changes in the threat environment necessitate regulatory action, the NRC is ready to issue additional security requirements to apply appropriate limitations for the use of CsCl in its current form.

Background

Security and Control of Radioactive Sources

Strong measures and regulatory requirements are currently in place for ensuring security and control of radioactive sources. After the terrorist events of September 11, 2001, the NRC and Agreement States issued security requirements mandating that licensees who possess IAEA Category 1 or 2 quantities of radioactive materials implement increased security and control measures to reduce the risk of malevolent use and intentional unauthorized access to radioactive material. The additional requirements enhanced and supplemented existing regulations in 10 CFR 20.1801, "Security of Stored Material," and 10 CFR 20.1802, "Control of Material Not in Storage," which are primarily intended to prevent or mitigate unintended exposure to radiation.

Current security requirements include access controls and background checks for personnel; monitoring, detecting and responding to unauthorized access; delay; advance coordination with local law enforcement; and the tracking of transfers and shipments. The security requirements require licensees to establish and implement trustworthiness and reliability standards to determine who will have unescorted access to the radioactive material. An individual's trustworthiness and reliability is based upon a background investigation. The NRC and Agreement States have jointly developed materials protection and security regulatory requirements that reflect the experience gained through implementation of existing requirements.

In addition, the NRC has implemented new regulatory requirements for import/export licensing and for reporting to the National Source Tracking System (NSTS) which increase accountability of Category 1 and 2 radioactive material transactions and help to ensure that such transactions are only made by authorized entities. The NRC developed and maintains the NSTS, which provides information on sources from the time of manufacture through transportation and use to end-of-life disposition. The NSTS and other systems under development, such as Web-Based-Licensing and License Verification System, are key components of a comprehensive program for the security and control of radioactive materials. When complete, these systems will include information on all NRC, Agreement State, and import/export licensees and high risk radioactive sources.

The measures described above are in place to ensure the security of all Category 1 and 2 radioactive sources, including CsCl sources. These measures have reduced the vulnerability of CsCl sources. In addition, the NRC and Agreement States are supporting the U.S. Department of Energy's (DOE's) NNSA voluntary program to retrofit existing CsCl irradiators with physical security enhancements and to incorporate these improvements into the designs of newly manufactured units. These modifications extend beyond current regulatory requirements. These efforts are often complemented by expert security guidance to licensees

[2] Report to the President and the U.S. Congress Under Public Law 109–58, The Energy Policy Act of 2005, The Radiation Source Protection and Security Task Force Report, NRC Reference No. ML062190349.

(assist visits) and table-top exercises that allow participants to share best practices.

The NRC and Agreement States also support the Federal Bureau of Investigation's ongoing Weapons of Mass Destruction (WMD) countermeasure effort to reach out to certain communities of licensees (including the CsCl irradiator licensee community). A critical aspect of this WMD countermeasure effort is information sharing through visits to licensees. These visits encourage communication and allow regulators, law enforcement, and licensees to gain an understanding of a licensee's security arrangements and how and when law enforcement would be engaged if there were a threat or an event at a licensee's site.

The NRC supports the security initiatives of international organizations (*e.g.,* IAEA), and other countries, as well as the initiatives of Federal agencies aimed to further increase the protection of high risk sources overseas (*e.g.,* NNSA's Global Threat Reduction Initiative). The NRC participates in the development of such protective measures in various international forums and will consider their applicability for use within the U.S. if the threat environment changes, warranting additional protective measures.

Uses of CsCl Sources

CsCl sources comprise approximately 3% of the IAEA Category 1 and 2 quantity sources in the U.S. Many in the medical and scientific communities indicate that these CsCl sources are important due to their application in blood irradiation, bio-medical and industrial research, and calibration of instrumentation and dosimetry, especially for critical reactor and first responder equipment. CsCl is used for these applications because of the properties of the nuclide cesium-137 (Cs-137), including its desirable single energy spectrum (662 keV), long half-life, low cost, and moderate shielding requirements relative to other nuclides. The CsCl used in these applications is in a compressed powder form that is doubly-encapsulated in two stainless steel capsules to ensure safety and security in normal use. This physical form is used because of its high specific activity (gamma emission per unit volume) and manufacturability. However, the powder is highly soluble and dispersible, which presents security concerns.

Blood irradiation is medically essential to prevent transfusion-associated Graft-Versus-Host disease, and some hospitals use only irradiated blood. CsCl blood irradiators are used in over 90% of all blood irradiation because they are the most reliable and efficient blood irradiation devices currently available.

In biomedical research, CsCl irradiation has been used for over 40 years in fields such as immunology, stem cell research, cancer research, in-vivo immunology, systemic drug research, chromosome aberrations, DNA damage/repair, human genome, and genetic factors. For most research there are no alternatives to Cs-137 irradiation because of the unique properties of Cs-137 radiation, such as high dose rates with uniform fields of linear energy transfer. No alternative technologies that can effectively replace CsCl sources for biomedical research have yet been developed.

The U.S. and international systems of radiation measurements are based on the energy spectrum of Cs-137. All American National Standards Institute standards and their associated test-and-evaluation protocols for radiation detection, instrumentation, and personal dosimetry rely on the use of Cs-137. In addition, all DHS-related standards for calibration of first responder and emergency response equipment, such as personnel self-reading dosimeters, portal monitors, and portable survey instruments, also require the use of Cs-137 for calibration purposes. Cs-137 was selected by the U.S. and the international community as the basis of calibration because of the optimal single energy spectrum of this nuclide and its long half-life. The National Institute of Standards and Technology (NIST) maintains the national measurement standards and calibrates the instruments for secondary laboratories. These instruments are sent to secondary and tertiary laboratories that, in turn, calibrate the instruments for end users. This network of facilities ensures that every radiation detection instrument that is used in the country measures correctly and is traceable to NIST.

Ensuring Secure Disposal for Disused CsCl Sources

The disposal of CsCl radioactive sources, which are currently in use, is a challenge because of the high cost of disposal and the lack of commercial disposal facilities. The vast majority of the CsCl sources in use today are classified as Greater-Than-Class C low-level radioactive waste. Today, used and unwanted CsCl sources are stored safely and securely at the users' sites under the applicable NRC and Agreement State control and security requirements until commercial options become available. To maintain source safety and security, the sites are routinely inspected in accordance with established NRC and Agreement State inspection procedures. The Commission considers it imperative to develop a pathway for the long term storage and disposal of these sources because long term storage at licensee facilities increases the potential for safety and security issues. To resolve these issues, the NRC will continue to participate with its Federal and State partners and representatives of the private sector in initiatives to explore medium- and long term-solutions to address the need for disposal and disposition of CsCl sources.

The Low-Level Radioactive Waste Policy Amendments Act of 1985 assigned responsibility for providing disposal of this type of waste to DOE. However, pending the availability of a disposal capability, DOE is not responsible for accepting disused sources for storage, transportation or other activities related to disposal except under special circumstances.[2] At the present time, no final decision has been made to proceed with approval, funding, and operation of a disposal facility. The Commission will actively support DOE in all phases of the process to establish a storage facility for permanent, safe and secure storage of used and unwanted sources.

The NRC's Perspective on Further Security Enhancements

The NRC believes that the current enhanced regulatory framework for security of radioactive sources has been very effective in enhancing and ensuring the security and control of risk-significant sources used in medical, industrial, and research activities in the U.S. The NRC encourages stakeholders to take an active role in source security and continue their efforts in maintaining the current security environment. As is necessary and practical, and in response to any change in the threat environment, the NRC will work with other Federal agencies to further enhance the secure use of Cs-137 sources. The NRC recognizes that it is prudent to maintain awareness of the status of research to identify alternative forms of CsCl. NRC will remain cognizant of these issues and appropriately consider whether there are safety and security benefits to further risk reduction. As part of NRC's

[2] Under specified circumstances, and pursuant to other authority and responsibility under the Atomic Energy Act of 1954, DOE may recover excess or unwanted sealed sources (including CsCl sources) for reuse, storage or disposal that present threats to public health, safety or national security.

responsibility to ensure the security of these sources, the NRC, in coordination with its Federal partners, continuously monitors the national threat environment and is prepared to take further regulatory actions should this environment change. Just as it did following the events following September 11, 2001, the NRC is prepared to take immediate action such as issuance of additional security requirements with orders or rulemaking to address such security-related issues, if necessary.

The NRC solicits stakeholder input into major issues associated with the use of CsCl. The Public Workshop on the Security and Continued Use of Cesium-137 Chloride Sources that the NRC held in September 2008, is an example of soliciting such input. The workshop was attended by a large number of stakeholders and, in addition to the oral presentations and comments, the NRC received a significant number of written submissions. The workshop provided valuable information for the formulation of this Policy Statement regarding the use of CsCl sources, security issues, and the diversity of impacts that licensees could experience as a result of potential further regulatory requirements.

While the current security requirements are adequate, the NRC recognizes that if the use of CsCl in its current form is to continue, the NRC encourages the source and device manufacturers to implement design improvements that further mitigate or minimize the radiological consequences of misuse or malevolent acts involving these sources given that such events, while unlikely, cannot be dismissed. Similarly, the NRC supports efforts to develop alternate forms of Cs-137 that would further reduce the risk of malevolent use associated with CsCl. The National Research Council of the National Academies (NA) issued a report [3] that supported these efforts, recommended that the NRC consider the potential economic and social disruption that changes to the CsCl requirements could cause, and supported a research and development program for alternative "matrices" for high-activity Cs-137 sources, which would provide lowered security hazards.

The NRC recognizes that objective measures of "solubility" and "dispersibility" need to be defined before alternate forms of Cs-137 that are less-soluble and less-dispersible than the compressed powder form can be developed. The Commission has already directed the NRC staff to work with Federal agencies to define these measures which must be readily expressible in physical and chemical terms and be demonstrated through well-defined test protocols. In addition, the criteria for the solubility and the dispersibility measures must be established at levels that ensure enhancement of security and reduction of risks of malevolent use. Consequently, the criteria must be developed and accepted by both the cognizant technical communities and the communities responsible for the Nation's security.

While it is outside the scope of NRC's mission to conduct developmental research, the Commission encourages stakeholder research to develop alternative chemical forms for large activity Cs-137 sources. One of the recommendations made by the NA was to investigate the development of alternate chemical forms of Cs-137. The NRC believes that such research should engage cognizant Federal agencies and should consider the practicality of producing an end product that would maintain the security as well as the societal benefits of the current applications of CsCl sources. The NRC considers that pursuit of alternate forms of cesium would provide benefits in the longer term, because the technology of manufacturing other forms of cesium is not yet available. Given the state of the current technology, NRC believes that, for the short term, it is more feasible to focus current security efforts on strengthening existing security of sources as necessary through cooperative efforts and voluntary initiatives of industries that currently manufacture and use irradiators with CsCl sources. While current NRC security requirements ensure the safety and security of these sources, it has been shown through the voluntary NNSA security initiative program that further security enhancements and future design improvements further minimize the potential misuse or malevolent acts involving these sources.

Summary

The NRC is continually working with its domestic and international partners to assess, integrate, and improve its security programs, and to make risk-significant radiation sources more secure and less vulnerable to terrorists. The NRC has the responsibility to ensure the safe and secure use and control of radioactive sources, including CsCl sources. The NRC has met this responsibility through imposition of additional security requirements. The NRC has articulated in the past that the use of alternative forms of Cs-137 is desirable. The NRC's actions to date have resulted in strong security measures being established, and the NRC recognizes that near term replacement of devices or CsCl sources in existing blood, research, and calibration irradiators is not practicable or necessary due to implementation of the additional requirements and considering a lack of a disposal capacity. A clear strategy for the end-of-life management of these sources, which is the responsibility of the DOE, is not mature and likely will not be for some time. Many medical, research, and emergency response stakeholders have indicated that short term replacement would be detrimental. Therefore, the NRC continues to believe that the security of these facilities should be maintained and enhanced as practical through the implementation of the regulatory requirements and through voluntary actions such as the physical security enhancements of existing devices and future designs against intrusion. The NRC supports efforts to develop alternate forms of Cs-137 that would reduce the security risks and will monitor these developments closely. The NRC will continue to work with its federal partners to ensure the safety and security of CsCl sources. In the event that changes in the threat environment necessitate regulatory action, the NRC is ready to issue additional security requirements to apply appropriate limitations for the use of CsCl in its current forms or for its replacement with suitable alternatives.

IV. Plans for a Public Meeting

The NRC is holding a facilitated public meeting on November 16–17, 2010, on the draft policy statement and the following issues:

- The NRC's role in ensuring security for radioactive materials.
- Statement of Policy.
- Security and control of radioactive sources.
- Uses of CsCl sources.
- Ensuring secure disposal for disused CsCl sources.
- NRC's perspective on further security enhancements.

During the public meeting, NRC will conduct roundtable panel discussion, with opportunity for audience participation, for each issue contained in Sections III and IV of this document. NRC is seeking the names of individuals interested in participating on these panels. Nominations by interested individuals or organizations should

[3] National Research Council of the National Academies, "Radiation Source Use and Replacement," The National Academies Press, Washington, DC, *http://www.nap.org.*

include the name of the proposed panel member, the issues they are interested in discussing, viewpoint(s) on the issue(s), and affiliation (if any). Roundtable panel participants will be selected with the goal of providing balanced viewpoints on each of the various issues. Please see the **DATES** section to submit nominations by October 8, 2010.

We encourage previous participants who attended, either as panel members or attendees, the prior public workshop, held on September 29–30, 2008, to also participate in this meeting. Information on the previous public meeting is accessible at *http://www.nrc.gov/materials/miau/licensing.html#cesium.*

Based on the comments received in both written and electronic form, and at the public meeting, the Commission will then be in a better position to proceed with the issuance of a final Policy Statement. The final Policy Statement, when issued by the Commission, will be published in the **Federal Register**.

Dated at Rockville, Maryland, this 22 day of June 2010.

For the Nuclear Regulatory Commission.

Cynthia Carpenter,

Deputy Director, Office of Federal and State Materials and Environmental Management Programs.

[FR Doc. 2010–15734 Filed 6–28–10; 8:45 am]

BILLING CODE 7590–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #12170 and #12171]

Kentucky Disaster Number KY–00033

AGENCY: Small Business Administration.

ACTION: Amendment 5.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for Public Assistance Only for the Commonwealth of Kentucky (FEMA–1912–DR), dated 05/11/2010.

Incident: Severe Storms, Flooding, Mudslides, and Tornadoes.

Incident Period: 05/01/2010 through 06/01/2010.

DATES: *Effective Date:* 06/16/2010.

Physical Loan Application Deadline Date: 07/12/2010.

Economic Injury (EIDL) Loan Application Deadline Date: 02/11/2011.

ADDRESSES: Submit completed loan applications to: Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: The notice of the President's major disaster declaration for Private Non-Profit organizations in the Commonwealth of Kentucky, dated 05/11/2010, is hereby amended to include the following areas as adversely affected by the disaster.

Primary Counties: Ballard, Carlisle, Clark, Hickman.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

James E. Rivera,

Associate Administrator for Disaster Assistance.

[FR Doc. 2010–15681 Filed 6–28–10; 8:45 am]

BILLING CODE 8025–01–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act; Notice of Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94–409, that the Securities and Exchange Commission will hold a Closed Meeting on Thursday, July 1, 2010 at 2 p.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the Closed Meeting. Certain staff members who have an interest in the matters also may be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (7), 9(B) and (10) and 17 CFR 200.402(a)(3), (5), (7), 9(ii) and (10), permit consideration of the scheduled matters at the Closed Meeting.

Commissioner Casey, as duty officer, voted to consider the items listed for the Closed Meeting in a closed session.

The subject matter of the Closed Meeting scheduled for Thursday, July 1, 2010 will be:

Institution and settlement of injunctive actions;
Institution and settlement of administrative proceedings;
Consideration of amicus participation;
An opinion; and
Other matters relating to enforcement proceedings.

At times, changes in Commission priorities require alterations in the scheduling of meeting items.

For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact:

The Office of the Secretary at (202) 551–5400.

Dated: June 24, 2010.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2010–15821 Filed 6–25–10; 11:15 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62359; File No. SR–FINRA–2009–054]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving a Proposed Rule Change, as Modified by Amendment No. 1, To Establish in the Market for OTC Equity Securities Certain Regulatory Protections Derived From Certain Rules Adopted by the Commission in the Market for Listed Securities

June 22, 2010.

I. Introduction

On August 7, 2009, the Financial Industry Regulatory Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act") [1] and Rule 19b–4 thereunder,[2] a proposed rule change to establish certain regulatory protections for the market for OTC Equity Securities [3] that are similar to those established for national market system securities by Regulation NMS.[4] The proposed rule change was published for comment in the **Federal Register** on August 26, 2009.[5] The Commission received 12 comments on the Initial Notice.[6] On

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* FINRA Rule 6420(d) (defining OTC Equity Security as "any non-exchange-listed security and certain exchange-listed securities that do not otherwise qualify for real-time trade reporting"). Pursuant to Securities Exchange Act Release No. 61979 (April 23, 2010), 75 FR 23316 (May 3, 2010), effective June 28, 2010, the term OTC Equity Security will be defined in FINRA Rule 6420(c) as "any equity security that is not an 'NMS stock' as that term is defined in Rule 600(b)(47) of Regulation NMS; provided, however, that the term "OTC Equity Security" shall not include any Restricted Equity Security."

[4] 17 CFR 242.600 *et seq.*

[5] *See* Securities Exchange Act Release No. 60515 (August 17, 2009), 74 FR 43207 ("Initial Notice").

[6] *See* Submission via SEC WebForm from anonymous, dated September 1, 2009; Letter to Nancy M. Morris, Commission, from Janet M. Kissane, Senior Vice President—Legal and Corporate Secretary, NYSE Euronext, dated September 23, 2009 ("ArcaEdge Letter"); Letter to Elizabeth M. Murphy, Secretary, Commission, from

March 1, 2010, FINRA filed Amendment No. 1 to the proposed rule change. The proposed rule change, as amended, was published for comment in the **Federal Register** on March 16, 2010.[7] The Commission received two comment letters in response to the Amended Notice.[8] This order approves the proposed rule change, as modified by Amendment No. 1

II. Description of the Proposed Rule Change

With this proposed rule change, FINRA proposes to establish certain regulatory protections for the market for OTC Equity Securities that are similar to those established for national market system securities by Regulation NMS. First, FINRA proposes to adopt Rule 6434 (Minimum Pricing Increment for OTC Equity Securities) to impose restrictions on the display of quotes and orders for OTC Equity Securities in sub-penny increments similar to those in Rule 612 of Regulation NMS.[9] Rule 6434 would prohibit members from displaying, ranking, or accepting from any person a bid or offer, order, or indication of interest in an OTC Equity Security in an increment smaller than $0.01 if the bid or offer, order, or indication of interest is priced $1.00 or greater per share. As initially filed, FINRA proposed to prohibit members from displaying, ranking, or accepting a bid or offer, order, or an indication of interest in an OTC Equity Security in an increment smaller than: (1) $0.0001, if the bid or offer, order, or indication of interest were priced between $0.01 and $1.00 per share; and (2) $0.000001, if the bid or offer, order, or indication of interest were priced less than $0.01 per share.[10] As discussed below, FINRA subsequently amended the proposal to prohibit members from displaying, ranking, or accepting from any person a bid or offer, order, or indication of interest in an OTC Equity Security in an increment smaller than $0.0001 for bids, offers, orders, and indications of interest priced below $1.00 per share. If an order or indication of interest is priced less than $0.0001 per share, a member may rank or accept, but not display, that order or indication of interest in an increment of $0.000001 or greater.

Second, FINRA proposes to adopt Rule 6437 (Prohibition from Locking or Crossing Quotation in OTC Equity Securities) to require that members implement policies and procedures that reasonably avoid the display of, or engaging in a pattern or practice of displaying, locking, or crossing quotations in any OTC Equity Security within the same inter-dealer quotation system. This is similar to Rule 610(d) of Regulation NMS.[11]

Third, FINRA is proposing a new regulatory approach to fees for accessing quotations in OTC Equity Securities. FINRA is deleting its Rule 6540(c), which provides that an alternative trading system ("ATS") or electronic communications network ("ECN") must reflect non-subscriber access or post-transaction fees in the ATS's or ECN's posted quote in the OTC Bulletin Board montage. In addition, FINRA proposes to allow market makers—as well as ATSs and ECNs—to charge access fees. As a result, market makers, ATSs, and ECNs may charge access fees that are not displayed in the quotation. Simultaneously, however, FINRA proposes to adopt new Rule 6450 (Restrictions on Access Fees) that would establish a cap on non-subscriber access and post-transaction fees in all OTC Equity Securities, similar to Rule 610(c) of Regulation NMS.[12] Rule 6450 would provide that, if the price of the published quotation were $1.00 or more, the fee or fees cannot exceed or accumulate to more than $0.003 per share. As initially filed, if the price of the published quotation were less than $1.00, the fee could not exceed 0.3% of the published quotation price per share. As discussed below, FINRA subsequently amended this portion of the proposal to provide that, if the price of the published quotation were less than $1.00 per share, fees cannot exceed or accumulate to more than the lesser of 0.3% of the quotation price per share, or 30% of the minimum pricing increment under Rule 6434.

Fourth, FINRA proposes to adopt Rule 6460 (Display of Customer Limit Orders), similar to Rule 604 of Regulation NMS.[13] Under Rule 6460, a market maker displaying a priced quotation in an inter-dealer quotation system would be required to immediately display a customer limit orders that it receives that (1) improves the price of the bid or offer displayed by the market maker; or (2) improves the size of its bid or offer by more than a *de minimis* amount, where it is priced equal to the best bid or offer in the inter-dealer quotation system where the market maker is quoting. Similar to Rule 604 of Regulation NMS, Rule 6460 excepts any customer limit order that (1) is executed upon receipt of the order; (2) is placed by a customer who expressly requests that the order not be displayed; (3) is an odd-lot order; (4) is a block size order, unless a customer placing such order requests that the order be displayed; (5) is delivered immediately upon receipt to a national securities exchange or to an electronic communications network that widely disseminates such order and complies with the Rule's provisions relating to such electronic communications network; (6) is delivered immediately upon receipt to another OTC market maker that complies with the proposed limit order display requirements with respect to that order; or (7) is an all-or-none order. In Amendment No. 1, FINRA proposed to add an exception for customer limit orders that are priced less than $0.0001 per share, consistent with the revision to proposed Rule 6434 that allows a member to rank or accept, but not display, an order or indication of interest in an increment as small as $0.000001, if the order or indication of interest is priced less than $0.0001 per share.

Leonard J. Amoruso, General Counsel, Knight Capital Group, Inc., and Michael T. Corrao, Chief Compliance Officer, Knight Equity Markets, L.P., dated September 16, 2009 ("Knight Letter"); Letter to Elizabeth M. Murphy, Secretary, Commission, from William Assatly, Senior Vice President—Trading, Mercator Associates, dated September 16, 2009 ("Mercator Letter"); Letter from Daniel Kanter, President, and Craig Carlino, Chief Compliance Officer, Monroe Securities, Inc., dated September 16, 2009 ("Monroe Letter"); Letter to Elizabeth M. Murphy, Secretary, Commission, from R. Cromwell Coulson, Chief Executive Officer, Pink OTC Markets, Inc., dated September 23, 2009 ("Pink OTC Letter"); Letter to Elizabeth M. Murphy, Secretary, Commission, from R. Cromwell Coulson, Chief Executive Officer, Pink OTC Markets, Inc., dated January 6, 2010 ("Pink OTC 2 Letter"); Letter to Elizabeth M. Murphy, Secretary, Commission, from Ann L. Vlcek, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, dated October 13, 2009 ("SIFMA Letter"); Letter to Elizabeth M. Murphy, Secretary, Commission, from Kimberly Unger, Executive Director, The Securities Traders Association of New York, Inc., dated September 14, 2009 ("STANY Letter"); Letter to Elizabeth M. Murphy, Secretary, Commission, from Kimberly Unger, Executive Director, The Securities Traders Association of New York, Inc., dated September 16, 2009 ("STANY 2 Letter"); Letter to Florence H. Harmon, Deputy Secretary, Commission, from Elaine M. Kaven, Chief Compliance Officer, StockCross Financial Services, Inc., dated September 16, 2009 ("StockCross Letter"); Letter to Elizabeth M. Murphy, Secretary, Commission, from Christopher Nagy, Managing Director Order Strategy, Co-Head of Government Relations, TD Ameritrade, Inc., dated October 5, 2009 ("TD Ameritrade Letter").

[7] *See* Securities Exchange Act Release No. 61677 (March 9, 2010), 75 FR 12584 ("Amended Notice").

[8] *See* Letter from Daniel Kanter, President and Craig Carlino, Chief Compliance Officer, Monroe Securities, dated April 6, 2010 ("Monroe 2 Letter"); Letter to Elizabeth M. Murphy, Commission, from R. Cromwell Coulson, Chief Executive Officer, Pink OTC Markets Inc., dated April 9, 2010 ("Pink OTC 3 Letter").

[9] 17 CFR 242.612.

[10] *See* Initial Notice, 74 FR at 43207.

[11] 17 CFR 242.610(d).

[12] 17 CFR 242.610(c).

[13] 17 CFR 242.604.

FINRA also proposed to make conforming changes to certain of its other rules to reflect the establishment of these new rules.

III. Summary of Comments

The Commission received 12 comments regarding the Initial Notice [14] and two comment letters regarding the Amended Notice. These comment letters are summarized below. Contemporaneously with filing Partial Amendment No. 1, FINRA submitted a response to the comments on the Initial Notice.

Minimum Quoting Increments. One commenter supported this aspect of the proposal, stating that it would improve depth and liquidity in the marketplace by mitigating potential harms associated with sub-penny quoting, including "stepping ahead" of publicly displayed orders.[15] Other commenters stated that sub-penny quoting may produce flickering quotes [16] or result in increased quote traffic without providing any discernable benefit to investors.[17]

Other commenters disagreed with the proposal as it relates to minimum quoting increments. While one commenter supported restrictions on sub-penny pricing in theory, it stated that the minimum quoting increments for shares priced below $1.00 per share were not "meaningful" increments.[18] Another commenter argued that certain stocks priced above $1.00 per share have benefited from the ability to trade in sub-penny increments, and that prohibiting sub-penny quoting could thus negatively impact the integrity of the OTC equity market.[19] Two commenters stated that securities traded in sub-penny increments "have traded efficiently for decades," [20] one of which added that FINRA had offered no empirical data to support its proposal.[21]

One commenter stated that the proposed minimum increments were still small, and would not prevent stepping ahead of customer orders or flickering quotes.[22] Another commenter noted that the initially proposed price increment of $0.000001 for stocks priced below $0.01 per share would create 10,000 price points below $0.01, which could lead to "significant operational and market quality issues," especially since most securities in the OTC equity markets trade at prices less than $0.01.[23] Another commenter proposed that the minimum price increment for securities priced between $0.10 and $1.00 per share should be $0.001, and that the minimum price increment for securities priced below $0.01 per share should be $0.0001.[24]

Locked and Crossed Markets. Three commenters supported this aspect of the proposal.[25] One commenter stated that the proposal would lead to a more fair and orderly market, as it would enhance the usefulness of quotation information and decrease investor confusion.[26] Three commenters noted, however, that investors would be better served if the proposal were extended across all inter-dealer quotation systems, and not just within separate inter-dealer quotation systems.[27] One of these commenters stated that the duty to avoid locked and crossed markets should be co-extensive with the duty of best execution.[28]

Two commenters stated that FINRA's proposal was unlikely to actually prevent locked or crossed markets,[29] because market participants already make reasonable efforts to avoid locked or crossed markets,[30] and market participants most likely lock or cross the market to avoid paying access fees.[31] One commenter supported FINRA's efforts to reduce locked and crossed markets, but stated that this proposal did not provide any data to support a conclusion that locked and crossed markets are occurring with sufficient frequency to impact market quality.[32] Another commenter stated that the number of locked and crossed markets would increase if Rule 6450 were adopted and if the requirement to display access fees in the quote were eliminated.[33]

Some commenters believed that the adoption of Rule 6450 would increase the incidence of locked and crossed markets resulting from "access-fee" trading.[34] One commenter noted that, since the proposed rule does not prohibit locking/crossing across inter-dealer quotation systems, market participants can lock or cross across markets, while receiving "an instant, virtually riskless profit" of the access fee.[35]

Limit Order Display. Three commenters endorsed proposed FINRA Rule 6460.[36] One of these commenters stated that investors "gain enormous benefits of added transparency when market centers are required to display limit orders that are better than that market center's current best bid or offer." [37] Another commenter stated that the proposal would foster increased quote competition and ultimately narrow spreads, promote greater depth and liquidity, and minimize investor transaction costs.[38]

A few commenters believed that a limit order display rule, without more, could harm investors.[39] One of these commenters stated that the proposed rule would likely be detrimental to retail and institutional investors looking to take sizeable positions in thinly traded stocks, as the displaying of a sizeable customer order will affect the way competing markets will react to the market.[40] One commenter noted that a limit order display rule could weaken the pricing leverage of a customer, as the displaying of an order "may well scare away bids or offers, since in thinly traded markets, many bids and offers are at risk quotes by market makers which are risking their own capital." [41] Another commenter stated that this proposal infringed upon the "experience and judgment of markets participants" and the "nature of any free market enterprise." [42]

One commenter believed that the proposed rule would act as a disincentive for broker-dealers to display quotations in an inter-dealer quotation system, because broker-dealers are free to withdraw from publishing a quotation in an OTC Equity Security at any time.[43] This commenter thus asserted that proposed Rule 6460 should be amended to require a broker-dealer that receives a customer limit order in an OTC Equity Security to execute the order, display the order in an inter-dealer quotation system or alternative trading system that makes its quotes publicly available, or transmit

[14] *See supra* note 6.

[15] *See* TD Ameritrade Letter at 2.

[16] *See* Pink OTC Letter at 8; STANY Letter at 2.

[17] *See* STANY Letter at 2.

[18] *See* Pink OTC Letter at 8.

[19] *See* SIFMA Letter at 2.

[20] Mercator Letter at 1; *see also* Knight Letter at 2.

[21] *See* Knight Letter at 2.

[22] *See* ArcaEdge Letter at 2.

[23] *See* Knight Letter at 2.

[24] *See* ArcaEdge Letter at 2.

[25] *See* ArcaEdge Letter at 2; TD Ameritrade Letter at 2; STANY Letter at 2.

[26] *See* TD Ameritrade Letter at 2.

[27] *See* Pink OTC Letter at 6; STANY Letter at 2; TD Ameritrade Letter at 2.

[28] *See* Pink OTC Letter at 7.

[29] *See* Mercator Letter at 1; StockCross Letter at 2.

[30] *See* Mercator Letter at 1.

[31] *See* Mercator Letter at 2; *see also StockCross* Letter at 2.

[32] *See* Knight Letter at 3.

[33] *See* SIFMA Letter at 3.

[34] *See* Knight Letter at 3; StockCross Letter at 2.

[35] Knight Letter at 3.

[36] *See* ArcaEdge Letter at 4; Knight Letter at 5; TD Ameritrade Letter at 2.

[37] TD Ameritrade Letter at 2.

[38] *See* ArcaEdge Letter at 4.

[39] *See* Mercator Letter at 1; STANY Letter at 2.

[40] *See* Mercator Letter at 1.

[41] Monroe Securities Letter at 1.

[42] StockCross Letter at 1.

[43] *See* Pink OTC 2 Letter at 3–4.

the order to another broker-dealer who will display the order.[44]

A few commenters suggested alternatives to the proposed limit order display rule.[45] One of these commenters suggested permitting a broker-dealer to post part of a limit order, because small orders are more likely to be executed than large orders.[46] The other commenter stated that, while market makers should be required to display only the price of an order, they should have discretion over display of the size of the order.[47] Specifically, this commenter believed that a broker should have discretion with at least 50% of the aggregate order size, and should not be required to display size that is more than ten times the tier size with respect to any order or aggregate of orders at that price level.[48]

Some commenters took issue with the proposed exceptions.[49] One commenter noted that, at a minimum, the proposed definition of "block-size" should be clarified, given the lack of liquidity of OTC Equity Securities.[50] Two commenters indicated that the current minimum quote size is a better standard for the required display size,[51] and one commenter suggested that limit orders of less than the minimum quotation size for OTC Equity Securities should not be required to be displayed.[52]

One commenter also proposed that Rule 6460 be amended to require the display of customer limit orders in OTC debt securities.[53]

Access Fees. Some commenters voiced their opposition to access fees in general.[54] One commenter stated that such fees are especially harmful to the OTC market, which is characterized by relatively infrequent trading and less natural liquidity.[55] That commenter also noted that market makers have operated successfully without charging access fees.[56]

Other commenters opposed the aspect of the proposal that would result in undisplayed access fees.[57] One commenter stated that FINRA should be required to demonstrate that the benefits of introducing "hidden" access fees exceed the "recognized harm hidden access fees cause to investor confidence and market quality."[58] Other commenters stated that the current rule offers greater transparency,[59] and that the proposal is "in effect a license for all market participants to charge access fees and keep those fees hidden from the public quote."[60] Another commenter noted that access fees in OTC equity markets constitute a significant component of the price of a security, and that removing the requirement to display access fees would "distort considerably the true market value of the security."[61] One commenter stated that this proposal would force market participants to pass fees on to the customer or pay the fees themselves when interacting with a displayed quotation.[62] Yet another commenter stated that the proposal would result in an unlevel playing field in the OTCBB market, if only electronic communications networks or alternative trading systems could utilize undisplayed access fees.[63]

Some commenters stated that the proposal would result in fee-driven gaming or the increased incidence of locked and crossed markets.[64] One such commenter noted that access fees in OTC equity markets constitute a "significant component" of the transaction and market price for a security, and that allowing the non-display of access fees would create "a new natural hunting ground for rebate trading" and large volumes that otherwise would not occur.[65] Market participants would take advantage of "inter-venue access fee quote arbitrage," with the result being fee disputes and locked markets.[66] Another commenter stated that market participants have little incentive to lock or cross markets where non-displayed access fees are not permitted, and that markets without non-displayed access fees have lower compliance costs.[67] Another commenter stated that eliminating the requirement to display non-subscriber access fees would also reduce displayed liquidity and encourage "undisplayed sub-penny price jumping."[68]

Two commenters supported the proposed access fee cap.[69] One commenter stated that, by imposing a uniform limitation of fees, this proposal would contribute to an "accurate evaluation of the actual quotations displayed in the public markets."[70] The other commenter stated that this requirement would foster a competitive market by "leveling the playing field amongst all market participants," as the current rule has "artificially supported a dealer-driven market."[71] That commenter also noted that uniform access fees would prevent access fee gaming.[72]

Two commenters stated that the proposed fee cap should be revised to 30% of the minimum quoting increment,[73] as access fees greater than the quote increment are not, by definition, *de minimis.*[74] One commenter also stated that FINRA should consider rules requiring broker-dealers to charge equal access or post transaction fees to all non-subscribers.[75]

IV. Amendment No. 1

In response to comments, FINRA filed Amendment No. 1 that proposed two substantive changes to its initial filing. First, FINRA proposed to amend Rule 6434 (Minimum Pricing Increment for OTC Equity Securities) to change the minimum quoting increment for orders and indications of interest priced under $1.00 per share. Initially, FINRA proposed to permit increments as small as $0.0001 for orders and indications of interest that were priced below $1.00 and equal to or greater than $0.01 per share, and quoting increments of $0.000001 for orders and indications of interest priced below $0.01 per share. As amended, FINRA proposed to permit quoting increments of $0.0001 for orders and indications of interest priced under $1.00 and equal to or greater than $0.0001 per share. FINRA also proposed a limited exception for orders and indications of interest priced less than $0.0001 per share. Under this exception, members would be permitted to rank or accept (but not display) orders and indications of interest in an increment of $0.000001 or greater for orders and indications of interest that are priced

[44] *See id.* at 4. The commenter acknowledged that its suggested change, however, would necessitate modifications to Rule 15c2–11 under the Act. *See id.*

[45] *See* Pink OTC Letter at 11–12; STANY Letter at 2.

[46] *See* STANY Letter at 2.

[47] *See* Pink OTC Letter at 11.

[48] *See id.*

[49] *See* Knight Letter at 5–6; Pink OTC Letter at 12; SIFMA Letter at 4.

[50] *See* SIFMA Letter at 4.

[51] *See* Knight Letter at 5–6; SIFMA Letter at 4.

[52] *See* Pink OTC Letter at 12.

[53] *See* Pink OTC 2 Letter at 5.

[54] *See* Mercator Letter at 2; STANY Letter at 2.

[55] *See* Mercator Letter at 2.

[56] *See id.*

[57] *See* Knight Letter at 4; Pink OTC Letter at 4.

[58] Pink OTC Letter at 5.

[59] *See* SIFMA Letter at 3.

[60] STANY Letter at 2.

[61] Knight Letter at 4.

[62] *See* StockCross Letter at 2.

[63] *See* SIFMA Letter at 3.

[64] *See* Knight Letter at 4; Pink OTC Letter at 5; STANY Letter at 2.

[65] Knight Letter at 4–5.

[66] *Id.* at 5.

[67] *See* Pink OTC Letter at 5.

[68] SIFMA Letter at 3.

[69] *See* ArcaEdge Letter at 3; TD Ameritrade Letter at 2.

[70] TD Ameritrade Letter at 2.

[71] ArcaEdge Letter at 3.

[72] *See id.* at 4.

[73] *See* ArcaEdge Letter at 4; Pink OTC Letter at 10.

[74] *See* Pink OTC Letter 9.

[75] *See* ArcaEdge Letter at 4.

under $0.0001 per share. FINRA stated that this exception recognized the fact that some OTC Equity Securities trade at prices less than $0.0001, and that restricting quoting in those securities to increments of $0.0001 would effectively eliminate trading in those securities.[76] FINRA also noted that most systems could not display pricing increments smaller than four decimal places, and that requiring securities priced under $1.00 and equal to or greater than $0.0001 per share to be quoted in increments of $0.0001 would promote uniformity in the OTC equity market at this price level.[77]

Second, FINRA proposed to amend Rule 6450 (Restrictions on Access Fees) to revise the access fee cap on quotations priced below $1.00 per share. As revised, the cap would be the lesser of 0.3% of the per-share quotation price, or 30% of the minimum permissible quotation increment. FINRA stated that this revised method of calculating access fees for securities priced under $1.00 would "ensure that the access fee is always less than the relevant quotation increment."[78]

Finally, FINRA proposed to amend Rule 6460 (Display of Customer Limit Orders) to add an exception to the display requirement for customer limit orders priced less than $0.0001 per share, to correspond with the revision to proposed Rule 6434 permitting members to rank or accept, but not display, orders and indications of interest priced below $0.0001 per share in an increment as small as $0.000001.

V. Summary of Comments on Amendment No. 1

Two comments were submitted in response to the Amended Notice. One commenter reiterated its opposition to the application of the proposed limit order display rule, and requested that the definition of "block size" for OTC securities be defined as an order that is "of at least 10,000 shares or * * * has a market value of at least $100,000."[79] This commenter stated that the current rule is designed for penny stocks only, and that the proposed definition would give larger orders in non-penny stocks the benefit of the block-size exemption.[80]

The second commenter reiterated its concerns with both the proposed limit order display requirement and the proposed rule against locked and crossed markets.[81] This commenter noted that the proposed limit order display rule would not require the publication of a customer limit order if the broker-dealer handling the order were not a market maker, as defined under FINRA's rules.[82] In addition, the commenter stated that the proposed rule would not apply to market makers that do not publish a quotation in an inter-dealer quotation system for the security that is the subject of the customer limit order.[83] The commenter stated that the rule would discourage broker-dealers from making publicly displayed markets in OTC Equity Securities.[84]

The commenter also criticized FINRA's amended proposal regarding locked and crossed markets.[85] According to the commenter, FINRA stated in its amended proposal that it would be unreasonable to require broker-dealers to avoid locked and crossed markets across inter-dealer quotation systems because there is not a mandated quotation mechanism for OTC Equity Securities.[86] The commenter pointed out that it itself "currently disseminates a widely accessible, consolidated national best bid and offer for OTC Equity Securities" quoted in inter-dealer quotation systems.[87] The commenter stated that these data should be used by broker-dealers in avoiding locking and crossing markets across multiple inter-dealer quotation systems, and that FINRA should have purchased this market data from the commenter.

Finally, the commenter stated that, unlike in the market for NMS securities, no business model in the market for OTC Equity Securities depends on the receipt of access fees among broker-dealers.[88] As an alternative to the proposed rule, the commenter suggested that FINRA allow ECNs to trade on a riskless principal basis with non-subscriber broker-dealers.[89]

VI. FINRA's Response to Comments on Amendment No. 1

In response to comments on the proposed limit order display rule, FINRA reiterated its view that the appropriate trigger for an obligation to display a customer limit order is when an OTC market maker already is displaying a priced quotation for the security in an inter-dealer quotation system (unless an exception applies).[90] FINRA similarly reiterated its view that, once triggered, the limit order display requirement should apply to the full size of a customer limit order.[91] FINRA noted that its approach was consistent with the Commission's determination when it first proposed a limit order display rule that the presumption should be to display "unless such orders are of block size, the customer requests that its order not be displayed, or one of the exceptions to the rule applies."[92]

FINRA also responded to the issue of whether the prohibition on locked and crossed markets should apply across inter-dealer quotation systems. FINRA stated that, at this time, the prohibition on locked and crossed markets should apply only within (and thus not across) inter-dealer quotation systems "due to the lack of an SRO-sponsored widely accessible, consolidated national best bid and offer for OTC equity securities."[93]

FINRA also reiterated its position that the proposed cap on access fees is the fairest and most appropriate resolution of the access fee issue, and that proposed Rule 6450 "permits a landscape where market forces can drive the adoption of various business models in the OTC market."[94]

VII. Discussion and Findings

After careful consideration of the amended proposal, the comments received, and FINRA's responses thereto, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association.[95] In particular, the Commission finds that the proposal is consistent with Section 15A(b)(6) of the Act,[96] which requires, among other things, that FINRA rules be designed to prevent fraudulent and manipulative acts and practices; to promote just and equitable principles of trade; to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions

[76] *See* Amended Notice, 75 FR at 12586.

[77] *See id.*

[78] *Id.* at 12585.

[79] Monroe 2 Letter at 1.

[80] *See id.*

[81] *See* Pink OTC 3 Letter at 1.

[82] *See id.* at 3.

[83] *See id.* at 2.

[84] *See id.* at 3.

[85] *See id.* at 4.

[86] *See* Pink OTC 3 Letter at 4.

[87] *Id.* at 5.

[88] *See id.* at 8.

[89] *See id.*

[90] *See* letter to Elizabeth M. Murphy, Secretary, Commission, dated June 22, 2010 from Racquel L. Russell, Assistant General Counsel, Regulatory Policy and Oversight ("FINRA Response Letter").

[91] *See id.*

[92] *See id.* at 3 (citing Securities Exchange Act Release No. 36310 (September 29, 1995) 60 FR 52792 (October 10, 1995)).

[93] *Id.* at 3–4.

[94] *Id.* at 4.

[95] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[96] 15 U.S.C. 78*o*–3(b)(6).

in securities; to remove impediments to and perfect the mechanism of a free and open market and a national market system; and, in general, to protect investors and the public interest. The Commission does not believe that any comments have been raised that should preclude approval of the proposal.

With this proposal, FINRA seeks to introduce into the market for OTC Equity Securities—over which it has supervisory responsibilities [97]—certain regulatory protections that were introduced by the Commission into the market for exchange-listed securities by Regulation NMS. The Commission adopted Regulation NMS in 2005 to "modernize and strengthen the national market system for equity securities." [98] Among the elements of Regulation NMS were: (1) A rule establishing a uniform quoting increment of no less than one penny for quotations in NMS stocks equal to or greater than $1.00 per share, to promote greater price transparency and consistency; (2) a cap on fees for accessing protected quotations, to ensure the "fairness and accuracy of displayed quotations by establishing an outer limit on the cost of accessing such quotations;" [99] and (3) a rule requiring the exchanges and FINRA to require their members reasonably to avoid locking or crossing protected quotations. Under the same authority used to establish Regulation NMS, the Commission had previously established a rule that generally requires display of customer limit orders.[100] Many of the same concerns expressed by the Commission in adopting Regulation NMS and the Limit Order Display Rule for exchange-listed securities also apply to the market in OTC Equity Securities. The rules proposed here by FINRA appear reasonably designed to address these concerns, and follow closely the regulatory approach set forth in the Commission's rules. Therefore, the Commission believes that FINRA's proposal is consistent with the Act.

With respect to the proposal to restrict sub-penny quoting, the Commission agrees with FINRA that the same concerns that were articulated in the context of Regulation NMS also exist for OTC Equity Securities. Such concerns include "stepping ahead" of standing limit orders by an economically insignificant amount, which reduces incentives to display limit orders and provide liquidity to the markets, and the increased incidence of "flickering quotes" and the resulting regulatory compliance and capacity burdens.[101]

Like Rule 612 of Regulation NMS,[102] proposed FINRA Rule 6434 requires that the minimum increment for bids, offers, orders, and indications of interest priced $1.00 or more per share is one penny. Furthermore, like Rule 612, proposed FINRA Rule 6434 requires that the minimum increment for bids, offers, orders, and indications of interest priced between $1.00 and $0.0001 per share is one hundredth of a penny. Unlike Rule 612, however, proposed FINRA Rule 6434 contains an additional provision for bids, offers, orders, and indications of interest priced below $0.0001 per share. Under this provision, a member may rank or accept (but not display) an order or indication of interest in an increment as small as $0.000001.[103] FINRA stated that this exception recognizes the fact that some OTC Equity Securities trade at prices less than $0.0001, and that restricting quoting in those securities to increments of $0.0001 would effectively eliminate trading in those securities.[104]

The Commission believes that proposed Rule 6434 is consistent with the Act because it adopts pricing increments similar to those set forth in Rule 612. Although the proposed rule differs from Rule 612 in that it permits acceptance of orders and indications of interest priced below $0.0001 per share in finer increments, the Commission believes that this is a reasonable accommodation given that certain OTC Equity Securities currently trade at very low prices.

With respect to FINRA's proposal regarding locking or crossing quotations, the Commission agrees with FINRA that many of the same concerns that were articulated in the context of Regulation NMS—namely, that locked and crossed markets may confuse investors and create market inefficiencies [105]—also exist for OTC Equity Securities. In response to commenters inquiring why FINRA did not extend this rule across inter-dealer quotation systems, FINRA stated that it is not practicable to extend locking and crossing restrictions across inter-dealer markets due to the lack of a widely accessible, consolidated national best bid and offer for OTC Equity Securities. The Commission believes that FINRA's proposal is consistent with the Act and is a reasonable first step to address problems caused by locked and crossed markets, while recognizing the market data limitations for OTC Equity Securities.

The Commission also finds that FINRA's proposal regarding access fees is consistent with the Act, for the same reasons that the Commission adopted its own rules regarding access fees. In the Reg NMS Adopting Release, the Commission noted that a flat access fee was the "fairest and most appropriate solution to what has been a longstanding and contentious issue." [106] The Commission noted that this fee would apply equally to ECNs, market makers, and other trading centers.[107] The Commission also noted that, for quotations to be fair and useful, "there must be some limit on the extent to which the true price can vary from the displayed price," and concluded that the cap on access fees "harmoniz[ed] quotation practices and preclude[ed] the distortive effects of exorbitant fees." [108] The Commission agrees with FINRA that the same considerations apply here. In capping the fees that may be charged to access a quotation in an OTC Equity Security, and in drafting the rule to apply to ATSs, ECNs, and market makers, the proposed rule is reasonably designed to promote transparency and fair competition in the market for OTC Equity Securities.

As noted above, a number of commenters argued that this access fee provision applicable to sub-penny quotations, as originally proposed, could lead to certain gaming activity. In response to these comments, FINRA proposed in Amendment No. 1 to modify the cap on access fees for sub-penny quotations. Specifically, the access fee cap would be the lesser of 0.3% of the published quotation price on a per-share basis, or 30% of the minimum allowable increment. The Commission believes that the amended

[97] *See* Section 15A(b)(11) of the Act, 15 U.S.C. 78*o*–3(b)(11) (rules of a national securities association must "include provisions governing the form and content of quotations relating to securities sold otherwise than on a national securities exchange").

[98] Securities Exchange Act Release 51808 70 FR 37496, 37496 (June 29, 2005) ("Reg NMS Adopting Release").

[99] Reg NMS Adopting Release, *id.,* 70 FR at 37502.

[100] *See* Securities Exchange Act Release No. 37619A (September 6, 1996), 61 FR 48290 (September 12, 1996) (adopting Rule 11Ac1–4 under the Act, which requires the display of customer limit orders priced better than a specialist's or OTC market maker's quote) ("Limit Order Display Release").

[101] *See* Reg NMS Adopting Release, *supra* note 98, 70 FR at 37553.

[102] 17 CFR 242.612.

[103] In the FINRA Response Letter, FINRA noted that a member's customer order protection obligations under IM–2110–2 (Trading Ahead of Customer Limit Order) continue to apply. *See* FINRA Response Letter, *supra* note 90 at 2.

[104] *See* Amended Notice, 75 FR at 12586.

[105] *See* Reg NMS Adopting Release, *supra* note 98, 70 FR at 37547.

[106] Reg NMS Adopting Release, *supra* note 98, 70 FR at 37545.

[107] *See id.*

[108] *Id.*

proposal is reasonably designed to minimize access fee gaming, as it prevents the access fee from exceeding the minimum quoting increment.

Finally, the Commission finds that FINRA's proposal to adopt a limit order display rule is consistent with the Act. With certain exceptions, the proposal requires a market maker displaying a priced quote in an inter-dealer quotation system to immediately display a customer limit order that it receives that (1) improves the price of the bid or offer displayed by the market maker, or (2) improves the size of its bid or offer by more than a *de minimis* amount where it is priced equal to the best bid or offer in the inter-dealer quotation system where the market maker is quoting. The Commission believes that extending limit order display requirements to OTC Equity Securities is reasonably designed to increase transparency in the market for OTC Equity Securities. As it has previously stated, the Commission believes that limit orders are a valuable component of price discovery, and that uniformly requiring display of such orders will encourage tighter, deeper, and more efficient markets.[109] Commenters generally supported the proposed limit order display requirement, although some commenters requested certain clarifications and modifications. In response to comments, FINRA noted in Amendment No. 1 that its proposed limit order display rule would not require display of customer orders that would result in a violation of the minimum quotation size tiers prescribed in FINRA Rule 6450 (Minimum Quotation Size Requirements For OTC Equity Securities).[110] FINRA also proposed a new exception for limit orders priced less than $0.0001 per share, consistent with the changes made to proposed FINRA Rule 6434 prohibiting the display of a bid or offer, order, or indication of interest in any OTC Equity Security priced less than $0.0001 per share.[111]

One commenter expressed concern that the proposed limit order display rule would apply only to OTC market-makers, rather than to all broker-dealers displaying a priced quotation in an inter-dealer quotation system or ECN, which could lead to a reduction in quotation activity in OTC Equity Securities. The Commission notes that FINRA's limit order display proposal acknowledges the role that market makers traditionally have played in providing price discovery and liquidity to the OTC Equity Securities market.

Further, in response to commenters' concerns that market makers be permitted greater discretion to display only a portion of a customer limit order, FINRA noted that, where the member believes that a customer would be best served by not displaying the full size of a limit order, the member is free to obtain the customer's consent to refrain from displaying such customer's order, as permitted by a proposed exception to the limit order display requirement. As it has previously stated, the Commission believes that the presumption of limit order display is the proper approach.[112] The Commission further believes that FINRA's limit order display proposal marks a positive step in efforts to improve the transparency of OTC Equity Securities and the handling of customer limit orders in this market sector.

VIII. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR–FINRA–2009–054), as modified by Amendment No. 1 thereto, be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[113]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–15707 Filed 6–28–10; 8:45 am]

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[109] *See* Limit Order Display Release, *supra* note 100, 61 FR at 48294. Rule 11Ac1–4, which was adopted prior to the approval of The Nasdaq Stock Market as a national securities exchange, applied generally to exchange specialists and Nasdaq market makers. Rule 11Ac1–4 was subsequently redesignated as Rule 604 under Regulation NMS. *See* NMS Adopting Release, *supra* note 98.

[110] *See* Amended Notice, *supra* note 7.

[111] *See id.*

[112] *See* Limit Order Display Release, *supra* note 100, 61 FR at 48301 (stating "[t]he Commission believes that the rule appropriately establishes a presumption that limit orders should be displayed, unless such orders are of block size, the customer requests that its order not be displayed, or one of the exceptions to the rule applies. The exception allowing a customer to request that its limit order not be displayed gives the customer ultimate control in determining whether to trust the display of the limit order to the discretion of a market professional, or to display the order either in full, or in part, to other potential market interest.").

[113] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62335; File No. SR–NYSEArca–2010–58]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Proposed Rule Change, as Modified by Amendment No. 1, Amending NYSE Arca Equities Rule 7.10 Relating to Clearly Erroneous Executions

June 21, 2010.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the "Act")[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on June 17, 2010, NYSE Arca, Inc. (the "Exchange" or "NYSE Arca") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. On June 18, 2010, the Exchange submitted Amendment No. 1 to the proposed rule change. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend NYSE Arca Equities Rule 7.10 relating to clearly erroneous executions. The text of the proposed rule change is available at the Commission's Web site at *http://www.sec.gov*, at the Exchange, the Commission's Public Reference Room, and *http://www.nyse.com.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange is proposing to amend NYSE Arca Equities Rule 7.10, entitled Clearly Erroneous Executions. First, the Exchange proposes replacing existing paragraph (c)(2) of Rule 7.10, entitled "Unusual Circumstances and Joint Market Rulings" with a new paragraph, entitled "Multi-Stock Events Involving Twenty or More Securities." Second, the Exchange proposes replacing existing paragraph (c)(4) of Rule 7.10, entitled "Numerical Guidelines Applicable to Volatile Market Opens" with a new paragraph, entitled "Individual Security Trading Pauses." Third, the Exchange is proposing changes to existing paragraphs (f) and (g) of Rule 7.10 to eliminate the ability of the Exchange to deviate from the Numerical Guidelines contained in paragraph (c)(1) (other than under limited circumstances set forth in paragraph (f)) when deciding which transactions will be reviewed by the Exchange as potentially clearly erroneous. Finally, the Exchange proposes modifications to paragraphs (c)(1), (c)(3), and (e) of Rule 7.10 consistent with the proposed changes to paragraphs (c)(2) and (c)(4).

The Exchange is proposing the rule changes described below in consultation with other markets and Commission staff to provide for uniform treatment: (1) Of clearly erroneous execution reviews in Multi-Stock Events involving twenty or more securities; and (2) in the event transactions occur that result in the issuance of an individual security trading pause by the primary market and subsequent transactions that occur before the trading pause is in effect on the Exchange. The Exchange has also proposed additional changes to Rule 7.10 that reduce the ability of the Exchange to deviate from the objective standards set forth in the Rule in those circumstances. The proposed changes are described in further detail below.

As proposed, the provisions of paragraphs (c), (e)(2), (f), and (g) of Rule 7.10, as amended pursuant to this filing, would be in effect during a pilot period set to end on December 10, 2010. If the pilot is not either extended or approved permanent by December 10, 2010, the prior versions of paragraphs (c), (e)(2), (f), and (g) of Rule 7.10 would be in effect.

Revised Paragraph (c)(2) Related to Multi-Stock Events Involving Twenty or More Securities

The Exchange proposes to eliminate the majority of existing paragraph (c)(2), which provides flexibility to the Exchange to use different Numerical Guidelines or Reference Prices in various "Unusual Circumstances." The Exchange proposes to replace this paragraph with new language that would apply to Multi-Stock Events involving twenty or more securities whose executions occurred within a period of five minutes or less. The revised paragraph would retain language making clear that during Multi-Stock Events involving twenty or more securities the number of affected transactions may be such that immediate finality is necessary to maintain a fair and orderly market and to protect investors and the public interest. Accordingly, in such circumstances, decisions made by the Exchange in consultation with other markets could not be appealed.

Further, as proposed, in connection with reviews of Multi-Stock Events involving twenty or more securities, the Exchange may use a Reference Price other than consolidated last sale in its review of potentially clearly erroneous executions. With the exception of those securities under review that are subject to an individual security trading pause as described in proposed paragraph (c)(4), and to ensure consistent application across market centers when proposed paragraph (c)(2) is invoked, the Exchange will promptly coordinate with the other market centers to determine the appropriate review period, which may be greater than the period of five minutes or less that triggered application of proposed paragraph (c)(2), as well as select one or more specific points in time prior to the transactions in question and use transaction prices at or immediately prior to the one or more specific points in time selected as the Reference Price. The Exchange will nullify as clearly erroneous all transactions that are at prices equal to or greater than 30% away from the Reference Price in each affected security during the review period selected by the Exchange and other markets consistent with the proposed paragraph (c)(2).

Because the Exchange and other market centers are adopting different threshold and standards to handle large-scale market events, which would include events occurring during times of high volatility at the beginning of regular trading hours, the Exchange proposes deletion of paragraph (c)(4) ("Numerical Guidelines Applicable to Volatile Market Opens") of the existing rule. The Exchange believes that this provision is no longer necessary, and if maintained, could result in extremely high Numerical Guidelines (up to 90%) in certain circumstances.

Revised Paragraph (c)(4) Related to Individual Security Trading Pauses

The Commission has just approved the Exchange's filing to adopt a rule permitting the primary listing market to invoke a trading pause for an individual security if the price of such security moves 10% or more from a sale in a preceding five-minute period.[4] This rule is currently a pilot and is applicable to securities included in the S&P 500 Index.

As described above, the Exchange is proposing to eliminate existing paragraph (c)(4) ("Numerical Guidelines Applicable to Volatile Market Opens"). The Exchange proposes adopting a rule, numbered as (c)(4) following such elimination, which will provide for uniform treatment of clearly erroneous execution reviews in the event transactions occur that result in the issuance of an individual security trading pause by the primary listing market and subsequent transactions that occur before the trading pause is in effect on the Exchange. The proposed rule change is necessary to provide greater certainty of the clearly erroneous Reference Price for transactions that trigger a trading pause (the "Trigger Trade") and subsequent transactions occurring between the time of the Trigger Trade and the time the trading pause message is received by the Exchange from the single plan processor responsible for consolidation and dissemination of information for the security and put into effect on the Exchange, especially under highly volatile and active market conditions.

The Exchange proposes to revise paragraph (c)(4) of Arca Equities Rule 7.10 to allow the Exchange to use the price that triggered a trading pause in an individual security (the "Trading Pause Trigger Price") as the Reference Price for clearly erroneous execution reviews of a Trigger Trade and transactions that occur immediately after a Trigger Trade but before a trading pause is in effect on the Exchange. As proposed, the phrase "Trading Pause Trigger Price" shall mean the price that triggered a trading pause in any security subject to Arca Equities Rule 7.11. The Trading Pause Trigger Price reflects a price calculated

[4] *See* Securities Exchange Act Release No. 62252 (June 10, 2010), 75 FR 34186 (June 16, 2010) (SR–NYSEArca–2010–41).

by the primary listing market over a rolling five-minute period and may differ from the execution price of a transaction that triggered a trading pause. The Exchange will rely on the primary listing market that issued an individual security trading pause to determine and communicate the Trading Pause Trigger Price for such security. The Exchange proposes to make clear in the text that the proposed standards in paragraph (c)(4) apply regardless of whether the security at issue is part of a Multi-Stock Event involving five or more securities as described in proposed paragraphs (c)(1) and (c)(2).

As proposed, the Numerical Guidelines set forth in NYSE Arca Equities Rule 7.10(c)(1), other than those Numerical Guidelines applicable to Multi-Stock Events, would apply to reviews of Trigger Trades and subsequent transactions. The Exchange proposes to review, on its own motion pursuant to paragraph (g) of the Rule, all transactions that trigger a trading pause and subsequent transactions occurring before the trading pause is in effect on the Exchange. Because the proposed rules for trading pauses would only apply within Regular Trading Hours,[5] an execution would be reviewed and nullified as clearly erroneous if it exceeds the following thresholds:

Reference price or product	Numerical guidelines (subject transaction's % difference from the Trading Pause Trigger Price)
Greater than $0.00 up to and including $25.00	10%
Greater than $25.00 up to and including $50.00	5%
Greater than $50.00	3%
Leveraged ETF/ETN securities	Regular Trading Hours Numerical Guidelines multiplied by the leverage multiplier (*i.e.,* 2x).

As further proposed, in conducting this review, and notwithstanding anything to the contrary contained in paragraph (c)(1), where a trading pause was triggered by a price decline (rise), the Exchange would limit its review to transactions that executed at a price lower (higher) than the Trading Pause Trigger Price.

Revision to Paragraph (e)

The Exchange further proposes to amend paragraph (e) to provide that when rulings are made in conjunction with one or more market centers, the number of the affected transactions is similarly such that immediate finality is necessary to maintain a fair and orderly market and to protect investors and the public interest and, hence, are also non-appealable. This provision ensures that in the case of joint market rulings, even for situations involving less than 20 securities, such rulings are not appealable. This is consistent with current paragraph (c)(2) of the Rule, which is proposed to be deleted.

Revisions to Paragraphs (f) and (g)

Consistent with other proposals made in this filing, the Exchange proposes modifying paragraphs (f) and (g) to eliminate the ability of an Exchange official to deviate from the Numerical Guidelines contained in the Rule other than under very limited circumstances set forth in paragraph (f).

Current paragraph (f) provides an officer of the Exchange or other senior level employee designee the ability on his or her own motion, to review and rule on executions that result from "any disruption or a malfunction in the use or operation of any electronic communications and trading facilities of the Exchange, or extraordinary market conditions or other circumstances in which the nullification of transactions may be necessary for the maintenance of a fair and orderly market or the protection of investors and the public interest exist." Without modification, the language "extraordinary market conditions or other circumstances * * *" would leave the Exchange with broad discretion to deviate from the Numerical Guidelines set forth in paragraph (c)(1). Thus, the Exchange proposes narrowing the scope of paragraph (f) so that it only permits the Exchange to nullify transactions consistent with that paragraph (including at a lower Numerical Guideline) if there is a disruption or malfunction in the operation of the Exchange's system. For the same reason, the Exchange proposes eliminating the words "use or" from the language in paragraph (f) to make clear that the provision only applies to a disruption or malfunction of the Exchange's system (and not of an Exchange user's systems).

Paragraph (g) gives an officer of the Exchange or other senior level employee designee the ability on his or her own motion to review transactions as potentially clearly erroneous. Consistent with the goal of achieving more objective and standard results, the Exchange proposes deleting language in existing paragraph (g) that would allow the Exchange to deviate from the Numerical Guidelines contained in paragraph (c)(1). In addition, the Exchange proposes to make clear that any Officer of the Exchange or other senior level employee reviewing transactions on his or her own motion must follow the guidelines set forth in proposed paragraph (c)(4), if applicable. Accordingly, the Exchange proposes to modify paragraph (g) to state that an officer must rely on paragraphs (c)(1)–(4) of Rule 7.10 when reviewing transactions on his or her own motion.

Additional Conforming Revisions to Paragraphs (c)(1) and (c)(3)

Based on proposed paragraph (c)(2), the Exchange has proposed certain conforming changes to paragraphs (c)(1) and (c)(3) of the existing Rule, as described below.

Under current NYSE Arca Equities Rule 7.10, a transaction may be found to be clearly erroneous only if the price of the transaction to buy (sell) that is the subject of the complaint is greater than (less than) the Reference Price by an amount that equals or exceeds the Numerical Guidelines set forth in paragraph (c)(1) of the Rule. The "Reference Price" is currently defined as "the consolidated last sale immediately prior to the execution(s) under review except for in Unusual Circumstances as described in paragraph (c)(2)" of NYSE Arca Equities Rule 7.10. The Exchange proposes modifying paragraph (c)(1) consistent with the changes described above such that the Exchange shall use the consolidated last sale immediately prior to the execution(s) under review as the Reference Price except for: (A) Multi-Stock Events involving twenty or more securities, as described in proposed paragraph (c)(2); (B) transactions not involving a Multi-Stock

[5] Core Trading Hours are defined in NYSE Arca Rule 1.1(j) as the time between 6:30 a.m. and 1 p.m. Pacific Time. An individual security trading pause could be issued based on a Trigger Trade that occurs at any time between 6:45 a.m. and 1:35 p.m. Pacific Time on the Exchange or 9:45 a.m. and 3:35 p.m. Eastern Time on the other primary listing markets. *See, e.g.,* NYSE Arca Rule 7.11, NYSE Rule 80C, and Nasdaq Rule 4120(a)(11).

Event as described in proposed paragraph (c)(2) that trigger a trading pause and subsequent transactions, as described in proposed paragraph (c)(4), in which case the Reference Price shall be determined in accordance with that paragraph (c)(4); and (C) in other circumstances, such as, for example, relevant news impacting a security or securities, periods of extreme market volatility, sustained illiquidity, or widespread system issues, where use of a different Reference Price is necessary for the maintenance of a fair and orderly market and the protection of investors and the public interest. The Exchange also proposes modifying paragraph (c)(1) to reduce uncertainty as to the applicability of the Numerical Guidelines, by requiring a finding that an execution was clearly erroneous if such execution exceeds the Numerical Guidelines, subject to the Additional Factors included in paragraph (c)(3). Finally, the Exchange proposes revising the existing description for Multi-Stock Events that is contained on the Numerical Guidelines chart to make clear that different Numerical Guidelines apply for Multi-Stock Events involving five or more, but fewer than twenty, securities whose executions occurred within a period of five minutes or less. In addition, the Exchange proposes adding to the Numerical Guidelines chart a row that contains the Numerical Guidelines (30%) for Multi-Stock Events involving twenty or more securities whose executions occurred within a period of five minutes or less.

In addition, the Exchange proposes clarifying paragraph (c)(3) to make clear that the additional factors set forth in that paragraph are not intended to provide any discretion to an Exchange official to deviate from the guidelines that apply to Multi-Stock Events or to transactions in securities subject to individual security trading pauses.

2. Statutory Basis

The statutory basis for the proposed rule change is Section 6(b)(5) of the Securities Exchange Act of 1934 (the "Act"),[6] which requires the rules of an exchange to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. The proposed rule change also is designed to support the principles of Section 11A(a)(1)[7] of the Act in that it seeks to assure fair competition among brokers and dealers and among exchange markets. The Exchange believes that the proposed rule meets these requirements in that it promotes transparency and uniformity across markets concerning reviews of potentially clearly erroneous executions in various contexts, including reviews in the context of a Multi-Stock Event involving twenty or more securities and reviews resulting from a Trigger Trade and any executions occurring immediately after a Trigger Trade but before a trading pause is in effect on the Exchange. Further, the Exchange believes that the proposed changes enhance the objectivity of decisions made by the Exchange with respect to clearly erroneous executions.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File No. SR–NYSEArca–2010–58 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File No. SR–NYSEArca-2010–58. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the 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 Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–NYSEArca–2010–58 and should be submitted on or before July 20, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–15747 Filed 6–28–10; 8:45 am]

BILLING CODE 8010–01–P

[6] 15 U.S.C. 78f(b)(5).

[7] 15 U.S.C. 78k–1(a)(1).

[8] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62344; File No. SR–NYSEArca–2010–57]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Proposed Rule Change Regarding Listing and Trading Shares of AdvisorShares WCM/BNY Mellon Focused Growth ADR ETF

June 21, 2010.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the "Act") [2] and Rule 19b–4 thereunder,[3] notice is hereby given that on June 16, 2010, NYSE Arca, Inc. ("NYSE Arca" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to list and trade the following under NYSE Arca Equities Rule 8.600 ("Managed Fund Shares"): AdvisorShares WCM/BNY Mellon Focused Growth ADR ETF. The text of the proposed rule change is available on the Exchange's Web site at *http://www.nyse.com,* at the Exchange's principal office and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to list and trade the following Managed Fund Shares [4] ("Shares") under NYSE Arca Equities Rule 8.600: AdvisorShares WCM/BNY Mellon Focused Growth ADR ETF (the "Fund").[5] The Shares will be offered by AdvisorShares Trust (the "Trust"), a statutory trust organized under the laws of the State of Delaware and registered with the Commission as an open-end management investment company.[6]

The investment advisor to the Fund is AdvisorShares Investments, LLC (the "Advisor"). WCM Investment Management ("WCM") is the sub-advisor ("Sub-Advisor") to the Fund and the portfolio manager. The Sub-Advisor selects securities for the Fund in which to invest pursuant to an "active" management strategy for security selection and portfolio construction. The Fund will periodically change the composition of its portfolio to best meet its investment objective. Neither the Advisor nor the Sub-Advisor is affiliated with a broker-dealer.[7]

According to the Registration Statement, the Fund's investment objective is long-term capital appreciation above international benchmarks such as the BNY Mellon Classic ADR Index, the Fund's primary benchmark, and the MSCI EAFE Index, the Fund's secondary benchmark.

WCM seeks to achieve the Fund's investment objective by selecting a portfolio of U.S. traded securities of non-U.S. organizations included in the BNY Mellon Classic ADR Index. The BNY Mellon Classic ADR Index predominantly includes American Depositary Receipts ("ADRs") and in addition includes other Depositary Receipts ("DRs"), which include Global Depositary Receipts ("GDRs"), Euro Depositary Receipts ("Euro DRs") and New York Shares ("NYSs").[8]

[4] A Managed Fund Share is a security that represents an interest in an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a) ("1940 Act") organized as an open-end investment company or similar entity that invests in a portfolio of securities selected by its investment advisor consistent with its investment objectives and policies. In contrast, an open-end investment company that issues Investment Company Units, listed and traded on the Exchange under NYSE Arca Equities Rule 5.2(j)(3), seeks to provide investment results that correspond generally to the price and yield performance of a specific foreign or domestic stock index, fixed income securities index or combination thereof.

[5] The Commission previously approved listing and trading on the Exchange of the following actively managed funds under Rule 8.600. *See, e.g.,* Securities Exchange Act Release Nos. 57801 (May 8, 2008), 73 FR 27878 (May 14, 2008) (SR–NYSEArca–2008–31) (order approving Exchange listing and trading of twelve actively-managed funds of the WisdomTree Trust); 59826 (April 28, 2009), 74 FR 20512 (May 4, 2009) (SR–NYSEArca–2009–22) (order approving Exchange listing and trading of Grail American Beacon Large Cap Value ETF); 60975 (November 10, 2009) (SR–NYSEArca–2009–83) (order approving listing of Grail American Beacon International Equity ETF). The Exchange previously filed a proposed rule change relating to listing on the Exchange of the AdvisorShares WCM/BNY Mellon Focused Growth ADR ETF in File No. SR–NYSEArca–2010–07. *See* Securities Exchange Act Release No. 61642 (March 3, 2010), 75 FR 11216 (March 10, 2010). No comments were received on the proposal. The Exchange withdrew the proposed rule change on April 9, 2010. *See* Securities Exchange Act Release No. 61953 (April 21, 2010), 75 FR 22169 (April 27, 2010).

[6] The Trust is registered under the 1940 Act. On April 23, 2010, the Trust filed with the Commission Post-Effective Amendment No. 5 to Form N–1A under the Securities Act of 1933 (15 U.S.C. 77a), and under the 1940 Act relating to the Fund (File Nos. 333–157876 and 811–22110) (the "Registration Statement"). The Trust has also filed an Amended Application for an Order under Section 6(c) of the 1940 Act for exemptions from various provisions of the 1940 Act and rules thereunder (File No. 812–13677 dated May 14, 2010) ("Exemptive Application"). The description of the operation of the Trust and the Fund herein is based on the Registration Statement.

[7] With respect to the Fund, the Exchange represents that the Advisor, as the investment advisor of the Fund, as well as the Sub-Advisor to the Fund and their related personnel, are subject to Investment Advisers Act Rule 204A–1. This Rule specifically requires the adoption of a code of ethics by an investment advisor to include, at a minimum: (i) Standards of business conduct that reflect the firm's/personnel fiduciary obligations; (ii) provisions requiring supervised persons to comply with applicable federal securities laws; (iii) provisions that require all access persons to report, and the firm to review, their personal securities transactions and holdings periodically as specifically set forth in Rule 204A–1; (iv) provisions requiring supervised persons to report any violations of the code of ethics promptly to the chief compliance officer ("CCO") or, provided the CCO also receives reports of all violations, to other persons designated in the code of ethics; and (v) provisions requiring the investment advisor to provide each of the supervised persons with a copy of the code of ethics with an acknowledgement by said supervised persons. In addition, Rule 206(4)–7 under the Advisers Act makes it unlawful for an investment advisor to provide investment advice to clients unless such investment advisor has (i) adopted and implemented written policies and procedures reasonably designed to prevent violation, by the investment advisor and its supervised persons, of the Advisers Act and the Commission rules adopted thereunder; (ii) implemented, at a minimum, an annual review regarding the adequacy of the policies and procedures established pursuant to subparagraph (i) above and the effectiveness of their implementation; and (iii) designated an individual (who is a supervised person) responsible for administering the policies and procedures adopted under subparagraph (i) above.

[8] According to the Registration Statement, DRs, which include ADRs, GDRs, Euro DRs and NYSs, are negotiable securities that generally represent a non-U.S. company's publicly traded equity or debt. Depositary Receipts may be purchased in the U.S. secondary trading market. They may trade freely, just like any other security, either on an exchange or in the over-the-counter market. Although

The Investment Process

According to the Registration Statement, WCM employs a team approach through Investment Strategy Group, consisting of four senior investment professionals (the "Portfolio Managers"). This team establishes portfolio guidelines for sector and industry analysis and develops the Fund's portfolio. The Portfolio Managers analyze the major trends in the global economy in order to identify those economic sectors and industries that are most likely to benefit. According to the Registration Statement, typical themes incorporated in the Portfolio Managers' investment process include demographics, global commerce, outsourcing, the growing global middle class and the proliferation of technology. A portfolio strategy is then implemented that will best capitalize on these investment themes and subsequent expected growth of the underlying assets. The Fund's portfolio will typically have fewer than 30 companies. All buy and sell decisions are made by the Portfolio Managers.

Portfolio Construction

According to the Registration Statement, WCM seeks non-U.S. domiciled quality growth businesses with superior growth prospects, high returns on invested capital and low or no debt, among other characteristics, as described in the Registration Statement. WCM focuses its attention on conventional growth sectors such as technology, consumer discretionary and staples, and healthcare.

The Fund utilizes quantitative analysis that entails backward-looking screens to help narrow the non-U.S. universe of companies in which the Fund invests. The Fund looks for companies with market capitalization of $3.5 billion or greater within traditional growth sectors, and that have high returns on invested capital; low or no debt; high gross, operating margins; and a history of sustainable growth. Typical portfolio construction would entail exposure to 15 or more industries with initial positions of approximately 2–5%; maximum position size of approximately 10%; maximum sector size of approximately 45%; maximum industry exposure of approximately 15%; and maximum emerging markets exposure of approximately 35%.

The Fund will under normal circumstances have at least 80% of its total assets invested in ADRs. The Fund may invest in equity securities, including common and preferred stock, warrants, convertible securities and Master Limited Partnerships. The Fund's portfolio will consist primarily of ADRs and the Fund will not invest in non-U.S. equity securities outside of U.S. markets.

According to the Registration Statement, the composition of the Fund's portfolio, on a continual basis, will be subject to the following:

(1) Component stocks that in the aggregate account for at least 90% of the weight of the portfolio each shall have a minimum market value of at least $100 million;

(2) Component stocks that in the aggregate account for at least 70% of the weight of the portfolio each shall have a minimum global monthly trading volume of 250,000 shares, or minimum global notional volume traded per month of $25,000,000, averaged over the last six months;

(3) A minimum of 20 component stocks of which the most heavily weighted component stock shall not exceed 25% of the weight of the portfolio, and the five most heavily weighted component stocks shall not exceed 60% of the weight of the portfolio; and

(4) Each non-U.S. equity security underlying ADRs held by the Fund will be listed and traded on an exchange that has last-sale reporting.

In addition, the Fund may invest up to 15% of its net assets in illiquid securities. For this purpose, "illiquid securities" are securities that the Fund may not sell or dispose of within seven days in the ordinary course of business at approximately the amount at which the Fund has valued the securities.

According to the Registration Statement, the Fund may not purchase or sell commodities or commodity contracts unless acquired as a result of ownership of securities or other instruments issued by persons that purchase or sell commodities or commodities contracts; but this shall not prevent the Fund from purchasing, selling and entering into financial futures contracts (including futures contracts on indices of securities, interest rates and currencies), options on financial futures contracts (including futures contracts on indices of securities, interest rates and currencies), warrants, swaps, forward contracts, foreign currency spot and forward contracts or other derivative instruments that are not related to physical commodities.[9]

The Fund, from time to time, in the ordinary course of business, may purchase securities on a when-issued or delayed-delivery basis (*i.e.,* delivery and payment can take place between a month and 120 days after the date of the transaction). The Fund may invest in U.S. government securities and U.S. Treasury zero-coupon bonds.

As stated in the Registration Statement, the Fund may not, with respect to 75% of its total assets, (i) purchase securities of any issuer (except securities issued or guaranteed by the U.S. Government, its agencies or instrumentalities) if, as a result, more than 5% of its total assets would be invested in the securities of such issuer; or (ii) acquire more than 10% of the outstanding voting securities of any one issuer.[10] In addition, the Fund may not purchase any securities which would cause 25% or more of its total assets to be invested in the securities of one or more issuers conducting their principal business activities in the same industry or group of industries, provided that this limitation does not apply to investments in securities issued or guaranteed by the U.S. Government, its agencies or instrumentalities, or shares of investment companies.

According to the Registration Statement, the Fund will seek to qualify for treatment as a Regulated Investment Company ("RIC") under the Internal Revenue Code.[11]

typically denominated in U.S. dollars, Depositary Receipts can also be denominated in Euros. Depositary Receipts can trade on all U.S. stock exchanges as well as on many European stock exchanges.

[9] Pursuant to the terms of the Exemptive Application, the Fund will not invest in options contracts, futures contracts or swap agreements.

[10] This diversification standard is contained in Section 5(b)(1) of the 1940 Act.

[11] According to the Registration Statement, one of several requirements for RIC qualification is that a Fund must receive at least 90% of the Fund's gross income each year from dividends, interest, payments with respect to securities loans, gains from the sale or other disposition of stock, securities or foreign currencies, or other income derived with respect to the Fund's investments in stock, securities, foreign currencies and net income from an interest in a qualified publicly traded partnership (the "90% Test"). A second requirement for qualification as a RIC is that a Fund must diversify its holdings so that, at the end of each fiscal quarter of the Fund's taxable year: (a) at least 50% of the market value of the Fund's total assets is represented by cash and cash items, U.S. Government securities, securities of other RICs, and other securities, with these other securities limited, in respect to any one issuer, to an amount not greater than 5% of the value of the Fund's total assets or 10% of the outstanding voting securities of such issuer; and (b) not more than 25% of the value of its total assets are invested in the securities (other than U.S. Government securities or securities of other RICs) of any one issuer or two or more issuers which the Fund controls and which are engaged in the same, similar, or related trades or businesses, or the securities of one or more qualified publicly traded partnership (the "Asset Test").

To respond to adverse market, economic, political or other conditions, the Fund may invest 100% of its total assets, without limitation, in high-quality short-term debt securities and money market instruments. The Fund may be invested in these instruments for extended periods, depending on the Sub-Advisor's assessment of market conditions. These debt securities and money market instruments include shares of other mutual funds, commercial paper, certificates of deposit, bankers' acceptances, U.S. Government securities and repurchase agreements.

Creations and redemptions of Shares occur in large specified blocks of Shares, referred to as "Creation Units". According to the Registration Statement, the shares of the Fund are "created" at their net asset value ("NAV") by market makers, large investors and institutions only in block-size Creation Units of 25,000 shares or more. A "creator" enters into an authorized participant agreement (a "Participant Agreement") with the Fund's distributor (the "Distributor") or a DTC participant that has executed a Participant Agreement with the Distributor (an "Authorized Participant"), and deposits into the Fund a portfolio of securities closely approximating the holdings of the Fund and a specified amount of cash, together totaling the NAV of the Creation Unit(s), in exchange for 25,000 shares of the Fund (or multiples thereof). Similarly, Shares can only be redeemed in Creation Units, generally 25,000 shares or more, principally in-kind for a portfolio of securities held by the Fund and a specified amount of cash together totaling the NAV of the Creation Unit(s). Shares are not redeemable from the Fund except when aggregated in Creation Units. The prices at which creations and redemptions occur are based on the next calculation of NAV after an order is received in a form prescribed in the Participant Agreement.

According to the Registration Statement, the Trust reserves the right to offer an "all cash" option for creations and redemptions of Creation Units for the Fund. In addition, Creation Units may be issued in advance of receipt of Deposit Securities subject to various conditions, including a requirement to maintain a cash deposit with the Trust at least equal to a specified percentage of the market value of the missing Deposit Securities. In each instance, transaction fees may be imposed that will be higher than the transaction fees associated with traditional in-kind creations or redemptions. In all cases, such fees will be limited in accordance with SEC requirements applicable to management investment companies offering redeemable securities.

The Shares will conform to the initial and continued listing criteria under NYSE Arca Equities Rule 8.600. The Exchange represents that, for initial and/or continued listing, the Fund will be in compliance with Rule 10A–3 [12] under the Exchange Act, as provided by NYSE Arca Equities Rule 5.3. A minimum of 100,000 Shares will be outstanding at the commencement of trading on the Exchange. The Exchange will obtain a representation from the issuer of the Shares that the net asset value and the Disclosed Portfolio will be made available to all market participants at the same time.

Availability of Information

The Fund's Web site (*http://www.advisorshares.com*), which will be publicly available prior to the public offering of Shares, will include a form of the Prospectus for the Fund that may be downloaded. The Fund's Web site will include additional quantitative information updated on a daily basis, including, for the Fund, (1) daily trading volume, the prior business day's reported closing price, NAV and mid-point of the bid/ask spread at the time of calculation of such NAV (the "Bid/Ask Price"),[13] and a calculation of the premium and discount of the Bid/Ask Price against the NAV, and (2) data in chart format displaying the frequency distribution of discounts and premiums of the daily Bid/Ask Price against the NAV, within appropriate ranges, for each of the four previous calendar quarters. On each business day, before commencement of trading in Shares in the Core Trading Session on the Exchange, the Fund will disclose on its Web site the Disclosed Portfolio as defined in NYSE Arca Equities Rule 8.600(c)(2) that will form the basis for the Fund's calculation of NAV at the end of the business day.[14]

On a daily basis, for each portfolio security of the Fund, the Fund will disclose on its Web site the following information: Ticker symbol, name of security, number of shares held in the portfolio, and percentage weighting of the security in the portfolio. On a daily basis, the Advisor will disclose for each portfolio security or other financial instrument of the Fund the following information: Ticker symbol (if applicable), name of security or financial instrument, number of shares or dollar value of financial instruments held in the portfolio, and percentage weighting of the security or financial instrument in the portfolio. The Web site information will be publicly available at no charge.

In addition, a basket composition file, which includes the security names and share quantities required to be delivered in exchange for Fund shares, together with estimates and actual cash components, will be publicly disseminated daily prior to the opening of the New York Stock Exchange ("NYSE") via the National Securities Clearing Corporation. The basket represents one Creation Unit of the Fund. The NAV of the Fund will normally be determined as of the close of the regular trading session on the NYSE (ordinarily 4 p.m. Eastern Time) on each business day.

Investors can also obtain the Trust's Statement of Additional Information ("SAI"), the Fund's Shareholder Reports, and its Form N–CSR and Form N–SAR, filed twice a year. The Trust's SAI and Shareholder Reports are available free upon request from the Trust, and those documents and the Form N–CSR and Form N–SAR may be viewed on-screen or downloaded from the Commission's Web site at *http://www.sec.gov.* Information regarding market price and trading volume of the Shares is and will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. Information regarding the previous day's closing price and trading volume information will be published daily in the financial section of newspapers. Quotation and last sale information for the Shares will be available via the Consolidated Tape Association ("CTA") high-speed line. In addition, the Portfolio Indicative Value, as defined in NYSE Arca Equities Rule 8.600 (c)(3), will be disseminated by one or more major market data vendors at least every 15 seconds during the Core Trading Session. The dissemination of the Portfolio Indicative Value, together with the Disclosed Portfolio, will allow investors to determine the value of the underlying portfolio of the Fund on a daily basis and to provide a close estimate of that value throughout the trading day.

Additional information regarding the Trust and the Shares, including investment strategies, risks, creation and redemption procedures, fees, portfolio

[12] 17 CFR 240.10A–3.

[13] The Bid/Ask Price of the Fund is determined using the highest bid and the lowest offer on the Exchange as of the time of calculation of the Fund's NAV. The records relating to Bid/Ask Prices will be retained by the Fund and its service providers.

[14] Under accounting procedures followed by the Fund, trades made on the prior business day ("T") will be booked and reflected in NAV on the current business day ("T+1"). Accordingly, the Fund will be able to disclose at the beginning of the business day the portfolio that will form the basis for the NAV calculation at the end of the business day.

holdings disclosure policies, distributions and taxes is included in the Registration Statement. All terms relating to the Fund that are referred to, but not defined in, this proposed rule change are defined in the Registration Statement.

Trading Halts

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares of the Fund.[15] Trading in Shares of the Fund will be halted if the circuit breaker parameters in NYSE Arca Equities Rule 7.12 have been reached. Trading also may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (1) The extent to which trading is not occurring in the securities comprising the Disclosed Portfolio and/or the financial instruments of the Fund; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. Trading in the Shares will be subject to NYSE Arca Equities Rule 8.600(d)(2)(D), which sets forth circumstances under which Shares of the Fund may be halted.

Trading Rules

The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. Shares will trade on the NYSE Arca Marketplace from 4 a.m. to 8 p.m. Eastern Time in accordance with NYSE Arca Equities Rule 7.34 (Opening, Core, and Late Trading Sessions). The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions.

Surveillance

The Exchange intends to utilize its existing surveillance procedures applicable to derivative products (which include Managed Fund Shares) to monitor trading in the Shares. The Exchange represents that these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws.

The Exchange's current trading surveillance focuses on detecting securities trading outside their normal patterns. When such situations are detected, surveillance analysis follows and investigations are opened, where appropriate, to review the behavior of all relevant parties for all relevant trading violations.

The Exchange may obtain information via the Intermarket Surveillance Group ("ISG") from other exchanges that are members of ISG.[16]

In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

Information Bulletin

Prior to the commencement of trading, the Exchange will inform its Equity Trading Permit ("ETP") Holders in an Information Bulletin ("Bulletin") of the special characteristics and risks associated with trading the Shares. Specifically, the Bulletin will discuss the following: (1) The procedures for purchases and redemptions of Shares in Creation Unit aggregations (and that Shares are not individually redeemable); (2) NYSE Arca Equities Rule 9.2(a), which imposes a duty of due diligence on its ETP Holders to learn the essential facts relating to every customer prior to trading the Shares; (3) the risks involved in trading the Shares during the Opening and Late Trading Sessions when an updated Portfolio Indicative Value will not be calculated or publicly disseminated; (4) how information regarding the Portfolio Indicative Value is disseminated; (5) the requirement that ETP Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (6) trading information.

In addition, the Bulletin will reference that the Fund is subject to various fees and expenses described in the Registration Statement. The Bulletin will discuss any exemptive, no-action, and interpretive relief granted by the Commission from any rules under the Exchange Act. The Bulletin will also disclose that the NAV for the Shares will be calculated after 4 p.m. Eastern Time each trading day.

2. *Statutory Basis*

The basis under the Exchange Act for this proposed rule change is the requirement under Section 6(b)(5)[17] that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest. The Exchange believes that the proposed rule change will facilitate the listing and trading of additional types of actively-managed exchange-traded products that will enhance competition among market participants, to the benefit of investors and the marketplace.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

The Exchange has requested accelerated approval of this proposed rule change prior to the 30th day after the date of publication of notice in the **Federal Register**. The Commission is considering granting accelerated approval of the proposed rule change at the end of a 15-day comment period.

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:

[15] *See* NYSE Arca Equities Rule 7.12, Commentary .04.

[16] For a list of the current members of ISG, *see http://www.isgportal.org*. The Exchange notes that not all components of the Disclosed Portfolio for the Fund may trade on markets that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement. *See* e-mail from Timothy J. Malinowski, Senior Director, Exchange, to Michou H.M. Nguyen, Special Counsel, Commission, dated June 21, 2010.

[17] 15 U.S.C. 78f(b)(5).

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NYSEArca–2010–57 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number *SR–NYSEArca–2010–57.* This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2010–57 and should be submitted on or before July 14, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–15749 Filed 6–28–10; 8:45 am]

BILLING CODE 8011–01–P

[18] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62350; File No. SR–NYSEArca–2010–49]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto Regarding Listing and Trading of the WisdomTree Emerging Markets Local Debt Fund

June 22, 2010.

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 June 10, 2010, NYSE Arca, Inc. (the "Exchange" or "NYSE Arca") 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. On June 18, 2010, the Exchange filed Amendment No. 1 to the proposed rule change. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to list and trade the shares of the following fund of the WisdomTree Trust (the "Trust") under NYSE Arca Equities Rule 8.600 ("Managed Fund Shares"): WisdomTree Emerging Markets Local Debt Fund (the "Fund"). The shares of the Fund are collectively referred to herein as the "Shares." The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and *http://www.nyse.com.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to list and trade the Shares of the WisdomTree Emerging Markets Local Debt Fund under NYSE Arca Equities Rule 8.600, which governs the listing and trading of Managed Fund Shares on the Exchange.[3] The Fund will be an actively managed exchange-traded fund. The Shares will be offered by the Trust, which was established as a Delaware statutory trust on December 15, 2005. The Trust is registered with the Commission as an investment company and the Fund has filed a registration statement on Form N–1A ("Registration Statement") with the Commission.[4]

Description of the Shares and the Fund

WisdomTree Asset Management, Inc. ("WisdomTree Asset Management") is the investment adviser ("Adviser") to the Fund.[5] WisdomTree Asset Management is not affiliated with any broker-dealer. Mellon Capital Management Corporation ("MCM") serves as sub-adviser for the Fund ("Sub-Adviser"). The Bank of New York Mellon is the administrator, custodian and transfer agent for the Trust. ALPS Distributors, Inc. serves as the distributor for the Trust.[6]

[3] The Commission approved NYSE Arca Equities Rule 8.600 and the listing and trading of certain funds of the PowerShares Actively Managed Funds Trust on the Exchange pursuant to Rule 8.600 in Securities Exchange Act Release No. 57619 (April 4, 2008), 73 FR 19544 (April 10, 2008) (SR–NYSEArca–2008–25). The Commission also previously approved listing and trading on the Exchange of a number of actively managed funds under Rule 8.600. *See, e.g.,* Securities Exchange Act Release Nos. 57801 (May 8, 2008), 73 FR 27878 (May 14, 2008) (SR–NYSEArca–2008–31) (order approving Exchange listing and trading of twelve actively-managed funds of the WisdomTree Trust); 58564 (September 17, 2008), 73 FR 55194 (September 24, 2008) (SR–NYSEArca–2008–86) (order approving Exchange listing and trading of WisdomTree Dreyfus Emerging Markets Fund).

[4] *See* Post-Effective Amendment No. 32 to Registration Statement on Form N–1A for the Trust, dated March 19, 2010 (File Nos. 333–132380 and 811–21864), as amended June 8, 2010. The descriptions of the Fund and the Shares contained herein are based on information in the Registration Statement.

[5] WisdomTree Investments, Inc. ("WisdomTree Investments") is the parent company of WisdomTree Asset Management.

[6] The Commission has issued an order granting certain exemptive relief to the Trust under the Investment Company Act of 1940 (15 U.S.C. 80a–1) ("1940 Act"). *See* Investment Company Act Release No. 28171 (October 27, 2008) (File No. 812–13458). In compliance with Commentary .05 to NYSE Arca Equities Rule 8.600, which applies to Managed Fund Shares based on an international or global portfolio, the Trust's application for exemptive relief under the 1940 Act states that the

Commentary .06 to Rule 8.600 provides that, if the investment adviser to the Investment Company issuing Managed Fund Shares is affiliated with a broker-dealer, such investment adviser shall erect a "fire wall" between the investment adviser and the broker-dealer with respect to access to information concerning the composition and/or changes to such Investment Company portfolio.[7] In addition, Commentary .06 further requires that personnel who make decisions on the open-end fund's portfolio composition must be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding the open-end fund's portfolio. Commentary .06 to Rule 8.600 is similar to Commentary .03(a)(i) and (iii) to NYSE Arca Equities Rule 5.2(j)(3); however, Commentary .06 in connection with the establishment of a "fire wall" between the investment adviser and the broker-dealer reflects the applicable open-end fund's portfolio, not an underlying benchmark index, as is the case with index-based funds. MCM is affiliated with multiple broker-dealers and has implemented a "fire wall" with respect to such broker-dealers regarding access to information concerning the composition and/or changes to the Fund's portfolio.[8] In addition, MCM personnel who make decisions regarding the Fund's portfolio are subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding the Fund's portfolio.

WisdomTree Emerging Markets Local Debt Fund

According to the Registration Statement, the Fund seeks to provide investors with a high level of total return consisting of both income and capital appreciation. The Fund is an actively managed exchange-traded fund ("ETF") and is designed to provide exposure to a broad range of emerging market countries and issuers through investment in local currency debt instruments. A "local currency" debt instrument is a bond, note or other debt obligation denominated in a currency other than the U.S. dollar.

The Fund is designed to provide exposure to a broad range of emerging market countries.[9] The Fund intends to invest in issuers in Asia, Latin America, Eastern Europe, Africa and the Middle East. Likely country exposures include Brazil, Chile, Colombia, Hungary, Indonesia, Israel, Malaysia, Mexico, Peru, Poland, Russia, South Africa, South Korea, Thailand and Turkey. The Fund intends to invest at least 70% of its net assets in debt instruments denominated in a currency other than the U.S. dollar issued by emerging market governments, government agencies, corporations and supranational issuers ("Debt Instruments"). "Supranational issuers" include international organizations such as the European Investment Bank, International Bank for Reconstruction and Development, International Finance Corporation, or other regional development banks.[10] The Fund expects to invest up to 20% of its net assets in emerging market corporate bonds. The Fund will invest only in corporate bonds that the Adviser or Sub-Adviser deems to be sufficiently liquid. Generally a corporate bond must have $200 million or more par amount outstanding and significant par value traded to be considered as an eligible investment.[11] The Fund is designed to

Fund will comply with the Federal securities laws in accepting securities for deposits and satisfying redemptions with redemption securities, including that the securities accepted for deposits and the securities used to satisfy redemption requests are sold in transactions that would be exempt from registration under the Securities Act of 1933 (15 U.S.C. 77a).

[7] An investment adviser to an open-end fund is required to be registered under the Investment Advisers Act of 1940 (the "Advisers Act"). As a result, the Adviser and Sub-Adviser are subject to the provisions of Rule 204A–1 under the Advisers Act relating to codes of ethics. This Rule requires investment advisers to adopt a code of ethics that reflects the fiduciary nature of the relationship to clients as well as compliance with other applicable securities laws. Accordingly, procedures designed to prevent the communication and misuse of non-public information by an investment adviser must be consistent with Rule 204A–1 under the Advisers Act.

[8] The Exchange represents that the Adviser and Sub-Adviser, and their related personnel, are subject to Investment Advisers Act Rule 204A–1. This Rule specifically requires the adoption of a code of ethics by an investment adviser to include, at a minimum: (i) Standards of business conduct that reflect the firm's/personnel fiduciary obligations; (ii) provisions requiring supervised persons to comply with applicable Federal securities laws; (iii) provisions that require all access persons to report, and the firm to review, their personal securities transactions and holdings periodically as specifically set forth in Rule 204A–1; (iv) provisions requiring supervised persons to report any violations of the code of ethics promptly to the chief compliance officer ("CCO") or, provided the CCO also receives reports of all violations, to other persons designated in the code of ethics; and (v) provisions requiring the investment adviser to provide each of the supervised persons with a copy of the code of ethics with an acknowledgement by said supervised persons. In addition, Rule 206(4)–7 under the Advisers Act makes it unlawful for an investment adviser to provide investment advice to clients unless such investment adviser has (i) adopted and implemented written policies and procedures reasonably designed to prevent violation, by the investment adviser and its supervised persons, of the Advisers Act and the Commission rules adopted thereunder; (ii) implemented, at a minimum, an annual review regarding the adequacy of the policies and procedures established pursuant to subparagraph (i) above and the effectiveness of their implementation; and (iii) designated an individual (who is a supervised person) responsible for administering the policies and procedures adopted under subparagraph (i) above.

[9] According to the Registration Statement, while there is no universally accepted definition of what constitutes an "emerging market," in general, emerging market countries are characterized by developing commercial and financial infrastructure with significant potential for economic growth and increased capital market participation by foreign investors. The Adviser and Sub-Adviser look at a variety of commonly-used factors when determining whether a country is an "emerging" market. In general, the Adviser and Sub-Adviser consider a country to be an emerging market if:

(1) It is either (a) classified by the World Bank in the lower middle or upper middle income designation for one of the past 3 years (*i.e.,* per capita gross national product of less than U.S. $9,385), or (b) classified by the World Bank as high income in each of the last three years, but with a currency that has been primarily traded on a non-delivered basis by offshore investors (*e.g.,* Korea and Taiwan); and

(2) The country's debt market is considered relatively accessible by foreign investors in terms of capital flow and settlement considerations; and

(3) The country has issued the equivalent of $5 billion in local currency sovereign debt. The criteria used to evaluate whether a country is an "emerging market" will change from time to time based on economic and other events.

[10] The category of "emerging market bonds" includes both U.S. dollar-denominated debt and non-U.S. or "local" currency debt. The market for local currency debt is larger and more actively traded than the market for dollar-denominated debt. According to the Emerging Markets Traders Association, the total dollar amount of emerging market debt instruments traded in 2009 was $4.445 trillion. Turnover in local currency debt instruments in 2009 was $2.870 trillion and accounted for approximately 65% of the total turnover in emerging market bonds. (*Source:* Emerging Markets Traders Association Press Release, March 8, 2010. Additional information relating to emerging market corporate bonds is available at: *http://www.emta.org.*) As of September 30, 2009, the total market capitalization of emerging market local currency sovereign debt in the J.P. Morgan Government Bonds Index—Emerging Markets ("GBI–EM") was $625 billion. The GBI–EM is a widely followed index of regularly traded, liquid, fixed-rate domestic currency government bonds. As of the same date, the market capitalization of emerging market dollar-denominated bonds in the J.P. Morgan Emerging Markets Bond Index ("EMBI") was $326 billion. The EMBI is a widely followed index of U.S. dollar denominated debt instruments issued by emerging market sovereign and quasi-sovereign entities. (Source: J.P. Morgan as of September 30, 2009). The Adviser represents that sovereign debt of many emerging market countries is issued in large par size and tends to be very liquid. Locally-denominated debt issued by supra-national entities is also actively traded. Intra-day, executable price quotations on such instruments are available from major broker-dealer firms. Intra-day price information is available through subscription services, such as Bloomberg and Thomson Reuters, which can be accessed by Authorized Participants and other investors.

[11] The Adviser represents that the size and liquidity of the market for emerging market bonds, and in particular corporate bonds, generally has been increasing in recent years. The aggregate dollar amount of emerging market corporate bonds traded in 2009 was $514 billion, representing a 32% increase over the $380 billion traded in 2008. Turnover in emerging market corporate debt

Continued

provide exposure to a broad range of emerging market countries and issuers. Economic and other conditions in specific countries may, from time to time, lead to a decrease in the average par amount outstanding of bond issuances. Therefore, although the Fund does not intend to do so, the Fund may invest up to 5% of its net assets in corporate bonds with less than $200 million par amount outstanding if (i) the Adviser or Sub-Adviser deems such security to be sufficiently liquid based on its analysis of the market for such security (based on, for example, broker-dealer quotations or its analysis of the trading history of the security or the trading history of other securities issued by the issuer), (ii) such investment is consistent with the Fund's goal of providing exposure to a broad range of countries and issuers, and (iii) such investment is deemed by the Adviser or Sub-Adviser to be in the best interest of the Fund.

According to the Registration Statement, the Fund typically will maintain aggregate portfolio duration of between 2 and 7 years. Aggregate portfolio duration is a measure of the portfolio's sensitivity to changes in the level of interest rates. The Fund's actual portfolio duration may be longer or shorter depending upon market conditions.

The universe of emerging markets local currency debt currently includes securities that are rated "investment grade" as well as "non-investment grade" securities. The Fund is designed to provide a broad-based, representative exposure to emerging market debt and therefore will invest in both investment grade and non-investment grade securities in a manner designed to provide this exposure. The Fund currently expects that it will have 75% or more of its assets invested in investment grade securities, and no more than 25% of its assets invested in non-investment grade securities. Because the Fund is designed to provide exposure to a broad range of emerging market countries and issuers, and because the debt ratings of such countries and issuers will change from time to time, the exact percentage of the Fund's investments in investment grade and non-investment grade debt will change from time to time in response to economic events and changes to the credit ratings of such government and corporate issuers. Within the non-investment grade category some issuers and instruments are considered to be of lower credit quality and at higher risk of default. In order to limit its exposure to these more speculative credits, the Fund will not invest more than 15% of its assets in securities rated B or below by Moody's, or equivalently rated by S&P or Fitch. The Fund does not intend to invest in unrated securities. However, it may do so to a limited extent, such as where a rated security becomes unrated, if such security is determined by the Adviser and Sub-Adviser to be of comparable quality. In determining whether a security is of "comparable quality," the Adviser and Sub-Adviser will consider, for example, whether the issuer of the security has issued other rated securities.

All money market securities acquired by the Fund will be rated investment grade or, if unrated, deemed to be of equivalent quality. The Fund does not intend to invest in any unrated money market securities.

The Fund will not concentrate 25% or more of the value of its total assets (taken at market value at the time of each investment) in any one industry, as that term is used in the 1940 Act (except that this restriction does not apply to obligations issued by the U.S. government, or any non-U.S. government, or their respective agencies and instrumentalities or government-sponsored enterprises).

The Fund intends to qualify each year as a regulated investment company (a "RIC") under Subchapter M of the Internal Revenue Code of 1986, as amended. The Fund will invest its assets, and otherwise conduct its operations, in a manner that is intended to satisfy the qualifying income, diversification and distribution requirements necessary to establish and maintain RIC qualification under Subchapter M.

In addition to satisfying the above referenced RIC diversification requirements, no portfolio security held by the Fund (other than U.S. government securities and non-U.S. government securities) will represent more than 30% of the weight of the Fund and the five highest weighted portfolio securities of the Fund (other than U.S. government securities and/or non-U.S. government securities) will not in the aggregate account for more than 65% of the weight of the Fund. For these purposes, the Fund may treat repurchase agreements collateralized by U.S. government securities or non-U.S. government securities as U.S. or non-U.S. government securities, as applicable.

The Fund will invest, under normal circumstances, at least 80% of the value of its net assets in investments that are tied economically to the particular country or geographic region suggested by the Fund's name (*i.e.,* emerging markets).

With respect to its limited investments in instruments other than Debt Instruments, the Fund may purchase short-term obligations issued or guaranteed by the U.S. Treasury or the agencies or instrumentalities of the U.S. government; may invest in short-term securities issued or guaranteed by non-U.S. governments, agencies and instrumentalities; may invest in deposits and other obligations of U.S. and non-U.S. banks and financial institutions; may invest in deposits and obligations of banks and financial institutions including certificates of deposit, time deposits, and bankers' acceptances.

The Fund also may invest in corporate debt obligations with less than 397 calendar days remaining to maturity, and may purchase floating rate and adjustable rate obligations, such as demand notes, bonds, and commercial paper. The Fund may pursue its investment objective by investing some of its assets in other WisdomTree Funds based on foreign currencies, as described in the Registration Statement.

The Fund may use derivative instruments as part of its investment strategies. The examples of derivative instruments include forward currency contracts, non-deliverable forward currency contracts, currency and interest rate swaps, currency options, futures contracts, options on futures contracts and swap agreements. The Fund's use of derivative instruments will be underpinned by investments in short term, high-quality U.S. money market securities. The Fund expects that no more than 30% of the value of the Fund's net assets will be invested in derivative instruments. Such investments will be consistent with the Fund's investment objective and will not be used to enhance leverage.

With respect to certain kinds of derivative transactions entered into by the Fund that involve obligations to make future payments to third parties, including, but not limited to, futures, forward contracts, swap contracts, the purchase of securities on a when-issued or delayed delivery basis, or reverse repurchase agreements, under

accounted for 12% of the overall volume of emerging market debt of $4.445 trillion in 2009, an increase over the 9% share in 2008. (Source: Emerging Markets Traders Association Press Release, March 8, 2010.) Additional information relating to emerging market corporate bonds is available at: *http://www.emta.org.* Emerging market corporate bond issuance in 2010 was $68 billion (through March). Local currency issuance made up 72% of the total $68 billion. (Source: *Emerging Markets Bonds Come of Age,* Corporate Financing Week, March 2010 (*http://www.corporatefinancingweek.com/file/87470/emerging-market-bond-markets-come-of-age.html*)).

applicable Federal securities laws, rules, and interpretations thereof, the Fund must "set aside" liquid assets, or engage in other measures to "cover" open positions with respect to such transactions.

The Fund may engage in foreign currency transactions, and may invest directly in foreign currencies in the form of bank and financial institution deposits, certificates of deposit, and bankers acceptances denominated in a specified non-U.S. currency. The Fund may enter into forward currency contracts in order to "lock in" the exchange rate between the currency it will deliver and the currency it will receive for the duration of the contract.

The Fund may enter into swap agreements, including interest rate swaps and currency swaps, and may buy or sell put and call options on foreign currencies either on exchanges or in the over-the-counter market. The Fund may enter into repurchase agreements with counterparties that are deemed to present acceptable credit risks, and may enter into reverse repurchase agreements, which involve the sale of securities held by the Fund subject to its agreement to repurchase the securities at an agreed upon date or upon demand and at a price reflecting a market rate of interest.

The Fund may invest in the securities of other investment companies (including money market funds and ETFs). The Fund may invest up to an aggregate amount of 10% of its net assets in illiquid securities. Illiquid securities include securities subject to contractual or other restrictions on resale and other instruments that lack readily available markets.

The Fund will not invest in non-U.S. equity securities.

The Shares

The Fund issues and redeems Shares on a continuous basis at net asset value ("NAV") [12] only in large blocks of Shares ("Creation Units") in transactions with authorized participants. Currently, Creation Units generally consist of 100,000 Shares, though this may change from time to time. Creation Units are not expected to consist of less than 50,000 Shares. The Fund generally issues and redeems Creation Units in exchange for a portfolio of money market securities closely approximating the holdings of the Fund or a designated basket of non-U.S. currency and/or an amount of U.S. cash. Once created, Shares of the Fund trade on the secondary market in amounts less than a Creation Unit.

Additional information regarding the Shares and the Fund, including investment strategies, risks, creation and redemption procedures, fees, portfolio holdings disclosure policies, distributions and taxes is included in the Registration Statement.

Availability of Information

The Fund's Web site (*http://www.wisdomtree.com*), which will be publicly available prior to the public offering of Shares, will include a form of the Prospectus for the Fund that may be downloaded. The Web site will include additional quantitative information updated on a daily basis, including, for the Fund: (1) The prior business day's reported NAV, mid-point of the bid/ask spread at the time of calculation of such NAV (the "Bid/Ask Price"),[13] and a calculation of the premium and discount of the Bid/Ask Price against the NAV; and (2) data in chart format displaying the frequency distribution of discounts and premiums of the daily Bid/Ask Price against the NAV, within appropriate ranges, for each of the four previous calendar quarters. On each business day, before commencement of trading in Shares in the Core Trading Session [14] on the Exchange, the Trust will disclose on its Web site the identities and quantities of the portfolio of securities and other assets (the "Disclosed Portfolio") held by the Fund that will form the basis for the Fund's calculation of NAV at the end of the business day.[15] The Disclosed Portfolio will include, as applicable, the names, quantity, percentage weighting and market value of securities, and other assets held by the Fund and the characteristics of such assets. The Web site and information will be publicly available at no charge.

In addition, for the Fund, an estimated value, defined in Rule 8.600 as the "Portfolio Indicative Value," that reflects an estimated intraday value of the Fund's portfolio, will be disseminated. The Portfolio Indicative Value will be based upon the current value for the components of the Disclosed Portfolio and will be updated and disseminated by one or more major market data vendors at least every 15 seconds during the Core Trading Session on the Exchange. In addition, during hours when the markets for securities in the Fund's portfolio are closed, the Portfolio Indicative Value will be updated at least every 15 seconds during the Core Trading Session to reflect currency exchange fluctuations.

The dissemination of the Portfolio Indicative Value, together with the Disclosed Portfolio, will allow investors to determine the value of the underlying portfolio of the Fund on a daily basis and to provide a close estimate of that value throughout the trading day.

Information regarding market price and volume of the Shares is and will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. The previous day's closing price and trading volume information will be published daily in the financial section of newspapers. Quotation and last sale information for the Shares will be available via the Consolidated Tape Association high-speed line.

Initial and Continued Listing

The Shares will be subject to Rule 8.600(d), which sets forth the initial and continued listing criteria applicable to Managed Fund Shares. The Exchange represents that, for initial and/or continued listing, the Shares must be in compliance with Rule 10A–3 under the Exchange Act,[16] as provided by NYSE Arca Equities Rule 5.3. A minimum of 100,000 Shares will be outstanding at the commencement of trading on the Exchange. The Exchange will obtain a representation from the issuer of the Shares that the net asset value and the Disclosed Portfolio will be made available to all market participants at the same time.

Trading Halts

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares of the Fund. Shares of the Fund will be

[12] The NAV of the Fund's Shares generally is calculated once daily Monday through Friday as of the close of regular trading on the New York Stock Exchange, generally 4 p.m. Eastern time (the "NAV Calculation Time"). NAV per Share is calculated by dividing the Fund's net assets by the number of Fund Shares outstanding. For more information regarding the valuation of Fund investments in calculating the Fund's NAV, see the Registration Statement.

[13] The Bid/Ask Price of the Fund is determined using the midpoint of the highest bid and the lowest offer on the Exchange as of the time of calculation of such Fund's NAV. The records relating to Bid/Ask Prices will be retained by the Fund and its service providers.

[14] The Core Trading Session is 9:30 a.m. to 4 p.m. Eastern time.

[15] Under accounting procedures followed by the Fund, trades made on the prior business day ("T") will be booked and reflected in NAV on the current business day ("T+1"). Notwithstanding the foregoing, portfolio trades that are executed prior to the opening of the Exchange on any business day may be booked and reflected in NAV on such business day. Accordingly, the Fund will be able to disclose at the beginning of the business day the portfolio that will form the basis for the NAV calculation at the end of the business day.

[16] *See* 17 CFR 240.10A–3.

halted if the "circuit breaker" parameters in NYSE Arca Equities Rule 7.12 are reached. Trading may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (1) The extent to which trading is not occurring in the securities comprising the Disclosed Portfolio and/or the financial instruments of the Fund; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. Trading in the Shares will be subject to Rule 8.600(d)(2)(D), which sets forth circumstances under which Shares of the Fund may be halted.

Trading Rules

The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. Shares will trade on the NYSE Arca Marketplace from 4 a.m. to 8 p.m. Eastern time in accordance with NYSE Arca Equities Rule 7.34 (Opening, Core, and Late Trading Sessions). The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions.

Surveillance

The Exchange intends to utilize its existing surveillance procedures applicable to derivative products (which includes Managed Fund Shares) to monitor trading in the Shares. The Exchange represents that these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable Federal securities laws.

The Exchange's current trading surveillance focuses on detecting securities trading outside their normal patterns. When such situations are detected, surveillance analysis follows and investigations are opened, where appropriate, to review the behavior of all relevant parties for all relevant trading violations.

The Exchange may obtain information via the Intermarket Surveillance Group ("ISG") from other exchanges who are members of the ISG.[17]

In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

Information Bulletin

Prior to the commencement of trading, the Exchange will inform its ETP Holders in an Information Bulletin ("Bulletin") of the special characteristics and risks associated with trading the Shares. Specifically, the Bulletin will discuss the following: (1) The procedures for purchases and redemptions of Shares in Creation Unit aggregations (and that Shares are not individually redeemable); (2) NYSE Arca Equities Rule 9.2(a), which imposes a duty of due diligence on its ETP Holders to learn the essential facts relating to every customer prior to trading the Shares; (3) the risks involved in trading the Shares during the Opening and Late Trading Sessions when an updated Portfolio Indicative Value will not be calculated or publicly disseminated; (4) how information regarding the Portfolio Indicative Value is disseminated; (5) the requirement that ETP Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (6) trading information.

In addition, the Bulletin will reference that the Fund is subject to various fees and expenses described in the Registration Statement. The Bulletin will discuss any exemptive, no-action, and interpretive relief granted by the Commission from any rules under the Exchange Act. The Bulletin will also disclose that the NAV for the Shares will be calculated after 4:00 p.m. Eastern time each trading day.

2. Statutory Basis

The basis under the Exchange Act for this proposed rule change is the requirement under Section 6(b)(5)[18] that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest. The Exchange believes that the proposed rule change will facilitate the listing and trading of additional types of exchange-traded products that will enhance competition among market participants, to the benefit of investors and the marketplace. In addition, the listing and trading criteria set forth in Rule 8.600 are intended to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve the proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NYSEArca–2010–49 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2010–49. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the

[17] For a list of the current members of ISG, *see http://www.isgportal.org.* The Exchange notes that not all of the components of the Disclosed Portfolio for the Fund may trade on exchanges that are members of the ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.

[18] 15 U.S.C. 78f(b)(5).

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 Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2010–49 and should be submitted on or before July 20, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–15752 Filed 6–28–10; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62353; File No. SR–NYSEArca–2010–53]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NYSE Arca, Inc. Adopting NYSE Arca Equities Rule 0 To Provide That Certain References in Exchange Rules Should Be Understood to Also Include FINRA, as Applicable

June 22, 2010.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the "Act")[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on June 14, 2010, NYSE Arca, Inc. (the "Exchange" or "NYSE Arca") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to adopt NYSE Arca Equities Rule 0 to provide that certain references in Exchange rules should be understood to also include FINRA, as applicable. The text of the proposed rule change is available at the Exchange, the Commission's Web site at *http://www.sec.gov,* the Commission's Public Reference Room, and *http://www.nyse.com.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this proposed rule change is to establish Rule 0 to provide that certain references in Exchange rules should be understood to also include FINRA, as applicable. Specifically, proposed Rule 0 sets forth that the Exchange and FINRA are parties to a Regulatory Services Agreement ("RSA") pursuant to which FINRA has agreed to perform certain of the Exchange's member regulatory functions on behalf of the Exchange[4] and that Exchange rules that refer to NYSE Regulation, Inc., NYSE Regulation staff or departments, Exchange staff, and Exchange departments should be understood as also referring to FINRA staff and FINRA departments acting on behalf of the Exchange pursuant to the RSA, as applicable. The proposed amendment further provides that notwithstanding that the Exchange has entered into an RSA with FINRA to perform certain of the Exchange's member regulatory functions, the Exchange shall retain ultimate legal responsibility for, and control of, such functions.

Background

NYSE Group, NYSE Regulation, Inc. ("NYSE Regulation"), NYSE Arca, New York Stock Exchange LLC ("NYSE"), and NYSE Amex LLC ("NYSE Amex") (collectively, the "NYSE Group Exchanges") anticipate entering into an RSA and an allocation plan pursuant to Section 17(d)(1) of the Securities Exchange Act of 1934 and Rule 17d–2 thereunder that together, when effective, will result in consolidating with FINRA essentially all member regulatory functions that are currently performed by NYSE Regulation on behalf of the Exchange and the other NYSE Group Exchanges.[5] The evolution and increasing fragmentation of the securities markets has heightened the need for effective cross-market, cross-product oversight, and the Exchange believes that as a centralized regulatory utility, FINRA is well positioned to perform such consolidated regulatory services. Among other things, FINRA will conduct examinations and surveillance of member and member firm conduct under Exchange rules, investigate and enforce violations of Exchange rules, and conduct disciplinary proceedings arising out of such enforcement actions. NYSE Regulation currently performs the Exchange's regulatory functions pursuant to a regulatory services agreement.[6]

Proposed Rule

In connection with the FINRA Consolidation, the Exchange proposes to establish NYSE Arca Equities Rule 0. As proposed, Rule 0 sets forth that (i) the Exchange and FINRA are parties to an RSA pursuant to which FINRA has agreed to perform certain of the Exchange's member regulatory functions on behalf of the Exchange; and (ii) Exchange rules that refer to NYSE Regulation, Inc., NYSE Regulation staff or departments, Exchange staff, and Exchange departments should be understood as also referring to FINRA staff and FINRA departments acting on behalf of the Exchange pursuant to the RSA, as applicable. Additionally, proposed Rule 0 would set forth that

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[19] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] The Exchange and FINRA are also party to an allocation plan pursuant to Section 17(d)(1) of the Securities Exchange Act of 1934 and Rule 17d–2 thereunder.

[5] NYSE Regulation will continue to have ultimate authority (as between itself and FINRA) regarding the proper interpretation of the rules of the NYSE Group Exchanges. NYSE Regulation will also continue to be responsible for listing regulation at the NYSE Exchanges.

[6] NYSE Regulation currently performs the regulatory functions of NYSE Arca and NYSE Amex pursuant to RSAs and of NYSE pursuant to delegated authority.

notwithstanding that the Exchange has entered into an RSA with FINRA to perform certain of the Exchange's member regulatory functions, the Exchange shall retain ultimate legal responsibility for, and control of, such functions. As noted above, the Exchange will be consolidating essentially all member regulatory functions with FINRA, in order to enhance cross-market, cross-product regulatory oversight and address the increasing market fragmentation. In connection therewith, FINRA is hiring substantially all the management and staff from NYSE Regulation who do market surveillance and enforcement for the NYSE Group Exchanges, so that the expertise related to those functions will reside with FINRA. Thus, the Exchange will necessarily rely on FINRA to determine the manner by which the regulatory services will be provided and the appropriate regulatory action to be taken to address particular matters. While the Exchange will have oversight rights with respect to FINRA's performance under the RSA, it will not exercise day to day control of such functions.

The proposed rule text is substantially identical to Nasdaq Rule 0130.

2. Statutory Basis

The Exchange believes that the proposed rule changes [sic] are consistent with Section 6(b) of the Act,[7] in general, and further the objectives of Section 6(b)(5) of the Act,[8] in particular, in that they [sic] are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Exchange believes that the proposed rule changes [sic] support the objectives of the Act by providing greater transparency to members and member organizations that FINRA will be providing regulatory services on behalf of the Exchange and that therefore the entity contacting members and member organizations in connection with such regulation may be FINRA, even if an Exchange rule specifies that NYSE Regulation or the Exchange will be performing such function.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[9] and Rule 19b–4(f)(6)[10] thereunder.

The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, because such waiver will enable the Exchange to implement new Rule 0 commensurate with its entering into the RSA. In addition, as noted by the Exchange, the proposal is consistent with the rules of other self-regulatory organizations previously approved by the Commission.[11] For these reasons, the Commission designates the proposed rule change as operative upon filing.[12]

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NYSEArca–2010–53 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca-2010–53. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2010–53 and should be submitted on or before July 20, 2010.

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[11] *See* Nasdaq Rule 0130 and BATS Rule 8.1(d).

[12] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–15754 Filed 6–28–10; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62352; File No. SR–NYSEArca–2010–54]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NYSE Arca, Inc. Adopting Rule 0 To Provide That Certain References in Exchange Rules Should Be Understood To Also Include FINRA, as Applicable

June 22, 2010.

Pursuant to section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the "Act")[2] and rule 19b–4 thereunder,[3] notice is hereby given that, on June 14, 2010, NYSE Arca, Inc. (the "Exchange" or "NYSE Arca") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to adopt rule 0 to provide that certain references in Exchange rules should be understood to also include FINRA, as applicable. The text of the proposed rule change is available at the Exchange, the Commission's Web site at *http://www.sec.gov,* the Commission's Public Reference Room, and *http://www.nyse.com.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this proposed rule change is to establish rule 0 to provide that certain references in Exchange rules should be understood to also include FINRA, as applicable. Specifically, proposed rule 0 sets forth that the Exchange and FINRA are parties to a Regulatory Services Agreement ("RSA") pursuant to which FINRA has agreed to perform certain of the Exchange's member regulatory functions on behalf of the Exchange[4] and that Exchange rules that refer to NYSE Regulation, Inc., NYSE Regulation staff or departments, Exchange staff, and Exchange departments should be understood as also referring to FINRA staff and FINRA departments acting on behalf of the Exchange pursuant to the RSA, as applicable. The proposed new rule further provides that notwithstanding that the Exchange has entered into an RSA with FINRA to perform certain of the Exchange's member regulatory functions, the Exchange shall retain ultimate legal responsibility for, and control of, such functions.

Background

NYSE Group, NYSE Regulation, Inc. ("NYSE Regulation"), NYSE Arca, New York Stock Exchange LLC ("NYSE"), and NYSE Amex LLC ("NYSE Amex") (collectively, the "NYSE Group Exchanges") anticipate entering into an RSA and an allocation plan pursuant to section 17(d)(1) of the Securities Exchange Act of 1934 and rule 17d–2 thereunder that together, when effective, will result in consolidating with FINRA essentially all member regulatory functions that are currently performed by NYSE Regulation on behalf of the Exchange and the other NYSE Group Exchanges.[5] The evolution and increasing fragmentation of the securities markets has heightened the need for effective cross-market, cross-product oversight, and the Exchange believes that as a centralized regulatory utility, FINRA is well positioned to perform such consolidated regulatory services. Among other things, FINRA will conduct examinations and surveillance of member and member firm conduct under Exchange rules, investigate and enforce violations of Exchange rules, and conduct disciplinary proceedings arising out of such enforcement actions. NYSE Regulation currently performs the Exchange's regulatory functions pursuant to a regulatory services agreement.[6]

Proposed Rule

In connection with the FINRA Consolidation, the Exchange proposes to establish NYSE Arca rule 0. As proposed, rule 0 sets forth that: (i) The Exchange and FINRA are parties to an RSA pursuant to which FINRA has agreed to perform certain of the Exchange's member regulatory functions on behalf of the Exchange; and (ii) Exchange rules that refer to NYSE Regulation, Inc., NYSE Regulation staff or departments, Exchange staff, and Exchange departments should be understood as also referring to FINRA staff and FINRA departments acting on behalf of the Exchange pursuant to the RSA, as applicable. Additionally, proposed rule 0 would set forth that notwithstanding that the Exchange has entered into an RSA with FINRA to perform certain of the Exchange's member regulatory functions, the Exchange shall retain ultimate legal responsibility for, and control of, such functions. As noted above, the Exchange will be consolidating essentially all member regulatory functions with FINRA, in order to enhance cross-market, cross-product regulatory oversight and address the increasing market fragmentation. In connection therewith, FINRA is hiring substantially all the management and staff from NYSE Regulation who do market surveillance and enforcement for the NYSE Group Exchanges, so that the expertise related to those functions will reside with FINRA. Thus, the Exchange will necessarily rely on FINRA to determine the manner by which the regulatory services will be provided and the appropriate regulatory action to be taken to address particular matters. While the Exchange will have oversight rights with respect to FINRA's performance under the RSA, it will not exercise day to day control of such functions.

[13] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] The Exchange and FINRA are also party to an allocation plan pursuant to section 17(d)(1) of the Securities Exchange Act of 1934 and rule 17d–2 thereunder.

[5] NYSE Regulation will continue to have ultimate authority (as between itself and FINRA) regarding the proper interpretation of the rules of the NYSE Group Exchanges. NYSE Regulation will also continue to be responsible for listing regulation at the NYSE Exchanges.

[6] NYSE Regulation currently performs the regulatory functions of NYSE Arca and NYSE Amex pursuant to RSAs and of NYSE pursuant to delegated authority.

The proposed rule text is substantially identical to Nasdaq rule 0130.

2. Statutory Basis

The Exchange believes that the proposed rule changes [sic] are consistent with section 6(b) of the Act,[7] in general, and further the objectives of section 6(b)(5) of the Act,[8] in particular, in that they [sic] are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Exchange believes that the proposed rule changes [sic] support the objectives of the Act by providing greater transparency to members and member organizations that FINRA will be providing regulatory services on behalf of the Exchange and that therefore the entity contacting members and member organization in connection with such regulation may be FINRA, even if an Exchange rule specifies that NYSE Regulation or the Exchange will be performing such function.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to section 19(b)(3)(A) of the Act[9] and rule 19b–4(f)(6)[10] thereunder.

The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, because such waiver will enable the Exchange to implement new rule 0 commensurate with its entering into the RSA. In addition, as noted by the Exchange, the proposal is consistent with the rules of other self-regulatory organizations previously approved by the Commission.[11] For these reasons, the Commission designates the proposed rule change as operative upon filing.[12]

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NYSEArca–2010–54 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2010–54. 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 Web site viewing and printing in the Commission's Public Reference Room, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2010–54 and should be submitted on or before July 20, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–15753 Filed 6–28–10; 8:45 am]

BILLING CODE 8010–01–P

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(6). In addition, rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[11] *See* Nasdaq rule 0130 and BATS rule 8.1(d).

[12] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62349; File No. SR–NYSEArca–2010–51]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by NYSE Arca, Inc. Relating to Listing and Trading of WisdomTree Dreyfus Commodity Currency Fund Under NYSE Arca Equities Rule 8.600

June 22, 2010.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the "Act")[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on June 10, 2010, NYSE Arca, Inc. (the "Exchange" or "NYSE Arca") filed with the

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to list and trade shares of the following fund of the WisdomTree Trust ("Trust") under NYSE Arca Equities Rule 8.600: WisdomTree Dreyfus Commodity Currency Fund ("Fund"). The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and on the Exchange's Web site at *http://www.nyse.com.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to list and trade the Shares of the Fund under NYSE Arca Equities Rule 8.600, which governs the listing and trading of "Managed Fund Shares" on the Exchange.[4] The Fund will be an actively managed exchange traded fund. The Shares will be offered by the Trust, which was established as a Delaware statutory trust on December 15, 2005. The Trust is registered with the Commission as an investment company.[5]

Description of the Shares and the Fund

WisdomTree Asset Management, Inc. ("WisdomTree Asset Management") is the investment adviser ("Adviser") to the Fund.[6] WisdomTree Asset Management is not affiliated with any broker-dealer. The Dreyfus Corporation ("Dreyfus") serves as sub-adviser ("Sub-Adviser") for the Fund. The Bank of New York is the administrator, custodian and transfer agent for the Trust. ALPS Distributors, Inc. serves as the distributor for the Trust.[7]

Commentary .06[8] to Rule 8.600 provides that, if the investment adviser to the Investment Company issuing Managed Fund Shares is affiliated with a broker-dealer, such investment adviser shall erect a "fire wall" between the investment adviser and the broker-dealer with respect to access to information concerning the composition and/or changes to such Investment Company portfolio.[9] In addition, Commentary .06 further requires that personnel who make decisions on the open-end fund's portfolio composition must be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding the open-end fund's portfolio. Commentary .06 to Rule 8.600 is similar to Commentary .03(a)(i) and (iii) to NYSE Arca Equities Rule 5.2(j)(3); however, Commentary .06 in connection with the establishment of a "fire wall" between the investment adviser and the broker-dealer reflects the applicable open-end fund's portfolio, not an underlying benchmark index, as is the case with index-based funds. Dreyfus is affiliated with multiple broker-dealers and has implemented a "fire wall" with respect to such broker-dealers regarding access to information concerning the composition and/or changes to the Fund's portfolio.[10]

WisdomTree Commodity Currency Fund

The WisdomTree Dreyfus Commodity Currency Fund (the "Fund") seeks to achieve total returns reflective of money market rates in selected commodity-producing countries and changes to the

[4] The Commission approved NYSE Arca Equities Rule 8.600 and the listing and trading of certain funds of the PowerShares Actively Managed Funds Trust on the Exchange pursuant to Rule 8.600 in Securities Exchange Act Release No. 57619 (April 4, 2008) 73 FR 19544 (April 10, 2008) (SR–NYSEArca–2008–25). The Commission also previously approved listing and trading on the Exchange of actively managed funds under Rule 8.600. *See, e.g.,* Securities Exchange Act Release Nos. 57801 (May 8, 2008), 73 FR 27878 (May 14, 2008) (SR–NYSEArca–2008–31) (order approving Exchange listing and trading of twelve actively-managed funds of the WisdomTree Trust); 58564 (September 17, 2008), _ [sic] 73 FR 55194 (September 24, 2008) (SR–NYSEArca–2008–86) (order approving Exchange listing and trading of WisdomTree Dreyfus Emerging Currency Fund); 60975 (November 10, 2009), 74 FR 59590 (November 18, 2009) (SR–NYSEArca–2009–83) (order approving listing of Grail American Beacon International Equity ETF); 60981 (November 10, 2009), 74 FR 59594 (November 18, 2009) (SR–NYSEArca–2009–79) (order approving listing of five fixed income funds of the PIMCO ETF Trust).

[5] *See* Post-Effective Amendment No. 32 to Registration Statement on Form N–1A for the Trust, dated March 19, 2010 (File Nos. 333–132380 and 811–21864), as supplemented on June 8, 2010 (the "Registration Statement"). The descriptions of the Fund and the Shares contained herein are based on information in the Registration Statement.

[6] WisdomTree Investments, Inc. ("WisdomTree Investments") is the parent company of WisdomTree Asset Management.

[7] The Commission has issued an order granting certain exemptive relief to the Trust under the Investment Company Act of 1940 (15 U.S.C. 80a-1) ("1940 Act"). *See* Investment Company Act Release No. 28174 (February 27, 2008) (File No. 812–13470). In compliance with Commentary .05 to NYSE Arca Equities Rule 8.600, which applies to Managed Fund Shares based on an international or global portfolio, the Trust's application for exemptive relief under the 1940 Act states that the Fund will comply with the federal securities laws in accepting securities for deposits and satisfying redemptions with redemption securities, including that the securities accepted for deposits and the securities used to satisfy redemption requests are sold in transactions that would be exempt from registration under the Securities Act of 1933 (15 U.S.C. 77a).

[8] *See* June 17, 2010 e-mail from Michael Cavalier, Exchange, to Joseph Morra, Commission (correcting references from Commentary .07 of Rule 8.600 to Commentary .06 of Rule 8.600).

[9] An investment adviser to an open-end fund is required to be registered under the Investment Advisers Act of 1940 (the "Advisers Act"). As a result, the Adviser and Sub-adviser are subject to the provisions of Rule 204A–1 under the Advisers Act relating to codes of ethics. This Rule requires investment advisers to adopt a code of ethics that reflects the fiduciary nature of the relationship to clients as well as compliance with other applicable securities laws. Accordingly, procedures designed to prevent the communication and misuse of non-public information by an investment adviser must be consistent with Rule 204A–1 under the Advisers Act.

[10] The Exchange represents that the Adviser and Sub-Adviser, and their related personnel, are subject to Investment Advisers Act Rule 204A–1. This Rule specifically requires the adoption of a code of ethics by an investment adviser to include, at a minimum: (i) Standards of business conduct that reflect the firm's/personnel fiduciary obligations; (ii) provisions requiring supervised persons to comply with applicable federal securities laws; (iii) provisions that require all access persons to report, and the firm to review, their personal securities transactions and holdings periodically as specifically set forth in Rule 204A–1; (iv) provisions requiring supervised persons to report any violations of the code of ethics promptly to the chief compliance officer ("CCO") or, provided the CCO also receives reports of all violations, to other persons designated in the code of ethics; and (v) provisions requiring the investment adviser to provide each of the supervised persons with a copy of the code of ethics with an acknowledgement by said supervised persons. In addition, Rule 206(4)–7 under the Advisers Act makes it unlawful for an investment adviser to provide investment advice to clients unless such investment adviser has (i) Adopted and implemented written policies and procedures reasonably designed to prevent violation, by the investment adviser and its supervised persons, of the Advisers Act and the Commission rules adopted thereunder; (ii) implemented, at a minimum, an annual review regarding the adequacy of the policies and procedures established pursuant to subparagraph (i) above and the effectiveness of their implementation; and (iii) designated an individual (who is a supervised person) responsible for administering the policies and procedures adopted under subparagraph (i) above.

value of such countries' currencies relative to the U.S. dollar.

The term "commodity currency" generally is used to describe the currency of a country whose economic success is commonly identified with the production and export of commodities (such as precious metals, oil, agricultural products or other raw materials) and whose value is closely linked to the value of such commodities. As the demand for, or price of, such commodities increases money tends to flow into the country. Conversely, declines in the demand for, or value of, such commodities historically have contributed to declines in the relative value of these countries' currencies.

The Fund is designed to provide exposure to both the currencies and money market rates available to foreign investors in selected commodity-producing countries. The Fund intends to invest in commodity-producing countries such as Australia, Brazil, Canada, Chile, Indonesia, Mexico, New Zealand, Norway, Russia and South Africa. In addition to seeking broad exposure across countries and currencies, the Fund intends to seek exposure across currencies correlated to each of the key commodity groups: industrial metals, precious metals, energy, agriculture and livestock. The Fund generally will invest only in currencies that "float" relative to other currencies. The value of a floating currency is largely determined by supply and demand and prevailing market rates. In contrast, the value of a "fixed" currency generally is set by a government or central bank at an official exchange rate. The Fund generally does not intend to invest in the currencies of notable commodity producers, such as China, Saudi Arabia and the United Arab Emirates, since they are fixed or otherwise closely linked to the U.S. dollar. The Fund will only invest in currencies that it deems to be sufficiently liquid and accessible.[11]

The Fund intends to achieve exposure to selected commodity-producing countries available to U.S. investors by investing primarily in short-term U.S. money market securities and forward currency contracts and swaps. The combination of money market securities with forward currency contracts and currency swaps is designed to create a position economically similar to a money market instrument denominated in a non-U.S. currency. A forward currency contract is an agreement to buy or sell a specific currency at a future date at a price set at the time of the contract. A currency swap is an agreement between two parties to exchange one currency for another at a future rate.

In order to reduce interest rate risk, the Fund generally expects to maintain an average portfolio maturity of 90 days or less. The "average portfolio maturity" of the Fund is the average of all the current maturities of the individual securities in the Fund's portfolio. All money market securities acquired by the Fund will be rated in the upper two short-term ratings by at least two nationally recognized statistical rating organizations ("NRSROs") or, if unrated, deemed by the Adviser to be of equivalent quality.

As a matter of general policy, the Fund will invest, under normal circumstances, at least 80% of its net assets, plus the amount of any borrowings for investment purposes, in investments that are tied economically to selected commodity-producing countries available to U.S. investors that make a significant contribution to the global export of commodities. If, subsequent to an investment, the 80% requirement is no longer met, the Fund's future investments will be made in a manner that will bring the Fund into compliance with this policy.

According to the Registration Statement, the Fund is considered to be "non-diversified" and is not limited by the 1940 Act with regard to the percentage of assets that may be invested in the securities of a single issuer. As a result, the Fund may invest more of its assets in the securities of a single issuer or a smaller number of issuers than if it were classified as a diversified fund. The Fund will maintain the level of diversification necessary to qualify as a regulated investment company ("RIC") under Subchapter M of the Code. The Subchapter M diversification tests generally require that (i) a Fund invest no more than 25% of its total assets in securities (other than securities of the U.S. government or other RICs) of any one issuer or two or more issuers that are controlled by a Fund and that are engaged in the same, similar or related trades or businesses, and (ii) at least 50% of a Fund's total assets consist of cash and cash items, U.S. government securities, securities of other RICs and other securities, with investments in such other securities limited in respect of any one issuer to an amount not greater than 5% of the value of the Fund's total assets and 10% of the outstanding voting securities of such issuer. These tax requirements are generally applied at the end of each quarter of a Fund's taxable year.

In addition to satisfying the above referenced RIC diversification requirements, no portfolio security held by a Fund (other than U.S. government securities and non-U.S. government securities) will represent more than 30% of the weight of a Fund and the five highest weighted portfolio securities of a Fund (other than U.S. government securities and/or non-U.S. government securities) will not in the aggregate account for more than 65% of the weight of a Fund. For these purposes, a Fund may treat repurchase agreements collateralized by U.S. government securities or non-U.S. government securities as U.S. or non-U.S. government securities, as applicable.

All U.S. money market securities acquired by the Fund will be rated in the upper two short-term ratings by at least two NRSROs or, if unrated, deemed to be of equivalent quality. The Fund may purchase short-term obligations issued or guaranteed by the U.S. Treasury or the agencies or instrumentalities of the U.S. government.

The Fund may invest in short-term securities issued or guaranteed by non-U.S. governments, agencies and instrumentalities; and deposits and other obligations of U.S. and non-U.S. banks and financial institutions. Deposits and obligations of banks and financial institutions include certificates of deposit, time deposits, and bankers' acceptances. The Fund may purchase floating rate and adjustable rate obligations, such as demand notes, bonds, and commercial paper; and mortgage-backed and asset-backed securities.

The Fund may engage in foreign currency transactions and may invest directly in foreign currencies in the form of bank and financial institution deposits, certificates of deposit, and bankers acceptances denominated in a specified non-U.S. currency and may enter into foreign currency exchange transactions. The Fund will conduct its foreign currency exchange transactions

[11] The Fund may pursue its objectives through direct investments in money market instruments issued by entities in the applicable foreign country and denominated in the applicable non-U.S. currency when WisdomTree Asset Management believes it is in the best interest of the Fund to do so. The decision to secure exposure directly or indirectly will be a function of, among other things, market accessibility, credit exposure, and tax ramifications for foreign investors. If the Fund pursues direct investment, eligible investments include short-term securities issued by the applicable foreign government and its agencies or instrumentalities, bank debt obligations and time deposits, bankers' acceptances, commercial paper, and short-term, high-quality corporate debt obligations designed to provide exposure to the applicable non-U.S. currency and money market rates, and U.S. dollar money market instruments.

either on a spot (*i.e.,* cash) basis at the spot rate prevailing in the foreign currency exchange market, or by entering into forward currency contracts to purchase or sell foreign currencies or forward currency swaps to exchange cash flows based on the notional difference among two or more currencies.

The Fund may enter into swap agreements, including interest rate swaps and currency swaps; may buy or sell put and call options on foreign currencies either on exchanges or in the over-the-counter market; may use futures contracts and related options: (i) To attempt to gain exposure to foreign currencies, and (ii) to attempt to gain exposure to a particular market, instrument or index; may use swap agreements; may enter into repurchase agreements with counterparties that are deemed to present acceptable credit risks; may enter into reverse repurchase agreements, which involve the sale of securities held by a [sic] Fund subject to its agreement to repurchase the securities at an agreed upon date or upon demand and at a price reflecting a market rate of interest; and may invest in the securities of other investment companies (including money market funds). Each [sic] Fund may use derivative instruments as part of its investment strategies, as described in the Registration Statement.

The Fund may invest up to an aggregate amount of 10% of its net assets in illiquid securities. Illiquid securities include securities subject to contractual or other restrictions on resale and other instruments that lack readily available markets.

The Fund may invest in very short-term money market securities denominated in various foreign currencies and/or investments designed to provide exposure to such currencies and money market rates. Such currencies include the Australian dollar; Brazilian Real; Canadian Dollar; Chilean Peso; Chinese Yuan; Indian Rupee; Indonesian Rupiah; Japanese Yen; Mexican Peso; New Zealand Dollar; Norwegian Kroner; Russian Ruble; South African Rand. In addition, the Funds may invest assets in a market or markets considered to be "emerging" or "developing" or in securities that provide exposure to such market(s).[12]

The Fund will not invest in non-U.S. equity securities.

The Shares

The Fund issues and redeems Shares on a continuous basis at net asset value ("NAV") [13] only in large blocks of shares ("Creation Units") in transactions with authorized participants. Currently, Creation Units generally consist of 50,000 shares, though this may change from time to time. Creation Units are not expected to consist of less than 25,000 shares. The Fund generally issues and redeems Creation Units in exchange for a portfolio of money market securities closely approximating the holdings of a [sic] Fund or a designated basket of non-U.S. currency and/or an amount of U.S. cash. Once created, Shares of the Funds [sic] trade on the secondary market in amounts less than a Creation Unit. For more information regarding the Shares and the Fund, including investment strategies, risks, creation and redemption procedures, fees, portfolio holdings disclosure policies, distributions and taxes, see the Registration Statement.

Availability of Information

The Fund's Web site (*http://www.wisdomtree.com*), which will be publicly available prior to the public offering of Shares, will include a form of the Prospectus for the Fund that may be downloaded. The Web site will include additional quantitative information updated on a daily basis, including, for the Fund: (1) The prior business day's reported NAV, mid-point of the bid/ask spread at the time of calculation of such NAV (the "Bid/Ask Price"),[14] and a calculation of the premium and discount of the Bid/Ask Price against the NAV; and (2) data in chart format displaying the frequency distribution of discounts and premiums of the daily Bid/Ask Price against the NAV, within appropriate ranges, for each of the four previous calendar quarters. On each business day, before commencement of trading in Shares in the Core Trading Session [15] on the Exchange, the Trust will disclose on its Web site the identities and quantities of the portfolio of securities and other assets (the "Disclosed Portfolio") held by the Fund that will form the basis for the Fund's calculation of NAV at the end of the business day.[16] The Web site and information will be publicly available at no charge.

In addition, for the Fund, an estimated value, defined in Rule 8.600 as the "Portfolio Indicative Value," that reflects an estimated intraday value of the Fund's portfolio, will be disseminated. The Portfolio Indicative Value will be based upon the current value for the components of the Disclosed Portfolio and will be updated and disseminated by one or more major market data vendors at least every 15 seconds during the Core Trading Session on the Exchange. The dissemination of the Portfolio Indicative Value, together with the Disclosed Portfolio, will allow investors to determine the value of the underlying portfolio of the Fund on a daily basis and to provide a close estimate of that value throughout the trading day.

Information regarding market price and volume of the Shares is and will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. The previous day's closing price and trading volume information will be published daily in the financial section of newspapers. Quotation and last sale information for the Shares will be available via the Consolidated Tape Association high-speed line.

Initial and Continued Listing

The Shares will be subject to Rule 8.600(d), which sets forth the initial and continued listing criteria applicable to Managed Fund Shares. The Exchange represents that, for initial and/or continued listing, the Shares must be in compliance with Rule 10A–3 [17] under the Exchange Act, as provided by NYSE Arca Equities Rule 5.3. A minimum of 100,000 Shares will be outstanding at the commencement of trading on the Exchange. The Exchange will obtain a

[12] Data for these currencies is included in the Bank for International Settlements Triennial Central Bank Survey, December 2007 ("BIS Survey"). The Fund will invest in instruments that provide exposure to currencies selected from the top 42 currencies in the chart included in the BIS Survey ("Currency distribution of foreign exchange turnover"), reflecting the percentage share of average daily turnover for the applicable month and year.

[13] The NAV of the Fund's shares generally is calculated once daily Monday through Friday as of the close of regular trading on the New York Stock Exchange, generally 4:00 p.m. Eastern time (the "NAV Calculation Time"). NAV per share is calculated by dividing a Fund's net assets by the number of Fund shares outstanding. For more information regarding the valuation of Fund investments in calculating a Fund's NAV, see the Registration Statement.

[14] The Bid/Ask Price of a Fund is determined using the midpoint of the highest bid and the lowest offer on the Exchange as of the time of calculation of such Fund's NAV. The records relating to Bid/Ask Prices will be retained by the Fund and its service providers.

[15] The Core Trading Session is 9:30 a.m. to 4 p.m. Eastern time.

[16] Under accounting procedures followed by the Fund, trades made on the prior business day ("T") will be booked and reflected in NAV on the current business day ("T+1"). Notwithstanding the foregoing, portfolio trades that are executed prior to the opening of the Exchange on any business day may be booked and reflected in NAV on such business day. Accordingly, the Fund will be able to disclose at the beginning of the business day the portfolio that will form the basis for the NAV calculation at the end of the business day.

[17] *See* 17 CFR 240.10A–3.

representation from the issuer of the Shares that the net asset value per share for the Fund will be calculated daily and that the net asset value and the Disclosed Portfolio will be made available to all market participants at the same time.

Trading Halts

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares of a Fund. Shares of the Fund will be halted if the "circuit breaker" parameters in NYSE Arca Equities Rule 7.12 are reached. Trading may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (1) The extent to which trading is not occurring in the securities comprising the Disclosed Portfolio and/or the financial instruments of a Fund; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. Trading in the Shares will be subject to Rule 8.600(d)(2)(D), which sets forth circumstances under which Shares of a Fund may be halted.

Trading Rules

The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. Shares will trade on the NYSE Arca Marketplace from 4 a.m. to 8 p.m. Eastern time in accordance with NYSE Arca Equities Rule 7.34 (Opening, Core, and Late Trading Sessions). The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions. The minimum trading increment for Shares on the Exchange will be $0.01.

Surveillance

The Exchange intends to utilize its existing surveillance procedures applicable to derivative products (which includes Managed Fund Shares) to monitor trading in the Shares. The Exchange represents that these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws.

The Exchange's current trading surveillance focuses on detecting securities trading outside their normal patterns. When such situations are detected, surveillance analysis follows and investigations are opened, where appropriate, to review the behavior of all relevant parties for all relevant trading violations.

The Exchange may obtain information via the Intermarket Surveillance Group ("ISG") from other exchanges who are members of the ISG.[18]

In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

Information Bulletin

Prior to the commencement of trading, the Exchange will inform its ETP Holders in an Information Bulletin ("Bulletin") of the special characteristics and risks associated with trading the Shares. Specifically, the Bulletin will discuss the following: (1) The procedures for purchases and redemptions of Shares in Creation Unit aggregations (and that Shares are not individually redeemable); (2) NYSE Arca Equities Rule 9.2(a), which imposes a duty of due diligence on its ETP Holders to learn the essential facts relating to every customer prior to trading the Shares; (3) the risks involved in trading the Shares during the Opening and Late Trading Sessions when an updated Portfolio Indicative Value will not be calculated or publicly disseminated; (4) how information regarding the Portfolio Indicative Value is disseminated; (5) the requirement that ETP Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (6) trading information.

In addition, the Bulletin will reference that the Fund is subject to various fees and expenses described in the Registration Statement. The Bulletin will discuss any exemptive, no-action, and interpretive relief granted by the Commission from any rules under the Exchange Act. The Bulletin will also disclose that the NAV for the Shares will be calculated after 4:00 p.m. Eastern time each trading day.

2. Statutory Basis

The basis under the Exchange Act for this proposed rule change is the requirement under Section 6(b)(5)[19] that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest. The Exchange believes that the proposed rule change will facilitate the listing and trading of an additional type of exchange-traded product that will enhance competition among market participants, to the benefit of investors and the marketplace. In addition, the listing and trading criteria set forth in Rule 8.600 are intended to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Other

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NYSEArca–2010–51 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary,

[18] For a list of the current members and affiliate members of ISG, *see http://www.isgportal.org*. The Exchange notes that not all of the components of the Disclosed Portfolio for the Fund may trade on exchanges that are members of the ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.

[19] 15 U.S.C. 78f(b)(5).

Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2010–51. 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 Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of NYSE Arca. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–NYSEArca–2010–51 and should be submitted on or before July 20, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[20]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–15750 Filed 6–28–10; 8:45 am]

BILLING CODE 8011–01–P

[20] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62343; File No. SR–NYSEArca–2010–45]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Rule 2.4

June 21, 2010.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 ("Act")[2] and Rule 19b–4 thereunder,[3] notice is hereby given that on June 2, 2010, NYSE Arca, Inc. ("NYSE Arca" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. NYSE Arca filed the proposed rule change as a "non-controversial" proposal pursuant to Section 19(b)(3)(A) of the Act[4] and Rule 19b–4(f)(6) thereunder,[5] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] 15 U.S.C. 78s(b)(3)(A).

[5] 17 CFR 240.19b–4(f)(6).

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend NYSE Arca Rule 2.4 governing Options Trading Permit Application Procedures. The text of the proposed rule change is available on the Exchange's Web site at *http://www.nyse.com,* on the Commission's Web site at *http://www.sec.gov,* at the Exchange, and at the Commission's Public Reference Room. A copy of this filing is available on the Exchange's Web site at *http://www.nyse.com,* at the Exchange's principal office and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend NYSE Arca Rule 2.4 to permit the Exchange to offer an expedited application process for NYSE Arca Options Trading Permit ("OTP") applicants that are NYSE Arca Equities Trading Permit Holders ("ETP Holders") in good standing.

Currently, the NYSE Arca OTP application process does not take into consideration an applicant's ETP status. This creates a duplicative application review because the requirements to become a NYSE Arca ETP Holder are substantially similar to the NYSE Arca OTP requirements and satisfy the criteria reviewed in the NYSE Arca OTP application process. Additionally, the rules related to registration are substantially similar for both OTP and ETP applicants. This proposed rule would eliminate inefficiencies and unnecessary burdens by creating an expedited application process for applicants who are NYSE Arca ETP Holders.

This proposal is substantially similar to previously approved Nasdaq Rule 1013(a)(5)(C) and Nasdaq OMX BX Rule 1013(a)(5)(C). Accordingly, the Exchange proposes to revise NYSE Arca Rule 2.4 by adding the following as new subsection (b):

> An applicant that is an approved NYSE Arca ETP Holder may apply to become an OTP Holder through an expedited process, by submitting a Short Form OTP Holder Application and an NYSE Arca User Agreement. The Short Form OTP Holder Application shall contain information sufficient to establish the identity of the applicant as an approved NYSE Arca ETP Holder, its proposed activity on the Exchange, and certain contact personnel, in addition to any other information that may be required by the Exchange.

In doing so, the Exchange will offer NYSE Arca ETP Holders an expedited and efficient OTP application process consistent with procedures established on other exchanges.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b)[6] of the Securities Exchange Act of 1934 (the "Exchange Act"), in general, and furthers the objectives of Section 6(b)(5)[7] in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system. The Exchange seeks to revise its membership rules so that OTP Holder

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

applicants are not unnecessarily burdened by duplicative oversight procedures.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act [8] and Rule 19b–4(f)(6) thereunder.[9] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [10] and Rule 19b–4(f)(6)(iii) thereunder.[11]

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NYSEArca–2010–45 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2010–45. 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 Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2010–45 and should be submitted on or before July 20, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–15748 Filed 6–28–10; 8:45 am]

BILLING CODE 8010–01–P

[8] 15 U.S.C. 78s(b)(3)(A)(iii).

[9] 17 CFR 240.19b–4(f)(6).

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(6)(iii). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to provide the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has fulfilled this requirement.

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62328; File No. SR–NYSEArca–2010–48]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by NYSE Arca, Inc. Relating to the Guaranteed Allocation for Lead Market Makers and Directed Order Market Makers

June 21, 2010.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the "Act") [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on June 8, 2010, NYSE Arca, Inc. ("NYSE Arca" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 6.76A, Order Execution—OX, to eliminate guaranteed allocations in certain circumstances. The text of the proposed rule change is available on the Exchange's Web site at *http://www.nyse.com,* on the Commission's Web site at *http://www.sec.gov,* at the Exchange, and at the Commission's Public Reference Room. A copy of this filing is available on the Exchange's Web site at *http://www.nyse.com,* at the Exchange's principal office and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this filing is to eliminate the guaranteed allocation for Lead Market Makers ("LMM"s) and Directed Order Market Makers ("DOMM"s) under certain circumstances.

Currently, under Rule 6.76A, a LMM (or DOMM) will receive a guaranteed allocation of 40% of an incoming marketable order, including 40% of the balance of an order after any customer orders ranked ahead of the LMM (or DOMM) are filled, provided the LMM (or DOMM) is quoting at the National Best Bid/Offer ("NBBO").

The Exchange proposes to amend Rule 6.76A to provide that LMMs (or DOMMs) will only receive the 40% guaranteed allocation if there are no resting Customer orders ranked ahead of the LMM (or DOMM).

At the time of the introduction of the OX system, the market structure rewarded LMMs for providing competitive quotes by giving them a 40% guarantee ahead of higher ranked non-Customers when Customer orders were ahead of the LMM in time ranking. This encouraged the LMM to join the customer price and augment the customer price with the LMM's added size.

As market participants have evolved, however, the Exchange has found that the guarantee after satisfying Customer trading interest ahead of the LMM in priority has discouraged other non-customer trading interests that wish to aggressively price orders to set the NBBO. NYSE Arca clients have submitted orders that set a new price, only to find themselves receiving a small portion of an incoming order after it fills Customers and 40% of the balance is allocated to the LMM.

The Exchange still views as necessary granting the LMM (or DOMM) 40% of incoming orders when no Customer orders are present, in return for the enhanced quoting obligations of LMMs and DOMMs.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with Section 6(b)[4] of the Securities Exchange Act of 1934 (the "Act"), in general, and furthers the objectives of Section 6(b)(5)[5] in particular in that it is designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, to remove impediments to and to perfect the mechanism for a free and open market and a national market system and, in general, to protect investors and the public interest. The Exchange believes that eliminating the LMM or DOMM 40% guarantee when Customers are ahead in the Consolidated Book will enhance competition amongst non-Customers.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve the proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR–NYSEArca–2010–48 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2010–48. 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 Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing will also be available for inspection and copying at the Exchange's principal office. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–NYSEArca–2010–48 and should be submitted on or before July 20, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–15746 Filed 6–28–10; 8:45 am]

BILLING CODE 8010–01–P

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(5).

[6] 17 CFR 200.30–3(a)(12).

SOCIAL SECURITY ADMINISTRATION

Agency Information Collection Activities: Proposed Request

The Social Security Administration (SSA) publishes a list of information collection packages requiring clearance by the Office of Management and Budget (OMB) in compliance with Public Law (Pub. L.) 104–13, the Paperwork Reduction Act of 1995, effective October 1, 1995. This notice includes extensions of OMB-approved information collections.

SSA is soliciting comments on the accuracy of the agency's burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility, and clarity; and ways to minimize burden on respondents, including the use of automated collection techniques or other forms of information technology. Mail, e-mail, or fax your comments and recommendations on the information collection(s) to the OMB Desk Officer and SSA Reports Clearance Director to the following addresses or fax numbers.

(OMB), Office of Management and Budget, Attn: Desk Officer for SSA, Fax: 202–395–6974, E-mail address: *OIRA_Submission@omb.eop.gov.*

(SSA), Social Security Administration, DCBFM, Attn: Reports Clearance Officer, 1333 Annex Building, 6401 Security Blvd., Baltimore, MD 21235, Fax: 410–965–6400, E-mail address: *OPLM.RCO@ssa.gov.*

The information collection below is pending at SSA. SSA will submit it to OMB within 60 days from the date of this notice. To be sure we consider your comments, we must receive them no later than August 30, 2010. Individuals can obtain copies of the collection instruments by calling the SSA Reports Clearance Officer at 410–965–8783 or by writing to the above e-mail address.

1. *Travel Expense Reimbursement—20 CFR 404.999(d) and 416.1499—0960–0434.* The Social Security Act provides for travel expense reimbursement from Federal and State agencies for claimants who travel in excess of 75 miles to attend medical examinations, reconsideration interviews, and proceedings before an administration law judge. Claimants' representatives and necessary witnesses are also eligible for reimbursement. Reimbursement procedures require the claimant to provide a list and receipt for the expenses. Federal and State personnel review the listings and receipts to verify the reimbursable amount. The respondents are claimants for Title II benefits and Title XVI payments, their representatives, and witnesses.

Type of Request: Extension of an OMB-approved information collection.

Number of Respondents: 50,000.

Frequency of Response: 1.

Average Burden per Response: 10 minutes.

Estimated Annual Burden: 8,333 hours.

2. *Application Status—20 CFR 401.45—0960–0763.* Application Status provides users with the capability to check the status of their pending Social Security claims either via the Internet or the National 800 Number Automated Telephone Service. Users need their Social Security number and a confirmation number to access this information. The Application Status shows users when SSA received the application, if we requested additional documents (*e.g.,* military discharge papers, W–2s, birth records, etc.), and provides the address for the office that is processing their application. Once SSA makes a decision on a claim, we post a copy of the decision notice online for the user to view. There are some exceptions to posting a copy online, such as disability denial notices (even if filed electronically) or claims users did not file via the Internet, as we may not have notices available for online review. Users access this application either from *http://www.ssa.gov/onlineservices/* or through the National 800 Number. Respondents are current Social Security recipients.

Type of Request: Extension of an OMB-approved information collection.

Type of request	Number of responses	Frequency of response	Average burden per response (minutes)	Total annual burden (hours)
Automated Telephone Services	764,885	1	2	25,496
Internet Services	2,881,804	1	1	48,030
Totals	3,646,689			73,526

Faye Lipsky,

Reports Clearance Officer, Center for Reports Clearance, Social Security Administration.

[FR Doc. 2010–15688 Filed 6–28–10; 8:45 am]

BILLING CODE 4191–02–P

SOCIAL SECURITY ADMINISTRATION

Agency Information Collection Activities: Emergency Clearance Request

The Social Security Administration (SSA) publishes a list of information collection packages requiring clearance by the Office of Management and Budget (OMB) in compliance with Public Law (Pub. L.) 104–13, the Paperwork Reduction Act of 1995, effective October 1, 1995. This notice includes a revision to an existing OMB-approved collection.

SSA is soliciting comments on the accuracy of the agency's burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility, and clarity; and ways to minimize burden on respondents, including the use of automated collection techniques or other forms of information technology. Mail, e-mail, or fax your comments and recommendations on the information collection to the OMB Desk Officer and SSA Reports Clearance Officer to the following addresses or fax numbers.

(OMB), Office of Management and Budget, Attn: Desk Officer for SSA, Fax: 202–395–6974, E-mail address: *OIRA_Submission@omb.eop.gov.*

(SSA), Social Security Administration, DCBFM, Attn: Reports Clearance Officer, 1333 Annex Building, 6401 Security Blvd., Baltimore, MD 21235, Fax: 410–965–6400, E-mail address: *OPLM.RCO@ssa.gov.*

SSA submitted the information collection below to OMB for Emergency Clearance. SSA is requesting Emergency Clearance from OMB no later than July 6, 2010. Individuals can obtain copies of the collection instrument by calling the SSA Reports Clearance Officer at 410–965–8783 or by writing to the above e-mail address.

Medicare Part B Income-Related Premium—Life-Changing Event Form—0960–0735. Per the Medicare Modernization Act of 2003, selected recipients of Medicare Part B insurance pay an income-related monthly adjustment amount (IRMAA). The Internal Revenue Service (IRS) transmits income tax return data to SSA in order for SSA to determine the amount of IRMAA. SSA uses Form SSA–44 to determine if a recipient qualifies for a reduction in IRMMA. If affected Medicare Part B recipients believe SSA should use more recent tax data because a life-changing event occurred that significantly reduces their income, they can report these changes to SSA and ask for a new initial determination of their IRMAA.

In this Information Collection Request, we are clearing minor changes to this form needed to fulfill the

provisions of soon-to-be-published interim final regulations. Since the provisions of these regulations will be effective on publication, we are seeking emergency clearance for this form. The respondents are Medicare Part B recipients who have a modified adjusted gross income over a high-income "threshold."

Type of Request: Revision of an OMB-approved information collection.

Method of information collection	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated annual burden (hours)
Personal Interview	139,000	1	30	69,500
Form	37,000	1	45	27,750
Totals	176,000			97,250

Faye Lipsky,

Reports Clearance Officer, Center for Reports Clearance, Social Security Administration.

[FR Doc. 2010–15689 Filed 6–28–10; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF STATE

Bureau of Diplomatic Security, Office of Foreign Missions

[Public Notice: 7070]

30-Day Notice of Proposed Information Collection: Forms DS–4138, Request for Escort Screening Courtesies; DS–4139, Photograph and Signature Card; & DS–4140, Application for OFM Web Site Account; DS–1504; Request for Customs Clearance of Merchandise; Foreign Diplomatic Services Applications (FDSA), OMB Collection Number 1405–0105

ACTION: Notice of request for public comment and submission to OMB of proposed collection of information.

SUMMARY: The Department of State has submitted the following information collection request to the Office of Management and Budget (OMB) for approval in accordance with the Paperwork Reduction Act of 1995.

- *Title of Information Collection:* Request for Escort Screening Courtesies.
- *OMB Control Number:* 1405–0105.
- *Type of Request:* Revision of Currently Approved Collection.
- *Originating Office:* Diplomatic Security/Office of Foreign Missions (DS/OFM).
- *Form Numbers:* DS–4138.
- *Respondents:* Foreign government representatives assigned to the United States.
- *Estimated Number of Respondents:* 350 missions.
- *Estimated Number of Responses:* 3,000 responses.
- *Average Hours per Response:* 10 minutes.
- *Total Estimated Burden:* 500 hours divided among the missions.
- *Frequency:* On occasion.
- *Obligation To Respond:* Required to obtain or retain a benefit.
- *Title of Information Collection:* Photograph and Signature Card.
- *OMB Control Number:* 1405–0105.
- *Type of Request:* Revision of Currently Approved Collection.
- *Originating Office:* Diplomatic Security/Office of Foreign Missions (DS/OFM).
- *Form Number:* DS–4139.
- *Respondents:* Foreign government representatives assigned to the United States.
- *Estimated Number of Respondents:* 350 missions.
- *Estimated Number of Responses:* 18,000 responses.
- *Average Hours per Response:* 10 minutes.
- *Total Estimated Burden:* 3,000 hours divided among the missions.
- *Frequency:* On occasion.
- *Obligation To Respond:* Required to obtain or retain a benefit.
- *Title of Information Collection:* Application for OFM Web site Account.
- *OMB Control Number:* 1405–0105.
- *Type of Request:* Revision of Currently Approved Collection.
- *Originating Office:* Diplomatic Security/Office of Foreign Missions (DS/OFM).
- *Form Numbers:* DS–4140.
- *Respondents:* Foreign government representatives assigned to the United States.
- *Estimated Number of Respondents:* 350 missions.
- *Estimated Number of Responses:* 456 responses.
- *Average Hours per Response:* 10 minutes.
- *Total Estimated Burden:* 76 hours divided among the missions.
- *Frequency:* On occasion.
- *Obligation To Respond:* Required to obtain or retain a benefit.
- *Title of Information Collection:* Request for Customs Clearance of Merchandise.
- *OMB Control Number:* 1405–0105.
- *Type of Request:* Revision of a Currently Approved Collection.
- *Originating Office:* Diplomatic Security/Office of Foreign Missions (DS/OFM).
- *Form Number:* DS–1504.
- *Respondents:* Foreign government representatives assigned to the United States.
- *Estimated Number of Respondents:* 350 missions.
- *Estimated Number of Responses:* 7,938 responses.
- *Average Hours per Response:* 30 minutes.
- *Total Estimated Burden:* 3,969 hours.
- *Frequency:* On occasion.
- *Obligation To Respond:* Required to obtain or retain a benefit.

DATES: Submit comments to the Office of Management and Budget (OMB) for up to 30 days from date of publication in the **Federal Register**.

ADDRESSES: Direct comments to the Department of State Desk Officer in the Office of Information and Regulatory Affairs at the Office of Management and Budget (OMB). You may submit comments by the following methods:

- *E-mail:* *oira_submission@omb.eop.gov.* You must include the DS form number, information collection title, and OMB control number in the subject line of your message.
- *Fax:* 202–395–5806. *Attention:* Desk Officer for Department of State.

FOR FURTHER INFORMATION CONTACT: You may obtain copies of the proposed information collection and supporting documents from: Jacqueline Robinson, Diplomatic Security, Office of Foreign Missions, 2201 C Street, NW., Room 2236, Washington, DC 20520, who may be reached on (202) 647–3416 or at *OFMInfo@state.gov.*

SUPPLEMENTARY INFORMATION:

We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary to properly perform our functions.
- Evaluate the accuracy of our estimate of the burden of the proposed

collection, including the validity of the methodology and assumptions used.

- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond.

Abstract of Proposed Collection

The Foreign Diplomatic Service Applications are all associated with OMB Collection number 1405–0105. Form DS–4138, *Request for Escort Screening Courtesies,* is the means by which the U.S. Department of State (DOS) will adjudicate requests for assignment of a DOS representative to ensure that eligible senior foreign government officials are exempted from the TSA security screening process at major U.S. airports. The request will be used to review for entitlement to the courtesy, the specific airport to be advised, and the assignment of a DOS escort. Form DS–4139, *Photograph and Signature Card,* is the means by which the Department obtains a photograph and/or signature for use in the production of an identification card, a sales tax exemption card, or DOS driver license when applications are submitted electronically (thru e-Gov) for foreign mission personnel and their dependents. Form DS–4140, *Application for OFM Web site Account,* is the means by which the Department provides accredited foreign mission administrative staff authorized access to the Office of Foreign Missions' electronic data submission (e-Gov) system. OFM's e-Gov system is accessed to submit automated service requests to the Office of Foreign Missions and the Office of Protocol of the U.S. State Department to obtain "benefits" designated under the Foreign Missions Act, 22 U.S.C. 4301 *et seq.,* and must be obtained through the U.S. Department of State. Also, form DS–1504, *Request for Customs Clearance of Merchandise,* is the means by which the Department provides customs duty-free entry privileges for foreign missions, its mission personnel and their dependents. The applications provide the Department with the necessary information to administer its programs effectively and efficiently.

Methodology

These applications/information collections are submitted by all foreign missions to the Office of Foreign Missions via the following methods: Electronically, mail, and/or personal delivery.

Dated: June 14, 2010.

Steve Maloney,

Managing Director, Bureau of Diplomatic Security, Office of Foreign Missions, Department of State.

[FR Doc. 2010–15760 Filed 6–28–10; 8:45 am]

BILLING CODE 4710–43–P

DEPARTMENT OF STATE

[Public Notice 7069]

Bureau of Political-Military Affairs: Directorate of Defense Trade Controls; Notifications to the Congress of Proposed Commercial Export Licenses

SUMMARY: Notice is hereby given that the Department of State has forwarded the attached Notifications of Proposed Export Licenses to the Congress on the dates indicated on the attachments pursuant to sections 36(c) and 36(d) and in compliance with section 36(f) of the Arms Export Control Act (22 U.S.C. 2776).

DATES: *Effective Date:* As shown on each of the 7 letters.

FOR FURTHER INFORMATION CONTACT: Mr. Robert S. Kovac, Managing Director, Directorate of Defense Trade Controls, Bureau of Political-Military Affairs, Department of State (202) 663–2861.

SUPPLEMENTARY INFORMATION: Section 36(f) of the Arms Export Control Act mandates that notifications to the Congress pursuant to sections 36(c) and 36(d) must be published in the **Federal Register** when they are transmitted to Congress or as soon thereafter as practicable.

May 26, 2010 (Transmittal No. 10–002)

Hon. Nancy Pelosi, Speaker of the House of Representatives

Dear Madam Speaker: Pursuant to Section 36(c) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed technical assistance agreement for the export of defense articles, including technical data, and defense services in the amount of $50,000,000 or more.

The transaction contained in the attached certification involves the export of defense articles, including technical data, and defense services to support the C–130 Air Crew Training Device Program for end use by the Royal Saudi Air Force.

The United States Government is prepared to license the export of these items having taken into account political, military, economic, human rights, and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,

Richard R. Verma

Assistant Secretary, Legislative Affairs

May 27, 2010 (Transmittal No. 10–011)

Hon. Nancy Pelosi, Speaker of the House of Representatives

Dear Madam Speaker: Pursuant to Section 36(c) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed amendment to a technical assistance agreement for the export of defense articles, including technical data, and defense services in the amount of $50,000,000 or more.

The transaction contained in the attached certification involves the export of defense articles, to include technical data, and defense services to Algeria for the avionics modernization of seventeen C–130H aircraft and the sale of associated spares, training, and one C–130H simulator for use by the Algerian Ministry of Defense.

The United States Government is prepared to license the export of these items having taken into account political, military, economic, human rights and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,

Richard R. Verma

Assistant Secretary, Legislative Affairs

May 28, 2010 (Transmittal No. 10–045)

Hon. Nancy Pelosi, Speaker of the House of Representatives

Dear Madam Speaker: Pursuant to Section 36(c) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed technical assistance agreement to include the export of defense articles, to include technical data, and defense services in the amount of $50,000,000 or more.

The transaction contained in the attached certification involves the transfer of defense articles, to include technical data, and defense services to support the Proton launch of the Intelsat 23 Commercial Communication Satellite from the Baikonur Cosmodrome in Kazakhstan.

The United States Government is prepared to license the export of these

items having taken into account political, military, economic, human rights, and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,

Matthew M. Rooney

Principal Deputy Assistant Secretary, Legislative Affairs

May 28, 2010 (Transmittal No. 10–050)

Hon. Nancy Pelosi, Speaker of the House of Representatives

Dear Madam Speaker: Pursuant to Section 36(c) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed technical assistance agreement to include the export of defense articles, to include technical data, and defense services in the amount of $100,000,000 or more.

The transaction contained in the attached certification involves the transfer of defense articles, to include technical data, and defense services to support the HYLAS 2 Commercial Communication Satellite Program of the United Kingdom.

The United States Government is prepared to license the export of these items having taken into account political, military, economic, human rights, and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,

Matthew M. Rooney

Principal Deputy Assistant Secretary, Legislative Affairs

May 28, 2010 (Transmittal No. 10–051)

Hon. Nancy Pelosi, Speaker of the House of Representatives

Dear Madam Speaker: Pursuant to Section 36(c) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed technical assistance agreement to include the export of defense articles, to include technical data, and defense services in the amount of $100,000,000 or more.

The transaction contained in the attached certification involves the transfer of defense articles, to include technical data, and defense services to support the NIMIQ 6 Commercial Communication Satellite Program of Canada.

The United States Government is prepared to license the export of these items having taken into account political, military, economic, human rights, and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,

Matthew M. Rooney

Principal Deputy Assistant Secretary, Legislative Affairs

May 28, 2010 (Transmittal No. 10–052)

Hon. Nancy Pelosi, Speaker of the House of Representatives

Dear Madam Speaker: Pursuant to Section 36(c) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed technical assistance agreement to include the export of defense articles, to include technical data, and defense services in the amount of $50,000,000 or more.

The transaction contained in the attached certification involves the transfer of defense articles, to include technical data, and defense services to support the Proton launch of the Yamal 401 Commercial Communication Satellite from the Baikonur Cosmodrome in Kazakhstan.

The United States Government is prepared to license the export of these items having taken into account political, military, economic, human rights, and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,

Matthew M. Rooney

Principal Deputy Assistant Secretary, Legislative Affairs

May 28, 2010 (Transmittal No. 10–054)

Hon. Nancy Pelosi, Speaker of the House of Representatives

Dear Madam Speaker: Pursuant to Section 36(c) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed technical assistance agreement to include the export of defense articles, to include technical data, and defense services in the amount of $50,000,000 or more.

The transaction contained in the attached certification involves the transfer of defense articles, to include technical data, and defense services to support the Proton launch of the Yamal 402 Commercial Communication Satellite from the Baikonur Cosmodrome in Kazakhstan.

The United States Government is prepared to license the export of these items having taken into account political, military, economic, human rights, and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,

Matthew M. Rooney

Principal Deputy Assistant Secretary, Legislative Affairs

Dated: June 15, 2010.

Robert S. Kovac,

Managing Director, Directorate of Defense Trade Controls, Department of State.

[FR Doc. 2010–15758 Filed 6–28–10; 8:45 am]

BILLING CODE 4710–25–P

DEPARTMENT OF STATE

[Public Notice 7071]

Culturally Significant Objects Imported for Exhibition Determinations: "Eton College Myers Collection at Johns Hopkins University"

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236 of October 19, 1999, as amended, and Delegation of Authority No. 257 of April 15, 2003 [68 FR 19875], I hereby determine that the objects to be included in the exhibition "Eton College Myers Collection at Johns Hopkins University," imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to a loan agreement with the foreign owner or custodian. I also determine that the exhibition or display of the exhibit objects at the Johns Hopkins University, Baltimore, Maryland, from on or about

August 1, 2010, until on or about August 1, 2025, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I have ordered that Public Notice of these Determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Paul W. Manning, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (*telephone:* 202–632–6469). The mailing address is U.S. Department of State, SA–5, L/PD, Fifth Floor (Suite 5H03), Washington, DC 20522–0505.

Dated: June 18, 2010.

Maura M. Pally,

Deputy Assistant Secretary for Professional and Cultural Exchanges, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2010–15756 Filed 6–28–10; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

Notice and Request for Comments

AGENCY: Surface Transportation Board.

ACTION: 60-day notice of intent to seek extension of approval.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3519 (PRA), the Surface Transportation Board (Board) gives notice of its intent to request from the Office of Management and Budget (OMB) approval without change of the two existing collections described below concerning rail fuel surcharges and rail "waybills."

Comments are requested concerning each collection as to (1) whether the particular collection of information is necessary for the proper performance of the functions of the Board, including whether the collection has practical utility; (2) the accuracy of the Board's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology, when appropriate. Submitted comments will be included and/or summarized in the Board's request for OMB approval.

DATES: Written comments are due on August 30, 2010.

ADDRESSES: Direct all comments to Marilyn Levitt, Surface Transportation Board, Suite 1260, 395 E Street, SW., Washington, DC 20423–0001, or to *levittm@stb.dot.gov.* Comments should be identified as "Paperwork Reduction Act Comments," and should refer to the title and control number of the specific collection(s) commented upon.

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the Rail Fuel Surcharge Report form, contact Marcin Skomial at (202) 245–0344 or *skomialm@stb.dot.gov,* or Paul Aguiar at (202) 245–0323 or *paul.aguiar@stb.dot.gov.* For further information regarding the Waybill Sample collection, contact Scott Decker at (202) 245–0330 or *deckers@ stb.dot.gov,* or Paul Aguiar at (202) 245–0323 or *paul.aguiar@ stb.dot.gov.* [Federal Information Relay Service (FIRS) for the hearing impaired: (800) 877–8339.]

Subjects: In this notice the Board is requesting comments on the following information collections:

Collection Number 1

Title: Report of Fuel Cost, Consumption, and Surcharge Revenue.

OMB Control Number: 2140–0014.

STB Form Number: None.

Type of Review: Extension without change.

Respondents: Class I railroads (railroads with operating revenues exceeding $250 million in 1991 dollars)

Number of Respondents: 7.

Estimated Time per Response: 1 hour.

Frequency: Monthly.

Total Burden Hours (annually including all respondents): 84 hours.

Total "Non-hour Burden" Cost: None identified.

Needs and Uses: Under 49 U.S.C. 10702, the Surface Transportation Board has the authority to address the reasonableness of a rail carrier's practices. The proposed information collection is intended to permit the Board to monitor the current fuel surcharge practices of the Class I carriers. Failure to collect this information would impede the Board's ability to fulfill its responsibilities under 49 U.S.C. 10702. The Board has authority to collect information about rail costs and revenues under 49 U.S.C. 11144 and 11145.

Retention Period: Information in this report will be maintained on the Board's Web site for a minimum of one year and will be otherwise maintained by the Board for a minimum of two years.

Collection Number 2

Title: Waybill Sample.

OMB Control Number: 2140–0015.

STB Form Number: None.

Type of Review: Extension without change.

Respondents: Any regulated railroad that terminated at least 4,500 carloads on its line in any of the three preceding years or that terminated at least 5% of the total revenue carloads that terminated in a particular state.

Number of Respondents: 52.

Estimated Time per Response: 75 minutes.

Frequency: Six (6) respondents report monthly; 46 report quarterly.

Total Burden Hours (annually including all respondents): 320 hours.

Total "Non-hour Burden" Cost: No "non-hour cost" burdens associated with this collection have been identified.

Needs and Uses: The Surface Transportation Board is, by statute, responsible for the economic regulation of common carrier rail transportation in the United States. Under 49 CFR Part 1244, a railroad is required to file carload waybill sample information (Waybill Sample) for all line-haul revenue waybills terminating on its lines if, in any of the three preceding years, it terminated 4,500 or more carloads, or it terminated at least 5% of the total revenue carloads that terminate in a particular State. The information in the Waybill Sample is used by the Board, other Federal and State agencies, and industry stakeholders to monitor traffic flows and rate trends in the industry, and to develop testimony in Board proceedings. The Board has authority to collect this information under 49 U.S.C. 11144 and 11145.

SUPPLEMENTARY INFORMATION: Under the PRA, a Federal agency conducting or sponsoring a collection of information must display a currently valid OMB control number. A collection of information, which is defined in 44 U.S.C. 3502(3) and (5) CFR 1320.3(c), includes agency requirements that persons submit reports, keep records, or provide information to the agency, third parties, or the public. Under section 3506(c)(2)(A) of the PRA, Federal agencies are required, prior to submitting a collection to OMB for approval, to provide a 60-day notice and comment period through publication in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information.

Dated: June 29, 2010.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2010–15677 Filed 6–28–10; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

June 22, 2010.

The Department of Treasury will submit the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13, on or after the publication date of this notice. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 11000, 1750 Pennsylvania Avenue, NW., Washington, DC 20220.

DATES: Written comments should be received on or before July 29, 2010 to be assured of consideration.

Bureau of Public Debt (BPD)

OMB Number: 1535–0121.

Type of Review: Extension without change of a currently approved collection.

Title: U.S. Treasury Securities State and Local Government Series Early Redemption Request.

Form: PD–F–5377.

Abstract: Used for early redemption of State and Local Government Series Securities.

Respondents: State, Local, and Tribal Governments.

Estimated Total Burden Hours: 247 hours.

OMB Number: 1535–0131.

Type of Review: Extension without change of a currently approved collection.

Title: Application for Disposition of Series I Savings Bonds after the Death of the registered owner(s).

Form: PDF 5394.

Abstract: Used to distribute Series I savings bonds after the death of the registered owner(s).

Respondents: Individuals or Households.

Estimated Total Burden Hours: 2,050 hours.

OMB Number: 1535–0094.

Type of Review: Extension without change of a currently approved collection.

Title: Regulations Governing Payments by the Automated Clearing House Method on Account of United States Securities.

Abstract: The information is needed in order to make payments to investors in United States Securities by the Automated Clearing House (ACH) method.

Respondents: Individuals or Households.

Estimated Total Burden Hours: 1 hour.

OMB Number: 1535–0095.

Type of Review: Extension without change of a currently approved collection.

Title: Regulations Governing United States Savings Bonds Series E/EE and H/HH.

Abstract: The regulations mandate the payment of H/HH interest by Direct Deposit (ACH method).

Respondents: Individuals or Households.

Estimated Total Burden Hours: 1 hour.

Clearance Officer: Bruce Sharp, Bureau of the Public Debt, 200 Third Street, Parkersburg, West Virginia, 26106; (304) 480–8112.

OMB Reviewer: Shagufta Ahmed, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503; (202) 395–7873.

Celina Elphage,

Treasury PRA Clearance Officer.

[FR Doc. 2010–15685 Filed 6–28–10; 8:45 am]

BILLING CODE 4810–39–P

Federal Register

Tuesday,
June 29, 2010

Part II

Federal Reserve System

12 CFR Part 226
Truth in Lending; Final Rule

FEDERAL RESERVE SYSTEM

12 CFR Part 226

[Regulation Z; Docket No. R–1384]

Truth in Lending

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule.

SUMMARY: The Board is amending Regulation Z, which implements the Truth in Lending Act, and the staff commentary to the regulation in order to implement provisions of the Credit Card Accountability Responsibility and Disclosure Act of 2009 that go into effect on August 22, 2010. In particular, the final rule requires that penalty fees imposed by card issuers be reasonable and proportional to the violation of the account terms. The final rule also requires credit card issuers to reevaluate at least every six months annual percentage rates increased on or after January 1, 2009. The final rule also requires that notices of rate increases for credit card accounts disclose the principal reasons for the increase.

DATES: *Effective Date.* The rule is effective August 22, 2010.

Mandatory compliance dates. The mandatory compliance date for the amendments to §§ 226.9, 226.52, and 226.59, and the amendments to Model Forms G–20 and G–22 in Appendix G to Part 226, is August 22, 2010. The amendments to the change-in-terms disclosures in Model Forms G–18(F) and G–18(G) also have a mandatory compliance date of August 22, 2010. The mandatory compliance date for the amendments to the penalty fee disclosures in §§ 226.5a, 226.6, 226.7, and 226.56, and in Model Forms G–10(B), G–10(C), G–10(E), G–17(B), G–17(C), G–18(B), G–18(D), G–18(F), G–18(G), G–21, G–25(A), and G–25(B) in Appendix G to Part 226, is December 1, 2010.

FOR FURTHER INFORMATION CONTACT: Stephen Shin, Attorney, or Amy Henderson or Benjamin K. Olson, Senior Attorneys, Division of Consumer and Community Affairs, Board of Governors of the Federal Reserve System, at (202) 452–3667 or 452–2412; for users of Telecommunications Device for the Deaf (TDD) only, contact (202) 263–4869.

SUPPLEMENTARY INFORMATION:

I. Background

The Credit Card Act

This final rule represents the third stage of the Board's implementation of the Credit Card Accountability Responsibility and Disclosure Act of 2009 (Credit Card Act), which was signed into law on May 22, 2009. Public Law 111–24, 123 Stat. 1734 (2009). The Credit Card Act primarily amends the Truth in Lending Act (TILA) and establishes a number of new substantive and disclosure requirements to establish fair and transparent practices pertaining to open-end consumer credit plans.

The requirements of the Credit Card Act that pertain to credit cards or other open-end credit for which the Board has rulemaking authority become effective in three stages. First, provisions generally requiring that consumers receive 45 days' advance notice of interest rate increases and significant changes in terms (new TILA Section 127(i)) and provisions regarding the amount of time that consumers have to make payments (revised TILA Section 163) became effective on August 20, 2009 (90 days after enactment of the Credit Card Act). A majority of the requirements under the Credit Card Act for which the Board has rulemaking authority, including, among other things, provisions regarding interest rate increases (revised TILA Section 171), over-the-limit transactions (new TILA Section 127(k)), and student cards (new TILA Sections 127(c)(8), 127(p), and 140(f)) became effective on February 22, 2010 (9 months after enactment). Finally, two provisions of the Credit Card Act addressing the reasonableness and proportionality of penalty fees and charges (new TILA Section 149) and re-evaluation by creditors of rate increases (new TILA Section 148) become effective on August 22, 2010 (15 months after enactment). The Credit Card Act also requires the Board to conduct several studies and to make several reports to Congress, and sets forth differing time periods in which these studies and reports must be completed.

Implementation of Credit Card Act

The Board has implemented the provisions of the Credit Card Act in stages, consistent with the statutory timeline established by Congress. On July 22, 2009, the Board published an interim final rule to implement the provisions of the Credit Card Act that became effective on August 20, 2009. *See* 74 FR 36077 (July 2009 Regulation Z Interim Final Rule). On February 22, 2010, the Board published a final rule adopting in final form the requirements of the July 2009 Regulation Z Interim Final Rule and implementing the provisions of the Credit Card Act that became effective on February 22, 2010. *See* 75 FR 7658 (February 2010 Regulation Z Rule).

On March 15, 2010, the Board published a proposed rule in the **Federal Register** to implement the provisions of the Credit Card Act that become effective on August 22, 2010. *See* 75 FR 12334 (March 2010 Regulation Z Proposal). The comment period on the March 2010 Regulation Z Proposal closed on April 14, 2010.[1] In response to the proposal, the Board received more than 22,000 comments from consumers, consumer groups, other government agencies, credit card issuers, industry trade associations, and others. As discussed in more detail elsewhere in this supplementary information, the Board has considered these comments in adopting this final rule.

II. Summary of Major Revisions

A. Reasonable and Proportional Penalty Fees

Statutory requirements. The Credit Card Act provides that "[t]he amount of any penalty fee or charge that a card issuer may impose with respect to a credit card account under an open end consumer credit plan in connection with any omission with respect to, or violation of, the cardholder agreement, including any late payment fee, over-the-limit fee, or any other penalty fee or charge, shall be reasonable and proportional to such omission or violation." The Credit Card Act further directs the Board to issue rules that "establish standards for assessing whether the amount of any penalty fee or charge * * * is reasonable and proportional to the omission or violation to which the fee or charge relates."

In issuing these rules, the Credit Card Act requires the Board to consider: (1) The cost incurred by the creditor from an omission or violation; (2) the deterrence of omissions or violations by the cardholder; (3) the conduct of the cardholder; and (4) such other factors as the Board may deem necessary or appropriate. The Credit Card Act authorizes the Board to establish "different standards for different types of fees and charges, as appropriate." Finally, the Act authorizes the Board to "provide an amount for any penalty fee or charge * * * that is presumed to be reasonable and proportional to the omission or violation to which the fee or charge relates."

Cost incurred as a result of violations. The final rule permits a credit card issuer to charge a penalty fee for a particular type of violation (such as a

[1] The comment period on the Paperwork Reduction Act analysis set forth in the March 2010 Regulation Z Proposal closed on May 14, 2010.

late payment) if it has determined that the amount of the fee represents a reasonable proportion of the costs incurred by the issuer as a result of that type of violation. Thus, the final rule permits issuers to use penalty fees to pass on the costs incurred as a result of violations while ensuring that those costs are spread evenly among consumers so that no individual consumer bears an unreasonable or disproportionate share.

The final rule provides guidance regarding the types of costs incurred by card issuers as a result of violations. For example, with respect to late payments, the final rule states that the costs incurred by a card issuer include collection costs, such as the cost of notifying consumers of delinquencies and resolving those delinquencies (including the establishment of workout and temporary hardship arrangements). Notably, the final rule also states that, although higher rates of loss may be associated with particular violations, those losses and related costs (such as the cost of holding reserves against losses) are excluded from the cost analysis. In order to ensure that penalty fees are based on relatively current cost information, the final rule requires card issuers to re-evaluate their costs at least annually.

Deterrence of violations. The Credit Card Act requires the Board to consider the deterrence of violations by the cardholder. As an alternative to basing penalty fees on costs, the Board's proposed rule would have permitted card issuers to base the amount of a penalty fee on a determination that the amount was reasonably necessary to deter that a particular type of violation. However, based on the comments and further analysis, the Board has determined that the proposed approach would not effectuate the purposes of the Credit Card Act. Instead, as discussed below, the Board has revised the safe harbors to better deter violations by generally allowing card issuers to impose higher fees for repeated violations during a particular period.

Consumer conduct. The Credit Card Act requires the Board to consider the conduct of the cardholder. The final rule does not require that each penalty fee be based on an assessment of the individual consumer conduct associated with the violation. Instead, the final rule takes consumer conduct into account in three ways. First, as discussed below, the Board has adopted safe harbors that generally allow card issuers to impose higher penalty fees when a consumer repeatedly engages in the same type of conduct during a particular period.

Second, the final rule prohibits issuers from imposing penalty fees that exceed the dollar amount associated with the violation. For example, under the final rule, a consumer who exceeds the credit limit by $5 cannot be charged an over-the-limit fee of more than $5. Similarly, a consumer who is late making a $20 minimum payment cannot be charged a late payment fee of more than $20.

Third, the final rule prohibits issuers from imposing multiple penalty fees based on a single event or transaction. For example, the final rule prohibits issuers from charging a late payment fee and a returned payment fee based on a single payment.

Safe harbors. Consistent with the safe harbor authority granted by the Credit Card Act, the final rule generally permits—as an alternative to the cost analysis discussed above—issuers to impose a $25 penalty fee for the first violation and a $35 fee for any additional violation of the same type during the next six billing cycles. For example, if a consumer paid late during the January billing cycle, a $25 late payment fee could be imposed. If one of the next six payments is late (*i.e.,* the payments due during the February through July billing cycles), a $35 late payment fee could be imposed. As discussed in detail below, the Board believes that these amounts are generally consistent with the statutory factors of cost, deterrence, and consumer conduct. These amounts will be adjusted annually to the extent that changes in the Consumer Price Index would result in an increase or decrease of $1.[2]

Although the safe harbors discussed above apply to charge card accounts, the final rule provides an additional safe harbor when a charge card account becomes seriously delinquent.[3] Specifically, the final rule provides that, when a charge card issuer has not received the required payment for two or more consecutive billing cycles, it may impose a late payment fee that does not exceed 3% of the delinquent balance.

B. Reevaluation of Rate Increases

Statutory requirements. The Credit Card Act requires card issuers that increase an annual percentage rate applicable to a credit card account, based on the credit risk of the consumer, market conditions, or other factors, to periodically consider changes in such factors and determine whether to reduce the annual percentage rate. Card issuers are required to perform this review no less frequently than once every six months, and must maintain reasonable methodologies for this evaluation. The Credit Card Act requires card issuers to reduce the annual percentage rate that was previously increased if a reduction is "indicated" by the review. However, the statute expressly provides that no specific amount of reduction in the rate is required. This provision is effective August 22, 2010 but requires that creditors review accounts on which an annual percentage rate has been increased since January 1, 2009.

General rule. Consistent with the Credit Card Act, the final rule applies to card issuers that increase an annual percentage rate applicable to a credit card account, based on the credit risk of the consumer, market conditions, or other factors. For any rate increase imposed on or after January 1, 2009, card issuers are required to review the account no less frequently than once each six months and, if appropriate based on that review, reduce the annual percentage rate. The requirement to reevaluate rate increases applies both to increases in annual percentage rates based on consumer-specific factors, such as changes in the consumer's creditworthiness, and to increases in annual percentage rates imposed based on factors that are not specific to the consumer, such as changes in market conditions or the issuer's cost of funds. If based on its review a card issuer is required to reduce the rate applicable to an account, the final rule requires that the rate be reduced within 45 days after completion of the evaluation.

Factors relevant to reevaluation of rate increases. The final rule generally permits a card issuer to review either the same factors on which the rate increase was originally based, or to review the factors that the card issuer currently considers when determining the annual percentage rates applicable to similar new credit card accounts. The Board believes that it is appropriate to permit card issuers to review the factors they currently consider in advancing credit to new consumers, because a review of these factors may result in

[2] Notwithstanding these safe harbors, card issuers will be prohibited from imposing a fee that exceeds the dollar amount associated with the violation. For example, if a consumer does not make a $20 minimum payment by the due date, the late payment fee cannot exceed $20, even though the safe harbors would otherwise permit imposition of a higher fee.

[3] For purposes of Regulation Z, a charge card is a credit card on an account for which no periodic rate is used to compute a finance charge. *See* § 226.2(a)(15)(iii). Charge cards are typically products where outstanding balances cannot be carried over from one billing cycle to the next and are payable in full when the periodic statement is received or at the end of each billing cycle. *See* §§ 226.5a(b)(7), 226.7(b)(12)(v)(A).

existing cardholders receiving the benefit of any reduced rate that they would receive if applying for a new credit card with the card issuer.

The final rule contains a special provision for rate increases imposed between January 1, 2009 and February 21, 2010. For rates increased during this period, the final rule requires an issuer to conduct its first two reviews by using the factors that the issuer currently considers when determining the annual percentage rates applicable to similar new credit card accounts, unless the rate increase was based solely upon consumer-specific factors, such as a decline in the consumer's credit risk or the consumer's delinquency or default.

Termination of obligation to reevaluate rate increases. The final rule requires that a card issuer continue to review a consumer's account each six months unless the rate is reduced to the rate in effect prior to the increase. Accordingly, in some circumstances, the final rule requires card issuers to reevaluate rate increases each six months for an indefinite period. The proposed rule solicited comment on whether the obligation to review the rate applicable to a consumer's account should terminate after some specific time period elapses following the initial increase, as well as on whether there is significant benefit to consumers from requiring card issuers to continue reevaluating rate increases even after an extended period of time.

Based on the comments and further analysis, the Board declines to adopt a specific time limit on the obligation to reevaluate rate increases. The Credit Card Act does not expressly create such a time limit, and it may be beneficial to a consumer to have his or her rate reevaluated when market conditions change or the consumer's creditworthiness improves, even if a number of years have elapsed since the rate increase giving rise to the review requirement.

III. Statutory Authority

General Rulemaking Authority

Section 2 of the Credit Card Act states that the Board "may issue such rules and publish such model forms as it considers necessary to carry out this Act and the amendments made by this Act." In addition, the provisions of the Credit Card Act implemented by this rule direct the Board to issue implementing regulations. *See* Credit Card Act Section 101(c) (new TILA Section 148) and Section 102(b) (new TILA Section 149). Furthermore, these provisions of the Credit Card Act amend TILA, which mandates that the Board prescribe regulations to carry out its purposes and specifically authorizes the Board, among other things, to do the following:

- Issue regulations that contain such classifications, differentiations, or other provisions, or that provide for such adjustments and exceptions for any class of transactions, that in the Board's judgment are necessary or proper to effectuate the purposes of TILA, facilitate compliance with the act, or prevent circumvention or evasion. 15 U.S.C. 1604(a).
- Exempt from all or part of TILA any class of transactions if the Board determines that TILA coverage does not provide a meaningful benefit to consumers in the form of useful information or protection. The Board must consider factors identified in the act and publish its rationale at the time it proposes an exemption for comment. 15 U.S.C. 1604(f).
- Add or modify information required to be disclosed with credit and charge card applications or solicitations if the Board determines the action is necessary to carry out the purposes of, or prevent evasions of, the application and solicitation disclosure rules. 15 U.S.C. 1637(c)(5).
- Require disclosures in advertisements of open-end plans. 15 U.S.C. 1663.

For the reasons discussed in this notice, the Board is using its specific authority under TILA and the Credit Card Act, in concurrence with other TILA provisions, to effectuate the purposes of TILA, to prevent the circumvention or evasion of TILA, and to facilitate compliance with TILA.

Authority To Issue Final Rule With an Effective Date of August 22, 2010

Because the provisions of the Credit Card Act implemented by this final rule are effective on August 22, 2010,[4] this final rule is also effective on August 22, 2010. In order to provide an adequate transition period, 12 U.S.C. 4802(b)(1) generally requires that new regulations and amendments take effect no earlier than the first day of the calendar quarter which begins on or after the date on which the regulations are published in final form. The date on which the Board's final rule is published in the **Federal Register** depends on a number of variables that are outside the Board's control, including the number and size of other notices submitted to the **Federal Register** prior to the Board's rule.[5] If this final rule is not published in the **Federal Register** on or before July 1, 2010, the effective date for purposes of 12 U.S.C. 4802(b)(1) would be October 1, 2010. However, the Board has determined that—under those circumstances—the statutory effective date of August 22, 2010 establishes good cause for making this final rule effective prior to October 1. *See* 12 U.S.C. 4802(b)(1)(A) (providing an exception to the general requirement when "the agency determines, for good cause published with the regulation, that the regulation should become effective before such time"). Furthermore, 12 U.S.C. 4802(b)(1)(C) provides an exception to the general requirement when "the regulation is required to take effect on a date other than the date determined under [12 U.S.C. 4802(b)(1)] pursuant to any other Act of Congress."

Finally, TILA Section 105(d) provides that any regulation of the Board (or any amendment or interpretation thereof) requiring any disclosure which differs from the disclosures previously required by Chapters 1, 4, or 5 of TILA (or by any regulation of the Board promulgated thereunder) shall have an effective date no earlier than "that October 1 which follows by at least six months the date of promulgation." However, even assuming that TILA Section 105(d) applies to this final rule, the Board believes that the specific provisions in new TILA Sections 148 and 149 governing effective dates override the general provision in TILA Section 105(d).

IV. Section-by-Section Analysis

Section 226.5a Credit and Charge Card Applications and Solicitations

Section 226.6 Account-Opening Disclosures

Sections 226.5a(a)(2)(iv) and 226.6(b)(1)(i) address the use of bold text in, respectively, the application and solicitation table and the account-opening table. Under the February 2010 Regulation Z Rule, these provisions require that any fee or percentage amounts for late payment, returned payment, and over-the-limit fees be disclosed in bold text. However, these provisions also state that bold text shall not be used for any maximum limits on

[4] *See* new TILA Sections 148(d) and 149(b).

[5] The Board notes that, although the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) generally requires that rules be published not less than 30 days before their effective date, it also provides an exception when "otherwise provided by the agency for good cause found and published with the rule." 15 U.S.C. 553(d)(3). Although the Board is issuing this final rule more than 30 days before August 22, 2010, it is possible that—for the reasons discussed above—the rule may not be published in the **Federal Register** more than 30 days before that date. Accordingly, to the extent applicable, the Board finds that good cause exists to publish the final rule less than 30 days before the effective date.

fee amounts unless the fee varies by state.

As discussed in detail below with respect to the amendments to the model forms in Appendix G–10 and G–17, disclosure of a maximum limit (or "up to" amount) may be necessary to accurately describe penalty fees that are consistent with the new substantive restrictions in § 226.52(b). While the Board previously restricted the use of bold text for maximum fee limits in order to focus consumers' attention on the fee or percentage amounts, the Board believes that—because the maximum limit may be the only amount disclosed for penalty fees—it is important to highlight that amount.

Accordingly, the Board is amending §§ 226.5a(a)(2)(iv) and 226.6(b)(1)(i) to require the use of bold text when disclosing maximum limits on fees. For consistency and to facilitate compliance, these amendments would apply to maximum limits for all fees required to be disclosed in the §§ 226.5a and 226.6 tables (including maximum limits for cash advance and balance transfer fees). The Board is also making conforming amendments to comment 5a(a)(2)–5.ii.

Section 226.7 Periodic Statement

Section 226.7(b)(11)(i)(B) currently requires card issuers to disclose the amount of any late payment fee and any increased rate that may be imposed on the account as a result of a late payment. If a range of late payment fees may be assessed, the card issuer may state the range of fees, or the highest fee and at the issuer's option with the highest fee an indication that the fee imposed could be lower. Comment 7(b)(11)–4 clarifies that disclosing a late payment fee as "up to $29" complies with this requirement. Model language is provided in Samples G–18(B), G–18(D), G–18(F), and G–18(G).

As discussed in greater detail below with respect to the amendments to Appendix G, an "up to" disclosure may be necessary to accurately describe a late payment fee that is consistent with the substantive restrictions in § 226.52(b). Accordingly, the Board is amending § 226.7(b)(11)(i)(B) to clarify that, in these circumstances, it is no longer optional to disclose an indication that the late payment fee may be lower than the disclosed amount.

However, the Board notes that, consistent with § 226.52(b), a card issuer could disclose a range of late payment fees in certain circumstances. As discussed in detail below, § 226.52(b)(2)(i) prohibits a card issuer from imposing a late payment fee that exceeds the amount of the delinquent required minimum periodic payment. However, while credit card minimum payments are generally a percentage of the outstanding balance (plus, in some cases, accrued interest and fees), many card issuers include a specific minimum amount in their minimum payment formulas. For example, a formula might state that the required minimum periodic payment will be the greater of 2% of the outstanding balance or $25. In these circumstances, the card issuer could disclose the late payment fee as a range from $25 to $35, which is the maximum fee amount under the safe harbors in § 226.52(b)(1)(ii)(A)–(B).

Section 226.9 Subsequent Disclosure Requirements

9(c) Change in Terms

9(c)(2) Rules Affecting Open-End (Not Home-Secured) Plans

9(g) Increases in Rates Due to Delinquency or Default or as a Penalty

Notice of Reasons for Rate Increase

The Credit Card Act added new TILA Section 148, which requires creditors that increase an annual percentage rate applicable to a credit card account under an open-end consumer credit plan, based on factors including the credit risk of the consumer, market conditions, or other factors, to consider changes in such factors in subsequently determining whether to reduce the annual percentage rate. New TILA Section 148 requires creditors to maintain reasonable methodologies for assessing these factors. The statute also sets forth a timing requirement for this review. Specifically, creditors are required to review, no less frequently than once every six months, accounts for which the annual percentage rate has been increased to assess whether these factors have changed. New TILA Section 148 is effective August 22, 2010 but requires that creditors review accounts on which the annual percentage rate has been increased since January 1, 2009.[6]

New TILA Section 148 requires creditors to reduce the annual percentage rate that was previously increased if a reduction is "indicated" by the review. However, new TILA Section 148(c) expressly provides that no specific amount of reduction in the rate is required. The Board is implementing the substantive requirements of new TILA Section 148 in a new § 226.59, discussed elsewhere in this supplementary information.

In addition to these substantive requirements, TILA Section 148 also requires creditors to disclose the reasons for an annual percentage rate increase applicable to a credit card under an open-end consumer credit plan in the notice required to be provided 45 days in advance of that increase. The Board is implementing the notice requirements in § 226.9(c) and (g), which are discussed in this section. As discussed in the February 2010 Regulation Z Rule, card issuers are required to provide 45 days' advance notice of rate increases due to a change in contractual terms pursuant to § 226.9(c)(2) and of rate increases due to delinquency, default, or as a penalty not due to a change in contractual terms of the consumer's account pursuant to § 226.9(g). The additional notice requirements included in new TILA Section 148 are the same regardless of whether the rate increase is due to a change in contractual terms or the exercise of a penalty pricing provision already in the contract; therefore for ease of reference the notice requirements under § 226.9(c)(2) and (g) are discussed in a single section of this supplementary information.

Consistent with the approach that the Board has taken in implementing other provisions of the Credit Card Act that apply to credit card accounts under an open-end consumer credit plan, the changes to § 226.9(c)(2) and (g) apply to "credit card accounts under an open-end (not home-secured) consumer credit plan" as defined in § 226.2(a)(15). Therefore, home-equity lines of credit accessed by credit cards and overdraft lines of credit accessed by a debit card are not subject to the new requirements to disclose the reasons for a rate increase implemented in § 226.9(c)(2) and (g).

Section 226.9(c)(2)(iv) sets forth the content requirements for significant changes in account terms, including rate increases that are due to a change in the contractual terms of the consumer's account. In the March 2010 Regulation Z Proposal, the Board proposed to add a new § 226.9(c)(2)(iv)(A)(*8*) to require a card issuer to disclose no more than four principal reasons for the rate increase for a credit card account under an open-end (not home-secured) consumer credit plan, listed in their order of importance, in order to implement the notice requirements of new TILA Section 148. Proposed comment 9(c)(2)(iv)–11 set forth additional guidance on the disclosure. Specifically, proposed comment 9(c)(2)(iv)–11 stated that there is no minimum number of reasons that are required to be disclosed under § 226.9(c)(2)(iv)(A)(*8*), but that the

[6] As discussed in the supplementary information to § 226.59, the rule requires that rate increases imposed between January 1, 2009 and August 21, 2010 first be reviewed prior to February 22, 2011 (six months after the effective date of new § 226.59).

reasons disclosed are required to relate to and accurately describe the principal factors actually considered by the credit card issuer.

Proposed comment 9(c)(2)(iv)–11 would have permitted a card issuer to describe the reasons for the increase in general terms, by disclosing for example that a rate increase is due to "a decline in your creditworthiness" or "a decline in your credit score," if the rate increase is triggered by a decrease of 100 points in a consumer's credit score. Similarly, the comment noted that a notice of a rate increase triggered by a 10% increase in the card issuer's cost of funds may be disclosed as "a change in market conditions." Finally, the proposed comment noted that in some circumstances, it may be appropriate for a card issuer to combine the disclosure of several reasons in one statement.

Consumer groups and a federal agency urged the Board to require more specificity in the disclosure of reasons for a rate increase. These commenters indicated that more specificity would assist consumers in determining whether they could take action to improve the rates applicable to their credit card accounts. Several of these commenters stated that the Board should require the same level of specificity as is required in adverse action notices under the Equal Credit Opportunity Act, as implemented in Regulation B, and the Fair Credit Reporting Act (FCRA). 15 U.S.C. 1691 *et seq.,* 12 CFR part 202, and 15 U.S.C. 1681 *et seq.* In addition, one city consumer protection agency urged the Board to require more detailed information if the rate increase results from a decline in the consumer's credit score. In this case, the commenter stated that the Board should require issuers to disclose the consumer's current credit score as well as the previous score on record with the issuer.

Industry commenters generally supported the Board's approach. Several commenters noted, however, that there would be significant burden associated with updating their systems in order to provide the disclosure of reasons for the increase and questioned whether the disclosure was necessary. Two credit union commenters asked the Board not to limit the disclosure to four reasons, while one other industry commenter stated that limiting the number of reasons in this manner was appropriate and should be retained.

The Board is adopting new § 226.9(c)(2)(iv)(A)(*8*) and new comment 9(c)(2)(iv)–11 generally as proposed. The Board continues to believe that this approach strikes the appropriate balance between providing consumers with useful information regarding the reasons for a rate increase while limiting "information overload" and unnecessary burden. Under the final rule, a consumer will be informed whether the rate increase is due to changes in his or her creditworthiness or behavior on the account, which the consumer may be able to take actions to mitigate, or whether the increase is due to more general factors such as changes in market conditions. The Board believes that consumers may find more detailed information confusing, and that, accordingly, the benefit to consumers of more detailed information would not outweigh the operational burden associated with providing such additional information.

The Board acknowledges that there may be a distinction between rate increases based on changes in a consumer's creditworthiness and portfolio-wide rate increases based on broader factors such as market conditions or the issuer's cost of funds. For individual rate increases, a consumer may be better able to take action to mitigate the change than for market-based rate increases. The Board has amended comment 9(c)(2)(iv)–11, as adopted, to clarify that the notice must specifically disclose any violation of the terms of the account on which the rate is being increased, such as a late payment or a returned payment, if such violation of the account terms is one of the four principal reasons for the rate increase. Accordingly, the notice required by § 226.9(c)(2)(iv)(A)(*8*) will inform consumers of any specific on-account behavior in which they have engaged that gave rise to the rate increase. The notice required by § 226.9(c)(2)(iv)(A)(*8*) will also inform consumers if the rate increase resulted from a decline in their creditworthiness.

The Board notes that, in many cases, consumers also will receive other notices under federal law that are more specifically intended to educate consumers about the relationship between their consumer reports and the terms of credit they receive. In particular, the Federal Trade Commission and Board's rules implementing section 615(h) of the FCRA require issuers to provide a risk-based pricing notice if a consumer's annual percentage rate on purchases is increased based in whole or in part on information in a consumer report. *See* 15 U.S.C. 1681m, 12 CFR part 222, and 16 CFR part 640. The risk-based pricing notice must inform the consumer that the rate is being increased based on information in a consumer report. In addition, a consumer who receives a risk-based pricing notice is entitled to obtain a free consumer report in order to check for errors. Accordingly, the Board believes that a more specific disclosure under § 226.9(c)(2) is unnecessary.

As discussed above, proposed comment 9(c)(2)(iv)–11 set forth several examples of how the reasons for a rate increase must be disclosed. The examples described a rate increase triggered by a decrease of 100 points in a consumer's credit score and a rate increase triggered by a 10% increase in an issuer's cost of funds. Two credit union commenters urged the Board to clarify that the examples in proposed comment 9(c)(2)(iv)–11 were not intended as guidance on acceptable reasons for rate increases. The Board notes that § 226.9(c)(2)(iv)(A)(*8*) and the associated commentary do not set forth, and are not intended to impose, any substantive limitations on when a rate increase may occur. The examples included in comment 9(c)(2)(iv)–11 are included for illustrative purposes only and are being adopted as proposed.

The Board proposed to add a new § 226.9(g)(3)(i)(A)(*6*), which mirrored proposed § 226.9(c)(2)(iv)(A)(*8*), for rate increases due to delinquency, default, or as a penalty not due to a change in contractual terms of the consumer's account. Proposed § 226.9(g)(3)(i)(A)(*6*) required a card issuer to disclose no more than four reasons for the rate increase, listed in their order of importance, for a credit card account under an open-end (not home-secured) consumer credit plan. Proposed comment 9(g)–7 cross-referenced comment 9(c)(2)(iv)–11 for guidance on disclosure of the reasons for a rate increase. For the reasons discussed above, § 226.9(g)(3)(i)(A)(*6*) and comment 9(g)–7 are adopted as proposed.

The Board also proposed to amend Samples G–18(F), G–18(G), G–20, and G–22 to incorporate examples of disclosures of the reasons for a rate increase as required by § 226.9(c)(2)(iv)(A)(*8*) and (g)(3)(i)(A)(*6*). One issuer commented in support of the proposed amendments to these model forms, which are adopted as proposed. In addition, the Board has made one technical change to comment 9(c)(2)(iv)–8, for consistency with changes to Sample G–21 that are discussed elsewhere in this **Federal Register** notice.

Finally, the Board is amending § 226.9(c)(2)(iv)(C) and (g)(3)(i)(B) for clarity and to eliminate redundancy with new § 226.9(c)(2)(iv)(A)(*8*) and (g)(3)(i)(A)(*6*). As adopted in the February 2010 Regulation Z Rule, § 226.9(c)(2)(iv)(C) and (g)(3)(i)(B)

required a creditor to include a statement of the reasons for the rate increase in any notice disclosing a rate increase based on a delinquency of more than 60 days. New § 226.9(c)(2)(iv)(A)(*8*) and (g)(3)(i)(A)(*6*) require all § 226.9(c) and (g) notices disclosing rate increases applicable to credit card accounts under an open-end (not home-secured) consumer credit plan to state the principal reasons for rate increases. Accordingly, the requirement to state the reasons for rate increases under § 226.9(c)(2)(iv)(C) and (g)(3)(i)(B) has been deleted as unnecessary, because such notice is now required under § 226.9(c)(2)(iv)(A)(*8*) and (g)(3)(i)(A)(*6*).

Other Amendments to § 226.9(c)(2)

For the reasons discussed in the supplementary information to § 226.52(b), the Board is amending § 226.9(c)(2)(iv)(B) to clarify that the right to reject does not apply to an increase in a fee as a result of a reevaluation of a determination made under § 226.52(b)(1)(i) or an adjustment to the safe harbors in § 226.52(b)(1)(ii) to reflect changes in the Consumer Price Index.

For the reasons discussed in the supplementary information to § 226.59(f), the Board also is adopting a new comment 9(c)(2)(v)–12 that clarifies the relationship between § 226.9(c)(2)(v)(B) and § 226.59 in the circumstances where a rate is increased due to loss of a temporary rate but is subsequently decreased pursuant to the review required by § 226.59.

Section 226.52 Limitations on Fees

52(b) Limitations on Penalty Fees

Most credit card issuers will assess a penalty fee if a consumer engages in activity that violates the terms of the cardholder agreement or other requirements imposed by the issuer with respect to the account. For example, most agreements provide that a fee will be assessed if the required minimum periodic payment is not received on or before the payment due date or if a payment is returned for insufficient funds or for other reasons. Similarly, some agreements provide that a fee will be assessed if amounts are charged to the account that exceed the account's credit limit.[7] These fees have increased significantly over the past fifteen years. A 2006 report by the Government Accountability Office (GAO) found that late payment and over-the-limit fees increased from an average of approximately $13 in 1995 to an average of approximately $30 in 2005.[8] The GAO also found that, over the same period, the percentage of issuer revenue derived from penalty fees increased to approximately 10%.[9]

According to data obtained by the Board from Mintel Comperemedia, the average late payment fee has increased to approximately $38 as of March 2010, while the average over-the-limit fee has increased to approximately $36.[10] In addition, a July 2009 review of credit card application disclosures by the Pew Charitable Trusts found that the median late payment and over-the-limit fees charged by the twelve largest bank card issuers were $39.[11]

However, it appears that smaller credit card issuers generally charge significantly lower late payment and over-the-limit fees. For example, the Board understands that some community bank issuers charge late payment and over-the-limit fees that average between $17 and $25. In addition, the Board understands that many credit unions charge late payment and over-the-limit fees of $20 on average.[12] Similarly, the Pew Credit Card Report found that the median late payment and over-the-limit fees charged by the twelve largest credit union card issuers were $20.[13]

The Credit Card Act creates a new TILA Section 149. Section 149(a) provides that "[t]he amount of any penalty fee or charge that a card issuer may impose with respect to a credit card account under an open end consumer credit plan in connection with any omission with respect to, or violation of, the cardholder agreement, including any late payment fee, over-the-limit fee, or any other penalty fee or charge, shall be reasonable and proportional to such omission or violation." Section 149(b) further provides that the Board, in consultation with the other federal banking agencies[14] and the National Credit Union Administration (NCUA), shall issue rules that "establish standards for assessing whether the amount of any penalty fee or charge * * * is reasonable and proportional to the omission or violation to which the fee or charge relates."

In issuing these rules, new TILA Section 149(c) requires the Board to consider: (1) The cost incurred by the creditor from such omission or violation; (2) the deterrence of such omission or violation by the cardholder; (3) the conduct of the cardholder; and (4) such other factors as the Board may deem necessary or appropriate. Section 149(d) authorizes the Board to establish "different standards for different types of fees and charges, as appropriate." Finally, Section 149(e) authorizes the Board—in consultation with the other federal banking agencies and the NCUA—to "provide an amount for any penalty fee or charge * * * that is presumed to be reasonable and proportional to the omission or violation to which the fee or charge relates."

As discussed below, the Board is implementing new TILA Section 149 in § 226.52(b). In developing § 226.52(b), the Board consulted with the other federal banking agencies and the NCUA.

Reasonable and Proportional Standard and Consideration of Statutory Factors

As noted above, the Board is responsible for establishing standards for assessing whether a credit card penalty fee is reasonable and proportional to the violation for which it is imposed. New TILA Section 149 does not define "reasonable and proportional," nor is the Board aware of any generally accepted definition for those terms when used in conjunction

[7] The Board notes that some card issuers have recently announced that they will cease imposing fees for exceeding the credit limit. In addition, § 226.56 prohibits card issuers from imposing such fees unless the consumer has consented to the issuer's payment of transactions that exceed the credit limit.

[8] U.S. Government Accountability Office, *Credit Cards: Increased Complexity in Rates and Fees Heightens Need for More Effective Disclosures to Consumers* (Sept. 2006) (GAO Credit Card Report) at 5, 18–22, 33, 72 (available at *http://www.gao.gov/new.items/d06929.pdf*).

[9] *See* GAO Credit Card Report at 72–73.

[10] The Mintel data, which is derived from a representative sample of credit card solicitations, indicates that the average late payment fee was approximately $37 in January 2007 and increased to approximately $38 by March 2010. During the same period, the average over-the-limit fee increased from approximately $35 to approximately $36. In addition, the average returned payment fee during this period increased from approximately $30 to approximately $37.

[11] *See* The Pew Charitable Trusts, *Still Waiting: "Unfair or Deceptive" Credit Card Practices Continue as Americans Wait for New Reforms to Take Effect* (Oct. 2009) (Pew Credit Card Report) at 3, 12–13, 31–33 (available at *http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Credit_Cards/Pew_Credit_Cards_Oct09_Final.pdf*). As noted in the Pew Credit Card Report, the largest bank card issuers generally tier late payment fees based on the account balance (with a median fee of $39 applying when the account balance is $250 or more). Similarly, some bank card issuers tier over-the-limit fees (with the median fee of $39 applying when the account balance is $1,000 or more). In both cases, the balance necessary to trigger the highest penalty fee is significantly less than the average outstanding balance on active credit card accounts. *See id.* at 12–13, 31.

[12] Data submitted during the comment period by a trade association representing federal and state credit unions supported the Board's understanding with respect to credit union penalty fees.

[13] *See* Pew Credit Card Report at 3, 31–33.

[14] The Office of the Comptroller of the Currency (OCC), the Federal Deposit Insurance Corporation (FDIC), and the Office of Thrift Supervision (OTS).

with one another. As a separate legal term, "reasonable" has been defined as "fair, proper, or moderate." [15] Congress often uses a reasonableness standard to provide agencies or courts with broad discretion in implementing or interpreting a statutory requirement.[16] The term "proportional" is seldom used by Congress and does not have a generally-accepted legal definition. However, it is commonly defined as meaning "corresponding in size, degree, or intensity" or as "having the same or a constant ratio." [17] Thus, it appears that Congress intended the words "reasonable and proportional" in new TILA Section 149(a) to require that there be a reasonable and generally consistent relationship between the dollar amounts of credit card penalty fees and the violations for which those fees are imposed, while providing the Board with substantial discretion in implementing that requirement.

However, in Section 149(c), Congress also set forth certain factors that the Board is required to consider when establishing standards for determining whether penalty fees are reasonable and proportional. Although Section 149(c) only requires *consideration* of these factors, the Board believes that they are indicative of Congressional intent with respect to the implementation of Section 149(a) and therefore provide useful measures for determining whether penalty fees are "reasonable and proportional." Accordingly, when implementing the reasonable and proportional requirement, the Board has been guided by these factors.[18]

In addition, pursuant to its authority under Section 149(c)(4) to consider "such other factors as the Board may deem necessary or appropriate," the Board has considered the need for general regulations that can be consistently applied by card issuers and enforced by the federal banking agencies, the NCUA, and the Federal Trade Commission. The Board has also considered the need for regulations that result in fees that can be effectively disclosed to consumers in solicitations, account-opening disclosures, and elsewhere. Finally, the Board has considered other relevant factors, as discussed below.

Section 226.52(b) reflects the Board's careful consideration of the statutory factors. However, when those factors were in conflict, the Board found it necessary to give more weight to a particular factor or factors. For example, as discussed below with respect to § 226.52(b)(2)(i), the Board has determined that—if a fee based on the card issuer's costs would be disproportionate to the consumer conduct that caused the violation—it is consistent with the intent of Section 149 to give greater weight to the consumer conduct factor. The Board has made these determinations pursuant to the authority granted by new TILA Section 149 and existing TILA Section 105(a).

Cost Incurred as a Result of Violations

New TILA Section 149(c)(1) requires the Board to consider the costs incurred by the creditor from the violation. The Board believes that, for purposes of new TILA Section 149(a), the dollar amount of a penalty fee is generally reasonable and proportional to a violation if it represents a reasonable proportion of the total costs incurred by the issuer as a result of all violations of the same type. Accordingly, the Board has adopted this standard in § 226.52(b)(1)(i). This application of Section 149 appears to be consistent with Congress' intent insofar as it permits card issuers to use penalty fees to pass on the costs incurred as a result of violations, while also ensuring that those costs are spread evenly among consumers and that no individual consumer bears an unreasonable or disproportionate share.[19] As discussed below, the Board has also adopted safe harbor amounts in § 226.52(b)(1)(ii) that the Board believes will be generally sufficient to cover issuers' costs.

The Board notes that § 226.52(b)(1)(i) does not require that a penalty fee be reasonable and proportional to the costs incurred as a result of a specific violation on a specific account. Such a requirement would force card issuers to wait until after a violation has been resolved to determine the associated costs. In addition to being inefficient and overly burdensome for card issuers, this type of requirement would be difficult for regulators to enforce and would result in fees that could not be disclosed to consumers in advance. The Board does not believe that Congress intended this result. Instead, as discussed in greater detail below, § 226.52(b)(1)(i) requires card issuers to determine that their penalty fees represent a reasonable proportion of the total costs incurred by the issuer as a result of the *type of violation* (for example, late payments).

Deterrence of Violations

New TILA Section 149(c)(2) requires the Board to consider the deterrence of violations by the cardholder. Under proposed § 226.52(b)(1)(ii), a penalty fee would have been deemed reasonable and proportional to a violation if the card issuer had determined that the dollar amount of the fee was reasonably necessary to deter that type of violation using an empirically derived, demonstrably and statistically sound model that reasonably estimated the effect of the amount of the fee on the frequency of violations. This proposed standard was intended to encourage issuers to develop an empirical basis for the relationship between penalty fee amounts and deterrence and to prevent consumers from being charged fees that unreasonably exceeded—or were out of proportion to—their deterrent effect.[20]

[15] *E.g., Black's Law Dictionary* at 1272 (7th ed. 1999); *see also id.* ("It is extremely difficult to state what lawyers mean when they speak of 'reasonableness.' " (quoting John Salmond, *Jurisprudence* 183 n.(u) (Glanville L. Williams ed., 10th ed. 1947)).

[16] *See, e.g.,* 42 U.S.C. 12112(b)(5) (defining the term "discriminate" to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee"); 28 U.S.C. 2412(b) ("Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys * * * to the prevailing party in any civil action brought by or against the United States or any agency."); 43 U.S.C. 1734(a) ("Notwithstanding any other provision of law, the Secretary may establish reasonable filing and service fees and reasonable charges, and commissions with respect to applications and other documents relating to the public lands and may change and abolish such fees, charges, and commissions.").

[17] *E.g., Merriam-Webster's Collegiate Dictionary* at 936 (10th ed. 1995).

[18] Several commenters asserted that Section 149 requires the Board to base the standards for penalty fees on one or more of the factors listed in Section 149(c). In particular, several industry commenters argued that proposed § 226.52(b)(1) was inconsistent with Section 149 insofar as it required issuers to choose between basing penalty fees on costs or deterrence, noting that Section 149(c) uses the conjunctive "and" rather than the disjunctive "or" when listing the factors. Such arguments misread Section 149(c), which—as noted above—only requires the Board to *consider* the listed factors. Thus, while these factors provide valuable guidance, the Board does not believe that Congress intended to limit the Board's discretion in the manner suggested by these commenters. Furthermore, as discussed below, there are circumstances where—in the Board's view—the statutory factors point to conflicting results, leaving it to the Board to resolve those conflicts.

[19] One commenter argued that the Board's "reasonable proportion" standard does not satisfy the requirement in Section 149(a) that penalty fees be "reasonable *and* proportional." (Emphasis added.) Specifically, the commenter argued that, while a fee that represents a reasonable proportion of an issuer's costs might be proportional, it was not necessarily reasonable. The Board disagrees. By listing costs incurred from a violation as one of the factors in Section 149(c), Congress indicated that a penalty fee based on such costs will generally be reasonable for purposes of Section 149(a). Furthermore, the limitations in § 226.52(b)(2) impose additional reasonableness requirements on penalty fees that are based on costs.

[20] Like § 226.52(b)(1)(i), proposed § 226.52(b)(1)(ii) would not have required that penalty fees be calibrated to deter individual consumers from engaging in specific violations. The Board noted that this type of requirement would be unworkable because the amount necessary to deter

However, commenters generally expressed strong reservations regarding the deterrence standard in proposed § 226.52(b)(1)(ii). Some industry commenters argued that, in order to develop the data necessary to comply with the proposed standard, the Board would have to permit card issuers to test—after the statutory effective date of August 22, 2010—the deterrent effect of fee amounts that would otherwise be inconsistent with § 226.52(b).[21] Other industry commenters urged the Board to adopt a less stringent standard, stating that it would be impossible for card issuers—particularly smaller institutions with limited resources—to develop the data and models necessary to satisfy proposed § 226.52(b)(1)(i). In contrast, consumer groups and a municipal consumer protection agency expressed concern that the proposed standard was not sufficiently stringent and would allow card issuers to use marginal changes in the frequency of violations to justify unreasonably high fee amounts.[22]

Based on its review of the comments and its own reevaluation of the proposed deterrence standard, the Board has determined that the standard in proposed § 226.52(b)(1)(ii) would not provide card issuers with a meaningful ability to base penalty fees on deterrence. Furthermore, the Board is concerned that adopting a less stringent standard could lead to penalty fees that are substantially higher than current levels, which would undermine the purpose of new TILA Section 149. Accordingly, the Board has not adopted proposed § 226.52(b)(1)(ii).

Instead, the Board has revised the safe harbors in proposed § 226.52(b)(3) to better address concerns regarding deterrence and adopted those safe harbors in § 226.52(b)(1)(ii). Specifically, § 226.52(b)(1)(ii) would permit card issuers to impose a $25 fee for the first violation of a particular type and a $35 fee for each additional violation of the same type during the next six billing cycles. For example, if a consumer pays late for the first time in January, § 226.52(b)(1)(ii) would limit the late payment fee to $25. If the consumer pays late again during February, March, April, May, June, or July, the card issuer would be permitted to impose a $35 late payment fee. However, if after paying late in January the consumer makes the next six payments on time, the fee for the next late payment would be limited to $25. The Board believes that § 226.52(b)(1)(ii) is consistent with new TILA 149(c)(2) insofar as—after a violation has occurred—the amount of the fee increases to deter additional violations of the same type during the next six billing cycles.

Although the application and solicitation disclosures in § 226.5a and the account opening disclosures in § 226.6 provide consumers with advance notice of the amount of credit card penalty fees,[23] the Board is concerned that some consumers may discount these disclosures because they overestimate their ability to avoid paying late and engaging in other conduct that violates the terms or other requirements of the account. However, as noted in the proposal, there is some evidence that the experience of incurring a late payment fee makes consumers less likely to pay late for a period of time.[24] Accordingly, although upfront disclosure of a penalty fee may be sufficient to deter some consumers from engaging in certain conduct, other consumers may be deterred by the imposition of the fee itself. For these consumers, the Board believes that imposition of a higher fee when multiple violations occur will have a significant deterrent effect on future violations. In addition, as discussed below, the Board believes that multiple violations during a relatively short period can be associated with increased costs and credit risk and reflect a more serious form of consumer conduct than a single violation.

In the proposal, the Board solicited comment on this tiered approach to the safe harbor, which was supported by some industry commenters as being consistent with the statutory factors of cost, deterrence, and consumer conduct. However, consumer groups and some industry commenters opposed a tiered safe harbor on the grounds that it would be overly complex. Although the Board agrees that, for these reasons, it would not be appropriate to establish numerous fee amounts, it does not appear that the two-tiered safe harbor in § 226.52(b)(1)(ii) is overly complex.[25]

Consumer Conduct

New TILA Section 149(c)(3) requires the Board to consider the conduct of the cardholder. As discussed above, the Board does not believe that Congress intended to require that each penalty fee be based on an assessment of the individual characteristics of the violation. Thus, § 226.52(b) does not require card issuers to examine the conduct of the individual consumer before imposing a penalty fee.[26] Instead, § 226.52(b) ensures that penalty fees will reflect consumer conduct in a number of ways.

As an initial matter, to the extent certain consumer conduct that violates the terms or other requirements of an account has the effect of increasing the costs incurred by the card issuer, fees imposed pursuant to § 226.52(b)(1)(i) will reflect that conduct because the issuer is permitted to recover those costs. Furthermore, as discussed above, the safe harbors in § 226.52(b)(1)(ii) address consumer conduct by allowing issuers to impose higher penalty fees on consumers who violate the terms or other requirements of an account

a particular consumer from, for example, paying late may depend on the individual characteristics of that consumer (such as the consumer's disposable income or other obligations) and other highly specific factors. Imposing such a requirement would create compliance, enforcement, and disclosure difficulties similar to those discussed above with respect to costs.

[21] Notably, some of these commenters stated that, even if such testing were permitted, they would not test high fee amounts on their consumers because of the risks involved. One industry commenter submitted the results of models based on issuer data estimating the deterrent effect of different penalty fee amounts. However, because the Board does not have access to the data and assumptions used to produce these results, the Board is unable to determine whether these models satisfy the proposed standard.

[22] Some consumer groups argued that deterrence was not an appropriate consideration because, for example, a penalty fee is unlikely to have a deterrent effect in circumstances where consumers cannot avoid the violation of the account terms. The Board acknowledged this possibility in the proposal. However, the Board also noted that deterrence is a required factor for the Board to consider under new TILA Section 149(c) and that there is evidence indicating that, as a general matter, penalty fees may deter future violations of the account terms. *See* Agarwal *et al., Learning in the Credit Card Market* (Feb. 8, 2008) (available at *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1091623&download=yes*).

[23] In addition, § 226.7(b)(11) requires card issuers to disclose on each periodic statement the amount of the late payment fee that will be imposed if payment is not received by the due date.

[24] For example, one study of four million credit card statements found that a consumer who incurs a late payment fee is 40% less likely to incur a late payment fee during the next month, although this effect depreciates approximately 10% each month. *See* Agarwal, *Learning in the Credit Card Market.* Although this study indicates that the imposition of a penalty fee may cease to have a deterrent effect on future violations after four months, the Board has concluded—as discussed in greater detail below—that imposing an increased fee for additional violations of the same type during the next six billing cycles is consistent with the intent of the Credit Card Act.

[25] The Board also solicited comment on whether penalty fees should be imposed in increments based on the consumer's conduct. For example, the Board suggested that card issuers could be permitted to impose a late payment fee of $5 each day after the payment due date until the required payment is received. However, the Board has not adopted this cumulative approach in the final rule because of concerns about complexity and the need to establish an upper limit for the total fee.

[26] Although some industry commenters argued that consumer conduct should serve as an independent basis for penalty fees, none suggested a specific method of basing the dollar amount of a penalty fee on consumer conduct.

multiple times, while limiting the amount of the penalty fee for a consumer who engages in a single violation and does not repeat that conduct for the next six billing cycles.

The Board notes that, based on data submitted by a large credit card issuer, consumers who pay late multiple times over a six-month period generally present a significantly greater credit risk than consumers who pay late a single time. Although this data also indicates that consumers who pay late two or more times over longer periods (such as twelve or twenty-four months) are significantly more risky than consumers who pay late a single time, the Board believes that, when evaluating the conduct of consumers who have violated the terms or other requirements of an account, it is consistent with other provisions of the Credit Card Act to distinguish between those who repeat that conduct during the next six billing cycles and those who do not. Specifically, new TILA Section 171(b)(4) provides that, if the annual percentage rate that applies to a consumer's existing balance is increased because the account is more than 60 days delinquent, the increase must be terminated if the consumer makes the next six payments on time. *See* § 226.55(b)(4). Furthermore, as discussed below with respect to § 226.59, new TILA Section 148 provides that, when an annual percentage rate is increased based on the credit risk of the consumer or other factors, the card issuer must review the account at least once every six months to assess whether those factors have changed (including whether the consumer's credit risk has declined).

In addition, § 226.52(b)(2)(i) takes consumer conduct into account by prohibiting issuers from imposing penalty fees that exceed the dollar amount associated with the violation. The Board believes that, in enacting new TILA Section 149, Congress intended the amount of a penalty fee to bear a reasonable relationship to the magnitude of the violation. For example, a consumer who exceeds the credit limit by $5 should not be penalized to the same degree as a consumer who exceeds the limit by $500. Accordingly, under § 226.52(b)(2)(i), a consumer who exceeds the credit limit by $5 could not be charged an over-the-limit fee of more than $5.

Finally, § 226.52(b)(2)(ii) prohibits issuers from imposing multiple penalty fees based on a single event or transaction. The Board believes that imposing multiple fees in these circumstances would be unreasonable and disproportionate to the conduct of the consumer because the same conduct may result in a single or multiple violations, depending on circumstances that may not be in the control of the consumer. For example, § 226.52(b)(2)(ii) would prohibit issuers from charging a late payment fee and a returned payment fee based on a single payment.

52(b)(1) General Rule

Section 226.52(b) provides that a card issuer must not impose a fee for violating the terms or other requirements of a credit card account under an open-end (not home-secured) consumer credit plan unless the dollar amount of the fee is consistent with § 226.52(b)(1) and (b)(2). Section 226.52(b)(1) states that, subject to the limitations in § 226.52(b)(2), a card issuer may impose a fee for violating the terms or other requirements of an account if the dollar amount of the fee is consistent with either the cost analysis in § 226.52(b)(1)(i) or the safe harbors in § 226.52(b)(1)(ii). These alternatives are discussed in detail below.

Proposed comment 52(b)–1 clarified that, for purposes of § 226.52(b), a fee is any charge imposed by a card issuer based on an act or omission that violates the terms of the account or any other requirements imposed by the card issuer with respect to the account, other than charges attributable to periodic interest rates. This comment provided the following examples of fees that are subject to the limitations in—or prohibited by—§ 226.52(b): (1) Late payment fees and any other fees imposed by a card issuer if an account becomes delinquent or if a payment is not received by a particular date; (2) returned payment fees and any other fees imposed by a card issuer if a payment received via check, automated clearing house, or other payment method is returned; (3) any fee or charge for an over-the-limit transaction as defined in § 226.56(a), to the extent the imposition of such a fee or charge is permitted by § 226.56;[27] (4) any fee or charge for a transaction that the card issuer declines to authorize; and (5) any fee imposed by a card issuer based on account inactivity (including the consumer's failure to use the account for a particular number or amount of transactions or a particular type of transaction) or the closure or termination of an account.[28]

Proposed comment 52(b)–1 also provided the following examples of fees to which § 226.52(b) does not apply: (1) Balance transfer fees; (2) cash advance fees; (3) foreign transaction fees; (4) annual fees and other fees for the issuance or availability of credit described in § 226.5a(b)(2), except to the extent that such fees are based on account inactivity; (4) fees for insurance described in § 226.4(b)(7) or debt cancellation or debt suspension coverage described in § 226.4(b)(10) written in connection with a credit transaction, provided that such fees are not imposed as a result of a violation of the terms or other requirements of an account; (5) fees for making an expedited payment (to the extent permitted by § 226.10(e)); (6) fees for optional services (such as travel insurance); and (7) fees for reissuing a lost or stolen card.

The examples in comment 52(b)–1 are adopted as proposed, although the Board has made non-substantive revisions and added fees imposed for

[27] Some industry commenters argued that over-the-limit fees should be exempt from § 226.52(b) because, once a consumer has consented to the payment of transactions that exceed the credit limit consistent with new TILA Section 127(k) and § 226.56, the fee for exceeding the limit is a fee for a service affirmatively requested by the consumer rather than a fee for violating the terms or other requirements of the account. On the other hand, a municipal consumer protection agency requested that the Board ban over-the-limit fees in all circumstances, arguing that such fees are never reasonable because the issuer controls whether to allow the account to exceed the credit limit. As noted in the proposal, it appears that Congress intended new TILA Section 149 to apply to over-the-limit fees. *See* new TILA § 149(a) (listing over-the-limit fees as an example of a penalty fee or charge). Furthermore, the Board has previously determined that the Credit Card Act's restrictions on fees for over-the-limit transactions apply regardless of whether the card issuer characterizes the fee as a fee for a service or a fee for a violation of the account terms. *See* comment 56(j)–1. Thus, the Board believes it would be inconsistent with Congress' intent to exempt over-the-limit fees from the application of Section 149. Similarly, because Section 127(k) specifically addresses the circumstances in which an over-the-limit fee may be charged, the Board believes that it would be inconsistent with Congress' intent to ban such fees entirely.

[28] As discussed below, § 226.52(b)(2)(i)(B) would prohibit the imposition of fees for declined transactions, fees based on account inactivity, and fees based on the closure or termination of an account. Several industry commenters objected to the treatment of inactivity and account closure fees as penalty fees for purposes of Section 149, arguing that a consumer who does not use an account for transactions or who closes an account generally has not violated an express term of the cardholder agreement. However, the Board believes that it would be inconsistent with the purpose of Section 149 to permit card issuers to exempt a fee from § 226.52(b) by placing the requirement on which that fee is based outside the account agreement. For example, if a card issuer charges a fee when a consumer fails to use an account for transactions, the card issuer is requiring consumers to use the account for transactions, even if that requirement does not appear in the cardholder agreement. Accordingly, § 226.52(b) applies to fees imposed for violating the terms *or other requirements* of a credit card account.

declined access checks as an additional example of a fee subject to § 226.52(b). Consumer group commenters noted that many card issuers cancel redeemable rewards points or similar benefits if a consumer pays late or otherwise violates the account terms and that, in those circumstances, some issuers require consumers to pay a fee to reinstate those rewards or benefits. These commenters requested that the Board treat both the cancellation and the reinstatement fee as penalty fees subject to new TILA Section 149. In contrast, one industry commenter requested that the Board clarify that any loss of a benefit as a result of a violation is not a fee for purposes of Section 149.

As discussed above, new TILA Section 149 applies to "any penalty *fee or charge*" imposed in connection with a violation. As a general matter, the Board believes that the loss of rewards points or other benefits as a result of a violation is not a "fee or charge" and therefore is not subject to Section 149. Furthermore, because a consumer can choose not to pay the reinstatement fee if the consumer decides that the rewards or benefits are not sufficiently valuable, the Board does not believe it would be appropriate to treat that fee as a penalty fee. However, as discussed in detail below with respect to inactivity fees, there are circumstances in which the loss of a benefit as a result of a violation cannot be meaningfully distinguished from the imposition of a penalty fee. *See* comment 52(b)(2)(i)–5. Accordingly, although losses of rewards points or other benefits are generally not subject to § 226.52(b), the Board does not believe that such losses can be categorically excluded. Instead, whether the loss of a benefit as a result of a violation of the terms or other requirements is subject to § 226.52(b) depends on the relevant facts and circumstances.

Proposed comment 52(b)–1 also clarified that § 226.52(b) does not apply to charges attributable to an increase in an annual percentage rate based on an act or omission that violates the terms or other requirements of an account. Currently, many credit card issuers apply an increased annual percentage rate (or penalty rate) based on certain violations of the account terms. Application of this increased rate can result in increased interest charges. However, the Board does not believe that Congress intended the words "any penalty fee or charge" in new TILA Section 149(a) to apply to penalty rate increases.

In the proposal, the Board noted that, elsewhere in the Credit Card Act, Congress expressly referred to increases in annual percentage rates when it intended to address them.[29] In fact, the Credit Card Act contains several provisions that specifically limit the ability of card issuers to apply penalty rates. Revised TILA Section 171 prohibits application of penalty rates to existing credit card balances unless the account is more than 60 days delinquent. *See* revised TILA Section 171(b)(4); *see also* § 226.55(b)(4). Furthermore, if an account becomes more than 60 days delinquent and a penalty rate is applied to an existing balance, the card issuer must terminate the penalty rate if it receives the required minimum payments on time for the next six months. *See* revised TILA Section 171(b)(4)(B); § 226.55(b)(4)(ii). With respect to new transactions, new TILA Section 172(a) generally prohibits card issuers from applying penalty rates during the first year after account opening. *See also* § 226.55(b)(3)(iii). Subsequently, the card issuer must provide 45 days advance notice before applying a penalty rate to new transactions. *See* new TILA Section 127(i); § 226.9(g). Finally, beginning on August 22, 2010, once a penalty rate is in effect, the card issuer generally must review the account at least once every six months thereafter and reduce the rate if appropriate. *See* new TILA Section 148; § 226.59. These protections—in combination with the lack of any express reference to penalty rate increases in new TILA Section 149—indicate that Congress did not intend to apply the "reasonable and proportional" standard to increases in annual percentage rates.[30]

Comments from individual consumers, consumer groups, state attorneys general, and state and municipal consumer protection agencies disagreed with the Board's interpretation. Some of these commenters argued that the Board was not giving effect to the reference in Section 149 to a penalty "charge" (as opposed to a penalty "fee"). However, as discussed above, the Board has expressly stated in comment 52(b)–1 that § 226.52(b) applies to "*any charge* imposed by a card issuer based on an act or omission that violates the terms of the account or any other requirements imposed by the card issuer with respect to the account, *other than charges attributable to periodic interest rates*." Comment 52(b)–1 (emphasis added). Thus, the Board has given effect to the words "any penalty fee or charge" in Section 149.

These commenters further argued that, even if new TILA Section 149 does not expressly apply to penalty rate increases, the Board should use its authority under TILA Section 105(a) to apply § 226.52(b) to such rate increases because doing so would effectuate the purposes of the Credit Card Act. However, the Board does not believe that this would be an appropriate use of its authority because, for the reasons discussed above, Congress has provided other protections that specifically apply to penalty rate increases.[31]

Proposed comment 52(b)–2 clarified that a card issuer may round any fee that complies with § 226.52(b) to the nearest whole dollar. For example, if § 226.52(b) permits a card issuer to impose a late payment fee of $21.50, the card issuer may round that amount up to the nearest whole dollar and impose a late payment fee of $22. However, if the permissible late payment fee were $21.49, the card issuer is not permitted to round that amount up to $22, although the card issuer could round that amount down and impose a late payment fee of $21. The Board did not receive any significant comment on this aspect of the proposal, which is adopted as proposed.

Finally, a state and a municipal consumer protection agency expressed concern that providing card issuers with the flexibility to choose between different methods for calculating penalty fees would lead issuers to switch back and forth between methods in order to charge the highest possible fee in all circumstances. As a general matter, the Board believes that card issuers should be permitted to choose

[29] For example, revised TILA Section 171(a) and (b) and new TILA Section 172 explicitly distinguish between annual percentage rates, fees, and finance charges.

[30] The Board also noted that prior versions of the Credit Card Act contained language that would have limited the amount of penalty rate increases, but that language was removed prior to enactment. *See* S. 414 § 103 (introduced Feb. 11, 2009) (proposing to create a new TILA Section 127(o) requiring that "[t]he amount of any fee or charge that a card issuer may impose in connection with any omission with respect to, or violation of, the cardholder agreement, including any late payment fee, over the limit fee, *increase in the applicable annual percentage rate,* or any similar fee or charge, shall be reasonably related to the cost to the card issuer of such omission or violation") (emphasis added) (available at *http://thomas.loc.gov*).

[31] One commenter argued that the Board should apply Section 149 to prohibit the assessment of deferred interest when a consumer pays late during a deferred interest period. For the reasons discussed above with respect to the assessment of additional interest charges as a result of a penalty rate increase, the Board believes that it would not be appropriate to apply Section 149 to the assessment of deferred interest. However, the Board notes that, effective February 22, 2010, card issuers were generally prohibited from assessing deferred interest as a result of a late payment. *See* comment 55(b)(1)–3.

between basing the amount of a penalty fee on a cost analysis that is consistent with § 226.52(b)(1)(i) or on the safe harbors in § 226.52(b)(1)(ii) because both methods result in fees that are consistent with new TILA Section 149. Accordingly, the Board has adopted comment 52(b)(1)–1, which clarifies that a card issuer may impose a fee for one type of violation pursuant to § 226.52(b)(1)(i) and may impose a fee for a different type of violation pursuant to § 226.52(b)(1)(ii). For example, a card issuer may impose a late payment fee of $30 based on a cost determination pursuant to § 226.52(b)(1)(i) but impose returned payment and over-the-limit fees of $25 or $35 pursuant to the safe harbors in § 226.52(b)(1)(ii).

In addition, the Board believes that card issuers should be permitted to shift from charging fees based on a cost analysis consistent with § 226.52(b)(1)(i) to charging fees that are consistent with the safe harbors in § 226.52(b)(1)(ii) (and vice versa). However, because the applicability of the safe harbors in § 226.52(b)(1)(ii)(A) and (B) depends on whether the consumer has engaged in multiple violations of the same type during the specified period, it would be inconsistent with the intent of § 226.52(b)(1)(ii) to permit a card issuer to charge the higher safe harbor amount in § 226.52(b)(1)(ii)(B) without having previously charged the lower amount in § 226.52(b)(1)(ii)(A). Accordingly, comment 52(b)(1)–1 clarifies that this practice is inconsistent with § 226.52(b)(1) and provides an illustrative example.

Finally, the Board has incorporated into this comment the guidance proposed in comment 52(b)(3)–1, which clarified that a card issuer that complies with the safe harbors is not required to determine that its fees represent a reasonable proportion of the total costs incurred by the card issuer as a result of a type of violation under § 226.52(b)(1)(i). However, this guidance also clarifies that § 226.52(b)(1) does not permit a card issuer to impose a fee that is inconsistent with the prohibitions in § 226.52(b)(2). For example, if § 226.52(b)(2)(i) prohibits the card issuer from imposing a late payment fee that exceeds $15, the safe harbors in § 226.52(b)(1)(ii) do not permit the card issuer to impose a higher late payment fee.

52(b)(1)(i) Fees Based on Costs

Section 226.52(b)(1)(i) permits a card issuer to impose a fee for violating the terms or other requirements of an account if the card issuer has determined that the dollar amount of the fee represents a reasonable proportion of the total costs incurred by the card issuer as a result of that type of violation. As discussed above, § 226.52(b)(1)(i) does not require card issuers to make individualized determinations with respect to the costs incurred as a result of each violation. Instead, card issuers would be required to make these determinations with respect to the *type* of violation (for example, late payments), rather than a specific violation or an individual consumer.

Because a card issuer is in the best position to determine the costs it incurs as a result of violations, the Board believes that, as a general matter, it is appropriate to make card issuers responsible for determining that their fees comply with § 226.52(b)(1)(i). As discussed below, to reduce the burden of making these determinations, § 226.52(b)(1)(ii) contains safe harbors that are intended to generally reflect issuers' costs. However, a card issuer that chooses to base its penalty fees on its own determination (rather than on the safe harbors) must be able to demonstrate to the regulator responsible for enforcing compliance with TILA and Regulation Z that its determination is consistent with § 226.52(b)(1)(i).[32]

Industry commenters generally supported proposed § 226.52(b)(1)(i), while consumer group commenters expressed a general concern that—by allowing card issuers with higher costs to collect higher fees—the proposed rule could have the unintended consequence of rewarding the issuers that are least efficient in managing their costs. The Board understands this concern. However, because Regulation Z requires card issuers to disclose the amounts of their penalty fees in the application and solicitation table (§ 226.5a(b)(9), (10), and (12)) and in the account-opening table (§ 226.6(b)(2)(viii), (ix), and (xi)) as well as the amount of their late payment fee on each periodic statement (§ 226.7(b)(11)(B)), the Board believes that—for competitive and other reasons—card issuers will have incentives to manage their costs efficiently. Accordingly, § 226.52(b)(1)(i) is adopted as proposed.

[32] Consumer groups objected to this approach, arguing that—in order to prevent manipulation of the cost determinations required by § 226.52(b)(1)(i)—card issuers should be required to submit all data supporting those determinations to the Board for publication on an anonymous basis. The Board believes that such a requirement would be inefficient and overly burdensome and is not necessary to effectuate the purpose of Section 149. An issuer's principal regulator is most familiar with its operations and is in the best position to evaluate its cost analysis under § 226.52(b)(1)(i).

A. Reevaluation of Cost Determinations

Proposed § 226.52(b)(1) would have required card issuers that base their penalty fees on costs to reevaluate their cost determination at least once every twelve months. If as a result of the reevaluation the card issuer determined that a lower fee represented a reasonable proportion of the total costs incurred by the card issuer as a result of that type of violation, the proposed rule would have required the card issuer to begin imposing the lower fee within 30 days after completing the reevaluation. If as a result of the reevaluation the card issuer determined that a higher fee represented a reasonable proportion of the total costs incurred by the card issuer as a result of that type of violation, the proposed rule clarified that the card issuer cannot begin imposing the higher fee until it has complied with the notice requirements in § 226.9.

This reevaluation requirement was intended to ensure that card issuers impose penalty fees based on relatively current cost information. However, because the Board did not wish to encourage frequent changes in penalty fees, it solicited comment on whether twelve months was an appropriate interval for the reevaluation. Generally, consumer groups supported the proposal while industry commenters requested less frequent reevaluation, citing the cost of reviewing their analyses annually and revising disclosures and account agreements. Based on its review of the comments and further analysis, the Board believes that an annual reevaluation requirement is appropriate. Although the Board understands that there will be costs involved in preparing a § 226.52(b)(1)(i) analysis, an issuer that determines that those costs outweigh the benefits of utilizing § 226.52(b)(1)(i) can instead comply with the safe harbors in § 226.52(b)(1)(ii).

However, because the Board understands that it may take some card issuers more than 30 days to implement a fee reduction, the Board has revised the reevaluation requirement to provide issuers with 45 days to do so. This period parallels the amount of time issuers are required to delay imposition of an increased fee under § 226.9. Furthermore, because it would be inconsistent with the intent of § 226.52(b)(1)(i) to prohibit issuers from increasing a fee to reflect increased costs, the Board has revised § 226.9(c)(2)(iv)(B) to provide that the right to reject an increase in a fee does not apply in these circumstances.

B. Factors Relevant to Cost Determination

Proposed comment 52(b)(1)(i)–1 would have clarified that a card issuer is not required to base its fees on the costs incurred as a result of a specific violation. Instead, for purposes of § 226.52(b)(1)(i), a card issuer must have determined that a fee for violating the terms or other requirements of an account represents a reasonable proportion of the costs incurred by the card issuer as a result of that type of violation. As proposed, the factors relevant to this determination included: (1) The number of violations of a particular type experienced by the card issuer during a prior period; and (2) the costs incurred by the card issuer during that period as a result of those violations. In addition, a card issuer was permitted, at its option, to base its fees on a reasonable estimate of changes in the number of violations of that type and the resulting costs during an upcoming period. For example, under the proposal, a card issuer could satisfy § 226.52(b)(1)(i) by determining that its late payment fee represented a reasonable proportion of the total costs incurred by the card issuer as a result of late payments based on the number of delinquencies it experienced in the past twelve months, the costs incurred as a result of those delinquencies, and a reasonable estimate about changes in delinquency rates and the costs incurred as a result of delinquencies during a subsequent period of time (such as the next twelve months).

The Board has revised several aspects of comment 52(b)(1)(i)–1 based on the comments and further analysis. First, the Board has clarified that card issuers must evaluate their costs based on a prior period of reasonable length (such as a period of twelve months). The Board believes that this clarification is necessary to ensure that any cost analysis is based on a period that accurately reflects the number of violations an issuer typically experiences and the costs incurred as a result of those violations.

One public interest group expressed a general concern that card issuers could manipulate estimates regarding future changes in the frequency of violations and the resulting costs. However, because the burden is on the card issuer to demonstrate that its estimates have a reasonable basis, the Board believes that any manipulation will be detected.

Industry commenters requested that the cost analysis reflect the fact that not all violations result in the collection of a penalty fee. These commenters noted that a penalty fee might not be collected because, for example, the account has charged off or because the card issuer has waived the fee as a courtesy to the consumer or as part of a workout or temporary hardship arrangement. The Board agrees that—to the extent a card issuer is unable to collect a penalty fee (for example, because the account has been charged off or discharged in bankruptcy)—that fee should not be considered when determining the amount needed to cover an issuer's costs.[33] However, the Board draws a distinction between fees the card issuer is unable to collect and those the card issuer chooses not to collect (such as fees the card issuer waives). Although the waiver of penalty fees is beneficial to consumers whose fees are waived, those waivers should not result in higher fees for other consumers. Several industry commenters warned that card issuers may be less willing to offer workout or temporary hardship arrangements if the cost analysis cannot be adjusted to reflect fees waived pursuant to such arrangements; however, the Board believes the effect on workout and temporary hardship arrangements is unlikely to be substantial because those arrangements are generally used by card issuers to prevent the entire account balance from becoming a loss.[34]

Accordingly, the Board has revised comment 52(b)(1)(i)–1 to clarify that, when determining the appropriate fee amount under § 226.52(b)(1)(i), a card issuer may, at its option, consider the number of fees imposed during the relevant period that it reasonably estimates it will be unable to collect. In addition, the Board has adopted a new comment 52(b)(1)(i)–5, which clarifies that, for purposes of § 226.52(b)(1)(i), a card issuer may consider fees that it is unable to collect when determining the appropriate fee amount. Fees that the card issuer is unable to collect include fees imposed on accounts that have been charged off or discharged in bankruptcy and fees that the card issuer is required to waive in order to comply with a legal requirement—such as the Servicemembers Civil Relief Act (SCRA), 50 U.S.C. app. 501 *et seq.,* which limits the charges a card issuer may impose on an account while the accountholder is in active military service. *See* 50 U.S.C. app. 527. However, the comment also clarifies that fees that the card issuer chooses not to impose or chooses not to collect (such as fees that the card issuer chooses to waive) are not relevant for purposes of this determination.

Finally, in response to industry comments, the Board has revised comment 52(b)(1)(i)–1 to clarify that a card issuer may make a single cost determination pursuant to § 226.52(b)(1)(i) for all of its credit card portfolios or may make separate determinations for each portfolio. The Board believes that it is appropriate to provide this flexibility because violations may be more or less frequent and may result in greater or lesser costs depending on the composition of the portfolio. For example, a card issuer with a retail credit card portfolio and a general purpose credit card portfolio might experience more frequent violations or greater costs on one portfolio than on the other. Although the Board does not believe it is necessary to specifically define the term "credit card portfolio," the Board notes that, for purposes of § 226.52(b)(1)(i), this term is generally intended to

[33] The Board notes that this treatment is not inconsistent with its determination that—as discussed below—losses are not costs for purposes of the cost analysis, which is discussed below. Card issuers are not permitted to include losses in the costs incurred as a result of violations. However, when dividing those costs among the violations, the Board believes that card issuers should be permitted to exclude violations that resulted in fees the card issuer cannot collect. For example, assume that a card issuer experiences 5 million late payments and $100 million in costs as a result of those late payments (not including losses). Dividing the $100 million in costs by the 5 million late payments results in a $20 late payment fee. However, if the card issuer cannot collect 25% of the late payment fees it imposes, the card issuer will be unable to recover 25% of the costs incurred as a result of late payments. Accordingly, the $100 million in costs should be divided by the 3.75 million delinquencies for which the card issuer could have collected a fee, which results in a late payment fee of approximately $27.

[34] The Board notes that this approach is consistent with the conclusions reached by the United Kingdom's Office of Fair Trading in its statement of the principles that credit card issuers must follow in setting default charges. *See* Office of Fair Trading (United Kingdom), *Calculating Fair Default Charges in Credit Card Contracts: A Statement of the OFT's Position* (April 2006) (OFT Credit Card Statement) at 25–26 (available at *http://www.oft.gov.uk/shared_oft/reports/financial_products/oft842.pdf*). The Board is aware that a recent opinion by the Supreme Court of the United Kingdom has called into question aspects of the OFT's legal authority to regulate prices paid by consumers for banking services. *See Office of Fair Trading* v. *Abbey Nat'l Plc and Others* (Nov. 25, 2009) (available at *http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0070_Judgment.pdf*). However, this opinion does not appear to affect the OFT's authority to regulate default charges, which was the basis for the Credit Card Statement. *See* OFT Credit Card Statement at 10–17. And regardless, this question does not affect the Board's legal authority (and mandate) to regulate credit card penalty fees under new TILA Section 149. As discussed in greater detail below, the Board also believes that—notwithstanding important distinctions between the laws of the United States and the United Kingdom—the OFT's findings warrant consideration along with other relevant information. However, the Board does not find the OFT's analysis to be dispositive on any particular point.

encompass a broader range of credit card accounts than the term "type of credit card plan," which is used in the commentary to § 226.59(d). The Board understands that, for example, a general purpose credit card portfolio may contain several different types of credit card plans (such as plans that provide rewards and plans that do not). However, the Board acknowledges that there may be circumstances in which a credit card portfolio contains only one type of credit card plan (such as certain retail credit card portfolios).

C. Exclusion of Losses From Cost Analysis

Proposed comment 52(b)(1)(i)–2 clarified that, although higher rates of loss may be associated with particular violations of the terms or other requirements of an account, those losses and associated costs (such as the cost of holding reserves against losses) are excluded from the § 226.52(b)(1)(i) cost analysis. In the proposal, the Board observed that, although an account generally cannot become a loss without first becoming delinquent, delinquencies and associated losses may be caused by a variety of factors (such unemployment, illness, and divorce). The Board also stated that, based on available data, it appeared that most violations did not actually result in losses.[35] Finally, the Board expressed concern that—if card issuers were permitted to begin recovering losses and associated costs through penalty fees rather than upfront rates—transparency in credit card pricing would be reduced because, as discussed above, some consumers overestimate their ability to avoid violations and therefore may discount upfront penalty fee disclosures.

A Federal agency, a municipal consumer protection agency, and consumer groups supported the proposed exclusion of losses and associated costs from the cost analysis. However, industry commenters challenged several aspects of the Board's rationale.

First, while industry commenters generally conceded that most violations do not result in losses, they argued that the cost associated with those that do is extremely high. They further argued that, if card issuers are not permitted to recover losses through penalty fees, those losses will cause issuers to reduce credit availability or will be reflected in the upfront annual percentage rates and annual fees charged to consumers who do not pay late. The Board does not dispute that losses impose substantial costs on card issuers. However, the Board understands that, historically, most card issuers have not priced for the risk of loss through penalty fees; instead, issuers have generally priced for risk through upfront annual percentage rates and penalty rate increases.[36] Although the Credit Card Act has restricted card issuers' ability to impose penalty rate increases on existing balances, the Board believes that these restrictions were based, in part, on an understanding that pricing for risk using upfront rates rather than penalty rate increases will promote transparency and protect consumers from unanticipated increases in the cost of credit.[37] Thus, the Board believes that it would be inconsistent with the purpose of the Credit Card Act to permit card issuers to begin recovering losses and associated costs through penalty fees rather than through upfront rates.[38] Furthermore, issuers generally acknowledged that—if losses were included in the cost analysis—§ 226.52(b)(1)(i) would permit the imposition of penalty fees that are dramatically higher than those imposed today, a result which appears directly contrary to the intent of Section 149.[39]

Finally, some industry commenters argued that Congress intended to include losses in the cost analysis. One commenter noted that the reference in new TILA Section 149(c)(1) to "costs incurred by the creditor from [an] omission or violation" does not expressly exclude losses and that definitions of "cost" typically include "loss."[40] However, as discussed above, the factors in Section 149(c) are *considerations* to be taken into account by the Board when establishing standards, not the standards themselves. Furthermore, the Board notes that Section 149(c)(1) refers to "costs incurred by the creditor *from* [an] omission or violation," which could be construed to mean that it is appropriate to exclude losses where—as here—card issuers do not incur losses as a result of the overwhelming majority of violations.[41]

For the reasons discussed above, comment 52(b)(1)(i)–2 is adopted as proposed, with two revisions. First, several industry commenters suggested that, even if losses were generally excluded from the cost analysis, card issuers should be permitted to include the cost of funding delinquent balances before the account becomes a loss. However, as a general matter, the Board does not believe that such costs can be meaningfully distinguished from losses. Accordingly, comment 52(b)(1)(i)–2 has

[35] Specifically, data submitted to the Board during the comment period for the January 2009 FTC Act Rule indicated that more than 93% of accounts that were over the credit limit or delinquent *twice* in a twelve month period did not charge off during the subsequent twelve months. *See* Federal Reserve Board Docket No. R–1314: Exhibit 5, Table 1a to Comment from Oliver I. Ireland, Morrison Foerster LLP (Aug 7, 2008) (Argus Analysis) (presenting results of analysis by Argus Information & Advisory Services, LLC of historical data for consumer credit card accounts believed to represent approximately 70% of all outstanding consumer credit card balances). Furthermore, because collections generally continue after the account has been charged off, an account that has been charged off is not necessarily a total loss (although the Board understands that recoveries after an account has been charged off are generally a small fraction of the account balance). The January 2009 FTC Act Rule was issued jointly with the OTS and NCUA under the Federal Trade Commission Act to protect consumers from unfair acts or practices with respect to consumer credit card accounts. *See* 74 FR 5498 (Jan. 29, 2009).

[36] The Board notes that industry commenters generally agreed with or did not dispute the Board's understanding. However, some industry commenters suggested that some issuers may currently use penalty fees to recover losses. Also, the Board recognizes that charge card accounts generally impose an annual fee but not interest charges because the balance must be paid in full each billing cycle. As discussed below, the Board had adopted a safe harbor in § 226.52(b)(1)(ii)(C) that specifically addresses charge cards.

[37] The relevant provisions of the Credit Card Act (which are codified in TILA §§ 171 and 172) appear to be based on similar limitations imposed by the Board in the January 2009 FTC Act Rule. In that final rule, the Board reasoned that pricing for risk using upfront rates rather than penalty rate increases would promote transparency and protect consumers from unanticipated increases in the cost of credit. *See* 74 FR 5521–5528.

[38] The Board notes that the OFT reached a similar conclusion with respect to losses. *See* OFT Credit Card Statement at 1, 19–22, 25. The Board reiterates that it does not find the OFT's analysis to be dispositive. However, notwithstanding the important distinctions between the laws of the United States and the United Kingdom, the Board believes this analysis warrants consideration.

[39] Although some industry commenters suggested that only a portion of losses be included in the cost analysis, they did not provide any meaningful way to distinguish between types of losses (nor is the Board aware of any).

[40] *See e.g., Merriam-Webster's Collegiate Dictionary* at 262 (10th ed. 1995) (defining cost as, among other things, "loss or penalty incurred esp. in gaining something").

[41] Another commenter referred to language in a report issued by the Senate Committee on Banking, Housing, and Urban Affairs stating the Committee's understanding that "the Federal Reserve Board, in determining reasonable relation to cost, will take into account a number of factors, including * * * credit risk associated with both portfolio and the individual. * * * " *See* S. Rep. No. 111–16, at 7 (2009). However, this report refers to a prior version of the Credit Card Act, which would have required that fees be based *solely* on costs. *See id.* at 10 ("This section requires that penalty fees assessed to cardholders be reasonably related to the cost incurred by the card issuer.") In contrast, under the final version of the legislation, costs are one of the several considerations. *See* new TILA Section 149(c). Nevertheless, the Board notes that it has taken credit risk into consideration when implementing Section 149. Specifically, the Board believes that the safe harbors in § 226.52(b)(1)(ii) address concerns that accounts that experience multiple violations over a particular period pose a greater credit risk than accounts that experience a single violation over the same period.

been revised to clarify that the cost of funding delinquent accounts is considered a loss and is therefore excluded from the cost analysis.

Second, several industry commenters suggested that all risk management costs should be included in the cost analysis, including the cost of underwriting new accounts in order to determine the likelihood that credit extended to an applicant will result in a loss. However, while the Board agrees that, for example, costs associated with managing risk on delinquent accounts should be included in the cost analysis, the Board also believes that upfront underwriting costs cannot be categorized as costs incurred by the card issuer *from* or *as a result of* violations. Accordingly, the Board has revised comment 52(b)(1)(i)–2 to clarify that a card issuer may not include in the cost analysis costs associated with evaluating whether consumers who have not violated the terms or other requirements of an account are likely to do so in the future (such as the costs associated with underwriting new accounts). However, the comment also clarifies that, once a violation of the account terms or other requirements has occurred, the costs associated with preventing additional violations for a reasonable period of time may be included in the cost analysis.

D. Additional Guidance and Examples

Proposed comment 52(b)(1)(i)–3 clarified that, as a general matter, amounts charged to the card issuer by a third party as a result of a violation of the terms or other requirements of an account are costs incurred by the card issuer for purposes of § 226.52(b)(1)(i). For example, if a card issuer is charged a specific amount by a third party for each returned payment, that amount is a cost incurred by the card issuer as a result of returned payments. However, if the amount is charged to the card issuer by an affiliate or subsidiary of the card issuer, the card issuer must have determined for purposes of § 226.52(b)(1)(i) that the amount represents a reasonable proportion of the costs incurred by the affiliate or subsidiary as a result of the type of violation. For example, if an affiliate of a card issuer provides collection services to the card issuer for delinquent accounts, the card issuer must determine that the amount charged to the card issuer by the affiliate for such services represents a reasonable proportion of the costs incurred by the affiliate as a result of late payments. The Board did not receive significant comment on this aspect of the proposal, which is adopted as proposed (with non-substantive clarifications).

Proposed comment 52(b)(1)–1 clarified that the fact that a card issuer's penalty fees are comparable to fees assessed by other card issuers is not sufficient to satisfy the requirements of § 226.52(b)(1)(i). Instead, a card issuer must make its own determinations whether the amounts of its fees represent a reasonable proportion of the total costs incurred by the issuer. Consumer groups generally supported this clarification. Some industry commenters argued that card issuers should be permitted to rely on general industry cost data or any other reliable information for purposes of § 226.52(b)(1)(i). However, the Board believes that this would be inconsistent with new TILA Section 149(c)(1), which refers to the "costs incurred by the *creditor* from [an] omission or violation." Accordingly, this comment has been revised for clarity and redesignated as comment 52(b)(1)(i)–4 for organizational reasons but otherwise adopted as proposed.

Proposed comment 52(b)(1)(i)–4 clarified the application of § 226.52(b)(1)(i) to late payment fees. In addition to providing illustrative examples, the comment stated that, for purposes of § 226.52(b)(1)(i), the costs incurred by a card issuer as a result of late payments include the costs associated with the collection of late payments, such as the costs associated with notifying consumers of delinquencies and resolving delinquencies (including the establishment of workout and temporary hardship arrangements). Although industry commenters requested that the Board specify that a variety of costs are costs incurred as a result of late payments, those costs generally appear to be addressed by the commentary discussed above.

Consumer group commenters requested that the Board exclude from the cost analysis any collection costs unless the issuer has actually begun collection activity. However, this approach would require examining individual violations, which—for the reasons discussed above—the Board generally does not believe to be warranted.

Consumer group commenters also requested that the Board exclude from the cost analysis time spent by a customer service representative speaking with a consumer who has been charged a fee. However, the Board believes that this is a cost incurred by the card issuer as a result of a violation. Accordingly, this comment has been redesignated as comment 52(b)(1)(i)–6 for organizational purposes and adopted as proposed, except for the provision of an additional illustrative example.

Proposed comment 52(b)(1)(i)–5 clarified the application of § 226.52(b)(1)(i) to returned payment fees. The comment stated that, for purposes of § 226.52(b)(1)(i), the costs incurred by a card issuer as a result of returned payments include the costs associated with processing returned payments and reconciling the card issuer's systems and accounts to reflect returned payments as well as the costs associated with notifying the consumer of the returned payment and arranging for a new payment. The comment also provided illustrative examples. An industry commenter noted that, in some cases, payments are intentionally made with checks written on accounts with insufficient funds in order to fraudulently increase the available credit or to fraudulently create a credit balance that will be refunded to the accountholder. Accordingly, the Board has revised this comment to clarify that the costs associated with investigating potential fraud with respect to returned payments are costs incurred by the issuer as a result of returned payments. The Board did not receive any other significant comment on this aspect of the proposal. Accordingly, this comment has been redesignated as comment 52(b)(1)(i)–7 for organizational purposes and adopted as proposed, except for the provision of an additional illustrative example.

Proposed comment 52(b)(1)(i)–6 clarified the application of § 226.52(b)(1)(i) to over-the-limit fees. In addition to providing illustrative examples, the comment stated that, for purposes of § 226.52(b)(1)(i), the costs incurred by a card issuer as a result of over-the-limit transactions include the costs associated with determining whether to authorize over-the-limit transactions and the costs associated with notifying the consumer that the credit limit has been exceeded and arranging for payments to reduce the balance below the credit limit. Consumer group commenters argued that any costs associated with the card issuer's authorization system should be excluded from the cost analysis because card issuers need this system for their general business operations. However, the Board does not believe it is possible to meaningfully distinguish between the cost of authorizing and declining transactions.

Consumer groups also argued that any costs incurred by the card issuer obtaining the affirmative consent of consumers to the payment of over-the-limit transactions consistent with

§ 226.56 are not costs incurred by a card issuer as a result of over-the-limit transactions. The Board agrees and has revised the proposed comment accordingly. The Board has also added an additional illustrative example. Otherwise, this comment has been redesignated as comment 52(b)(1)(i)–8 for organizational purposes and adopted as proposed.

The Board has adopted a new comment 52(b)(1)(i)–9 clarifying the application of § 226.52(b)(1)(i) to fees charged when the card issuer declines payment on checks that access a credit card account. In addition to providing an illustrative example, the comment clarifies that the costs incurred by a card issuer as a result of a declined access check include costs associated with determining whether to decline access checks, costs associated with processing declined access checks and reconciling the card issuer's systems and accounts to reflect declined access checks, costs associated with investigating potential fraud with respect to declined access checks, and costs associated with notifying the consumer and the merchant that accepted the access check that the check has been declined.

Finally, the Board notes that consumer group commenters requested that all overhead costs be excluded from the cost analysis. Although the Board agrees that not all overhead costs are costs incurred as a result of a violation, it would not be feasible to develop a meaningful definition of "overhead" for purposes of this regulation. Instead, the Board believes that the determination of whether certain costs are incurred as a result of violations of the account terms or other requirements should be made based on all the relevant facts and circumstances.

52(b)(1)(ii) Safe Harbors

As discussed above, new TILA Section 149(e) authorizes the Board to provide amounts for penalty fees that are presumed to be reasonable and proportional to the violation. The Board acknowledges that specific safe harbor amounts cannot perfectly reflect the factors listed in new TILA Section 149(c) insofar as the costs incurred as a result of violations, the amount necessary to deter violations, and the consumer conduct associated with violations will vary depending on the issuer, the consumer, the type of violation, and other circumstances. However, as discussed above, it would not be feasible to implement new TILA Section 149 based on individualized determinations. Instead, the Board believes that establishing generally applicable safe harbors will facilitate compliance by issuers and increase consistency and predictability for consumers.

Commenters generally supported the adoption of safe harbors. Some industry commenters noted that safe harbors were necessary for smaller institutions that may lack the resources to perform the cost analysis required by § 226.52(b)(1)(i). However, comments from credit unions, small banks, a state consumer protection agency, and a municipal consumer protection agency expressed concern that, while larger issuers with the resources to conduct a cost analysis would be able to choose between relying on that analysis or on the safe harbors, smaller issuers would be forced to use the safe harbors, which would create inconsistency and bifurcate the market. However, some risk of inconsistency is inevitable because new TILA 149 does not authorize the Board to establish a single fee amount that must be used by all issuers. Furthermore, as discussed below, the Board does not believe that smaller issuers will be significantly disadvantaged by the safe harbor amounts in § 226.52(b)(1)(ii) because those amounts are generally consistent with the fees currently charged by smaller issuers.

Some industry commenters argued that, in order to promote consistency and reduce compliance burden, the Board should apply the safe harbors to all of the requirements in § 226.52(b). Specifically, these commenters argued that an issuer that complies with the safe harbors should not be required to comply with the limitations in § 226.52(b)(2) on fees that exceed the dollar amount associated with the violation and on the imposition of multiple fees based on a single event or occurrence. However, as discussed below, the Board believes that the limitations in § 226.52(b)(2) provide important protections for consumers and will not be overly burdensome for card issuers.

Accordingly, for the reasons discussed below, § 226.52(b)(1)(ii) states that, except as provided in § 226.52(b)(2), a card issuer may impose a fee for violating the terms or other requirements of an account if the dollar amount of the fee generally does not exceed one of two amounts. For the first violation of a particular type, the card issuer may impose a fee of $25. For a subsequent violation of the same type during the next six billing cycles (for example, a second late payment), the card issuer may impose a fee of $35. Both amounts may be adjusted annually by the Board to reflect changes in the Consumer Price Index. Finally, for the reasons discussed below, when a charge card issuer has not received the required payment for two or more consecutive billing cycles, the issuer may impose a fee that does not exceed 3% of the delinquent balance.

52(b)(1)(ii)(A)–(B) First and Subsequent Violations

The Board believes that, as a general matter, the safe harbor amounts in § 226.52(b)(1)(ii)(A) and (B) are reasonable and proportional to violations of the terms and other requirements of an account. As discussed below, these amounts are based on the statutory factors listed in new TILA Section 149(c) and on the Board's analysis of the data and other information discussed in the proposal and submitted by commenters. Specifically, the safe harbor amount in § 226.52(b)(1)(ii)(A) is generally intended to represent a reasonable proportion of the costs incurred by most card issuers as a result of a single violation of the terms or other requirements of an account. In contrast, the higher safe harbor amount in § 226.52(b)(1)(ii)(B) is intended to represent the increased costs incurred as a result of additional violations of the same type during the next six billing cycles as well as to address the consumer conduct that leads to such violations and to deter subsequent violations.

A. Safe Harbor Amounts

1. Penalty Fees for Credit Card Accounts

As an initial matter, the Board considered the dollar amounts of penalty fees currently charged by credit card issuers. Although credit card penalty fees appear to be approximately $36 to $38 on average, many smaller card issuers (such as credit unions and community banks) charge penalty fees of $20 to $25. As discussed above, the Board understands that—rather than basing penalty fees solely on costs and deterrence—most card issuers currently consider a number of additional factors, including the need to maintain or increase overall revenue. Nevertheless, the Board noted in the proposal that the discrepancy between the fees charged by large and small issuers suggested that—although violations of the terms or other requirements of an account likely impact different types of card issuers to different degrees—fees that are substantially lower than the current average may be sufficient to cover the costs incurred as a result of those violations and to deter such violations.

The Board requested that commenters submit relevant information that would

assist the Board in establishing a safe harbor amount or amounts for credit card penalty fees. In particular, the Board asked commenters to provide, for each type of violation of the terms or other requirements of a credit card account, data regarding the costs incurred as a result of that type of violation (itemized by the type of cost). In addition, commenters were asked to provide, if known, the dollar amounts reasonably necessary to deter violations and the methods used to determine those amounts.

In response, commenters suggested a wide variety of safe harbor amounts but relatively few provided any data supporting those suggestions. Consumer groups, a state consumer protection agency, and a municipal consumer protection agency suggested amounts ranging from $10 to $20 based on state laws (which are discussed in detail below) and the fees charged by credit unions and community banks. Credit unions, community banks, and a state attorney general suggested fees of $20 to $25. However, large issuers argued that comparisons with the fees charged by credit unions and community banks were not valid because smaller institutions have a less risky customer base and therefore incur fewer costs as a result of violations. Most large issuers declined to suggest a specific safe harbor amount, but those that did generally suggested amounts between $29 and $34 (although two large issuers suggested fees as high as $40 or $50).

The Board did not receive any data regarding the costs incurred as a result of—or the amounts necessary to deter—returned payments, over-the-limit transactions, or declined access checks. However, the Board did receive a comment providing the results of a study of the costs associated with late payments on credit card accounts issued by ten of the largest credit card issuers. According to the comment, issuers participating in the study were asked to identify operating expenses associated with handling late payments and delinquent accounts and with recovering those costs via late fee assessments. The comment stated that, based on this information, a late payment costs the participating issuers $28.40 on average.[42] The comment also provided a second figure of $32.45, which was represented as an adjusted cost estimate based on the number of assessed fees that are not recovered by the issuer.

Although these figures are generally useful in understanding the costs incurred by large issuers as a result of violations, the Board has significant concerns about aspects of this study. As an initial matter, the Board is unable to determine whether the cost information collected from the participants was accurate or consistent from issuer to issuer. Although the comment states that the cost methodologies used by the participants were reasonable, the participants presumably do not track their costs in a uniform fashion. Furthermore, it appears that some of the costs included in the study are not—in the view of the Board—costs incurred as a result of violations for purposes of § 226.52(b)(1)(i). In particular, although the comment states that losses were excluded from the study, it also states that the cost of funding balances that were eventually charged off was included. The Board believes that most or all of these funding costs should be categorized as losses for purposes of § 226.52(b)(1)(i). Finally, although it is not clear precisely how the study determined the amount of assessed fees that were not recovered for purposes of the $32.45 figure, it does appear that this amount included fees that the participating issuers chose to waive, which—as discussed above—the Board has excluded from the cost analysis. For all of these reasons, the Board believes that this study significantly overstates the fee amounts necessary to cover the costs incurred by large issuers as a result of violations, although the exact extent of the overstatement is unclear.

The same commenter also submitted the results of applying two deterrence modeling methods to data gathered from all leading credit card issuers in the United States. According to the commenter, these models estimated that fees of $28 or less have relatively little deterrent effect on late payments but that higher fees are a statistically significant contributor to sustaining lower levels of delinquent behavior. Although the Board does not have access to the data underlying these results, the significance of the $28 figure appears to be questionable based on the information provided. In addition, the Board is concerned that the results submitted by this commenter could—if accepted at face value—be used to justify late payment fees in excess of $100, which would be contrary to the intent of new TILA Section 149. While the Board questions the assumptions used to arrive at these results, they give additional support to some of the concerns that—as discussed above—prompted the Board to remove deterrence as an independent basis for setting penalty fee amounts. Nevertheless, the Board does accept that—as generally illustrated by these models—increases in the amount of penalty fees can affect the frequency of violations.[43]

2. Penalty Fees for Other Types of Accounts

The Board has also considered the dollar amounts of penalty fees charged with respect to deposit accounts and consumer credit accounts other than credit cards. As a general matter, these fees appear to be significantly lower than average credit card penalty fees, which further supports the conclusion that lower credit card penalty fees may adequately reflect the cost of violations and deter future violations. For example, according to a January 2008 report by the GAO, the average overdraft and insufficient funds fee charged by depository institutions was just over $26 per item in 2007.[44] Notably, the GAO also reported that large institutions on average charged between $4 and $5 more for overdraft and insufficient funds fees compared to smaller institutions.[45] Similarly, the Board understands that, for many home-equity lines of credit, the late payment fee, returned payment fee, and over-the-limit fee is $25 (although in some cases those fees may be set by state law).

[42] The comment emphasized that—because $28.40 is the average cost—a safe harbor based on that amount would force many issuers to perform their own cost analysis under § 226.52(b)(1)(i) or incur losses. One large issuer commented that smaller institutions would have higher costs as a result of violations because they lack economies of scale. However, comments from small institutions stated that their current fees of $20 to $25 were sufficient to cover their costs.

[43] This commenter also submitted the results of an online survey of consumers who were asked what fee amounts would or would not deter them from paying late. According to the commenter, the survey indicated that a fee of $30 to $34 was necessary to deter the majority of participants and that a fee of $50 to $54 was necessary to deter 80% of participants. Although surveys of this type are sometimes used to gauge the prices consumers may be willing to pay for retail products, the Board understands that their accuracy is limited even in that context. Furthermore, the Board is not aware of this type of survey being used to measure the deterrent effect of fees. Accordingly, the Board does not believe that it would be appropriate to give significant weight to the results of this survey.

[44] *See Bank Fees: Federal Banking Regulators Could Better Ensure That Consumers Have Required Disclosure Documents Prior to Opening Checking or Savings Accounts,* GAO Report 08–281, at 14 (January 2008) (GAO Bank Fees Report); *see also* "Consumer Overdraft Fees Increase During Recession: First-Time Phenomenon," Press release, Moebs $ervices (July 15, 2009) (Moebs 2009 Pricing Survey Press Release) (available at: *http://www.moebs.com/AboutUs/Pressreleases/tabid/58/ctl/Details/mid/380/ItemID/65/Default.aspx*) (reporting an average overdraft fee of $26).

[45] *See* GAO Bank Fees Report at 16. Another recent survey suggests that the cost difference in overdraft fees between small and large institutions may be larger than reported by the GAO. *See* Moebs 2009 Pricing Survey Press Release (reporting that banks with more than $50 billion in assets charged on average $35 per overdrawn check compared to $26 for all institutions).

However, for most closed-end mortgage loans and some home-equity lines of credit and automobile installment loans, the late payment fee is 5% of the overdue payment. This information was discussed in the proposal but was not the subject of significant comment.

3. State and Local Laws Regulating Penalty Fees

The Board has also considered state and local laws regulating penalty fees. As above, except in the case of late payment fees that are a percentage of the overdue amount, it appears that state and local laws that specifically address penalty fees generally limit those fees to amounts that are significantly lower than the current average for credit card penalty fees. For example, California law does not permit credit and charge card late payment fees unless the account is at least five days' past due and then limits the fee to an amount between $7 and $15, depending on the number of days the account is past due and whether the account was previously past due.[46] In addition, California law does not permit over-the-limit fees unless the credit limit is exceeded by the lesser of $500 or 20% of the limit and then restricts the fee to $10.[47] Massachusetts law limits delinquency charges for all open-end credit plans to the lesser of $10 or 10% of the outstanding balance and permits such fees only when the account is more than 15 days past due.[48] Maine law generally limits delinquency charges for consumer credit transactions and open-end credit plans to the lesser of $10 or 5% of the unpaid amount.[49] Finally, the Board understands some state and local laws governing late payment fees for utilities permit only fixed fee amounts (ranging between $5 and $25), while others limit the fee to a percentage of the amount past due (ranging from 1% to 10%) or some combination of the two (for example, the greater of $20 or 5% of the amount past due).

Consumer groups and a municipal consumer protection agency urged the Board to consider these types of statutes when setting safe harbor amounts. Industry commenters generally did not address these provisions. However, industry commenters did note that the Internal Revenue Service imposes penalty fees that are a percentage of the amount owed by the taxpayer. Industry commenters also noted that some state and local governments impose substantial penalty fees for speeding and other traffic infractions.

4. Safe Harbor Established by the United Kingdom

The Board has also considered the safe harbor threshold for credit card default charges established by the United Kingdom's Office of Fair Trading (OFT) in 2006. As a general matter, the OFT concluded that—under the laws and regulations of the United Kingdom—provisions in credit card agreements authorizing default charges "are open to challenge on grounds of unfairness if they have the object of raising more in revenue than is reasonably expected to be necessary to recover certain limited administrative costs incurred by the credit card issuer."[50] In order to "help encourage a swift change in market practice," the OFT stated that it would regard charges set below a monetary threshold of £12 as "either not unfair, or insufficiently detrimental to the economic interests of consumers in all the circumstances to warrant regulatory intervention at this time."[51] The OFT explained that, in establishing its threshold, it took into account "information * * * on the banks' recoverable costs includ[ing] not only direct costs but also indirect costs that have to be allocated on the basis of judgment."[52] The OFT did not, however, disclose this cost information, nor does it appear that the OFT considered the need to deter violations of the account terms or the relationship between the amount of the fee and the conduct of the cardholder (which the Board is required to do). Based on average annual exchange rates, £12 has been equivalent to approximately $18 to $24 (based on annual averages) since the OFT announced its monetary threshold in April 2006.

The Board is aware that—as noted by many industry commenters—a different regulator in the United Kingdom announced in March 2010 that it would not impose restrictions on rate increases similar to those in the Credit Card Act.[53] These commenters also noted numerous other differences between the laws of the United Kingdom and those of the United States. The Board recognizes these distinctions and does not find the OFT Credit Card Statement to be dispositive on any particular point. Indeed, the safe harbors established by the Board are substantially different than the safe harbor established by the OFT. Nevertheless, the Board believes that the OFT's findings with respect to credit card penalty fees warrant consideration, along with other factors.

5. Conclusion

Although it is not possible based on the available information to set safe harbor amounts that precisely reflect the costs incurred by a widely diverse group of card issuers and that deter the optimal number of consumers from future violations, the Board believes that, for the reasons discussed above, the safe harbor amounts in § 226.52(b)(1)(ii)(A) and (B) are generally sufficient to cover issuers' costs and to deter future violations. Based on the comments, the $25 safe harbor in § 226.52(b)(1)(ii)(A) for the first violation is sufficient to cover the costs incurred by most small issuers as a result of violations. Furthermore, the Board did not receive any information indicating that this amount would not be sufficient to cover the costs incurred by large issuers as a result of returned payments, transactions that exceed the credit limit, and declined access checks. With respect to late payments, the Board believes that large issuers generally incur fewer collection and other costs on accounts that experience a single late payment and then pay on time for the next six billing cycles than on accounts that experience multiple late payments during that period. Even if $25 is not sufficient to offset all of the costs incurred by some large issuers as a result of a single late payment, those issuers will be able to recoup any unrecovered costs through upfront annual percentage rates and other pricing strategies.

When an account experiences additional violations during the six billing cycles following the initial violation, the Board believes that the $35 safe harbor in § 226.52(b)(1)(ii)(B) will generally be sufficient to cover any increase in the costs incurred by the card issuer and will have a reasonable deterrent effect on additional violations. Furthermore, the Board believes that allowing the imposition of an increased fee in these circumstances appropriately distinguishes between consumers who engage in conduct that results in a single violation during a period and consumers who repeatedly engage in such conduct during the same period.

[46] *See* Cal. Fin. Code § 4001(a)(1)–(2).

[47] *See id.* § 4001(a)(3).

[48] *See* Mass. Ann. Laws ch. 140 § 114B.

[49] *See* Me. Rev. Stat. Ann. tit. 9–A, § 2–502(1); *see also* Minn. Stat. §§ 48.185(d), 53C.08(1)(c), and 604.113(2)(a) (generally limiting late payment fees on open-end credit plans to the greater of $5 or 5% of the amount past due if the account is more than 10 days past due and limiting returned-payment and over-the-limit fees to $30).

[50] OFT Credit Card Statement at 1.

[51] OFT Credit Card Statement at 27–28.

[52] OFT Credit Card Statement at 29.

[53] *See* Dep't for Business Innovation & Skills, *A Better Deal for Consumers: Review of the Regulation of Credit and Store Cards: Gov't Response to Consultation* (Mar. 2010) 33–35 (available at *http://www.bis.gov.uk/assets/biscore/corporate/docs/c/10–768-consumer-credit-card-consultation-response.pdf*).

Indeed, data submitted on behalf of a large credit card issuer indicates that consumers who pay late multiple times over six months generally are significantly more likely to charge off than consumers who only pay late once during the same period.

Comment 52(b)(1)(ii)–1 provides guidance regarding the application of the safe harbors in § 226.52(b)(1)(ii)(A) and (B). In addition to providing several illustrative examples, the comment clarifies that, for purposes of § 226.52(b)(1)(ii), a $35 fee may be imposed pursuant to § 226.52(b)(1)(ii)(B) if, during the six billing cycles following the billing cycle in which a violation occurred, another violation of the same type occurs. The comment further clarifies the billing cycle in which various types of violations occur for purposes of § 226.52(b)(1)(ii). For late payments, the violation occurs during the billing cycle in which the payment may first be treated as late consistent with the requirements of 12 CFR part 226 and the terms or other requirements of the account. For returned payments, the violation occurs during the billing cycle in which the payment is returned to the card issuer. For transactions that exceed the credit limit, the violation occurs during the billing cycle in which the transaction occurs or is authorized by the card issuer. Finally, a check that accesses a credit card account is declined during the billing cycle in the card issuer declines payment on the check.

This comment also clarifies the relationship between the safe harbors in § 226.52(b)(1)(ii)(A) and (B) and the substantive limitations in §§ 226.52(b)(2)(ii) and 226.56(j)(1)(i). Specifically, it clarifies that, if multiple violations are based on the same event or transaction such that § 226.52(b)(2)(ii) prohibits the card issuer from imposing more than one fee, the event or transaction constitutes a single violation for purposes of § 226.52(b)(1)(ii). Furthermore, the comment clarifies that, consistent with the limitations in § 226.56(j)(1)(i) on imposing more than one over-the-limit fee during a billing cycle, no more than one violation for exceeding an account's credit limit can occur during a single billing cycle for purposes of § 226.52(b)(1)(ii).

B. Consumer Price Index Adjustments

Section 226.52(b)(1)(i) provides for annual adjustments to the safe harbor amounts in § 226.52(b)(1)(ii)(A) and (B) to reflect changes in the Consumer Price Index. Comment 52(b)(1)(ii)–2 states that the Board will calculate each year a price level adjusted safe harbor fee using the Consumer Price Index in effect on June 1 of that year. When the cumulative change in the adjusted minimum value derived from applying the annual Consumer Price level to the current safe harbor fee amount has risen by a whole dollar, the safe harbor fee amount will be increased by $1.00. Similarly, when the cumulative change in the adjusted minimum value derived from applying the annual Consumer Price level to the current safe harbor fee amount has decreased by a whole dollar, the safe harbor fee amount will be decreased by $1.00. The comment also states that the Board will publish adjustments to the safe harbor fee.[54]

The proposed rule provided for annual adjustments based on the Consumer Price Index in § 226.52(b)(3) and comment 53(b)(3)–2. Consumer group commenters generally opposed such adjustments, arguing that changes in the Consumer Price Index will not necessarily correspond with changes in the costs incurred by issuers as a result of violations or the amount necessary to deter violations. These commenters argued that the Board should instead adjust the safe harbor amounts as appropriate through rulemaking. The Board believes that this approach would be inefficient. While the Consumer Price Index is not a perfect substitute, the Board believes that changes in the Consumer Price Index will be sufficiently similar to changes in issuers' costs and the deterrent effect of the safe harbor amounts that additional rulemaking generally will not be necessary.

Industry commenters did not object to adjustments based on the Consumer Price Index but requested that such adjustments be exempted from the right to reject in § 226.9(h). The Board agrees that, to the extent that a change in the amount of a penalty fee results from a change in the Consumer Price Index, the right to reject should not apply. The Board has revised § 226.9(c)(2)(iv)(B) accordingly.

C. Proposed Safe Harbor of 5% of Dollar Amount Associated With Violation

As an alternative to the proposed safe harbor amount, proposed § 226.52(b)(3) would have permitted card issuers to impose a penalty fee that did not exceed 5% of the dollar amount associated with the violation (up to a specific dollar amount). This approach was based on certain state laws that—as discussed above—permit penalty fees to be the greater of a dollar amount or a percentage of the amount past due. The Board intended that the specific safe harbor amount would be imposed for most violations but that card issuers could use the 5% safe harbor to impose a higher fee when the dollar amount associated with the violation was large, although that fee could not exceed a specified upper limit.[55]

However, industry commenters opposed the 5% safe harbor on the grounds that it made fee amounts difficult to predict and disclose, which would be confusing for consumers. These commenters also argued that this safe harbor was not useful because the dollar amount associated with a violation would have to be extremely high for 5% of that amount to exceed a reasonable safe harbor amount. Based on these comments and the revisions to the safe harbor discussed above, the Board agrees that the 5% safe harbor would not be sufficiently useful to justify the added complexity of including it in the final rule.

52(b)(1)(ii)(C) Charge Cards

For purposes of Regulation Z, a charge card is a credit card on an account for which no periodic rate is used to compute a finance charge. *See* § 226.2(a)(15)(iii). Charge cards are typically products where outstanding balances cannot be carried over from one billing cycle to the next and are payable in full when the periodic statement is received or at the end of each billing cycle. *See* §§ 226.5a(b)(7), 226.7(b)(12)(v)(A). In the proposal, the Board acknowledged that—in contrast to conventional credit card accounts—issuers do not use annual percentage rates to manage the risk of loss on charge card accounts. For that reason, the Board solicited comment on whether any adjustments to proposed § 226.52(b) were necessary with respect to charge card accounts.

In response, one industry commenter stated that, for charge card accounts, late payment fees play an important role in deterring further delinquency by encouraging consumers to pay delinquent balances. Because charge card issuers cannot use rate increases for this purpose, this commenter urged the Board to exempt charge cards from § 226.52(b) entirely.

[54] The approach set forth in this comment is similar to § 226.5a(b)(3), which sets a $1.00 threshold for disclosure of the minimum interest charge but provides that the threshold will be adjusted periodically to reflect changes in the Consumer Price Index.

[55] For example, if the specific safe harbor amount were $25, the safe harbor would not have permitted a card issuer to impose a fee that exceeded $25 unless the dollar amount associated with the violation was more than $500. In addition, if the upper limit were $40, a card issuer could not have imposed a fee that exceeded $40 under the proposed safe harbor even if the dollar amount associated with the violation was more than $800.

The Board does not believe that it would be consistent with the purpose of new TILA Section 149 to exempt charge cards entirely. However, the Board does believe that additional flexibility is appropriate to permit charge card issuers to deter consumers that become seriously delinquent from remaining delinquent. While the Credit Card Act generally prohibits the application of increased rates to existing credit card balances, it provides an exception when an account becomes more than 60 days delinquent. *See* TILA Section 171(b)(4); § 226.55(b)(4). This exception appears to recognize that it is appropriate to provide card issuers with more flexibility when an account becomes seriously delinquent. Because charge card issuers do not apply an annual percentage rate to the account balance and therefore cannot respond to serious delinquencies by increasing that rate, the Board believes that it is appropriate to provide additional flexibility for charge cards with respect to late payment fees. The Board is concerned that, without such flexibility, charge card issuers may not be able to effectively manage risk, which could affect the cost and availability of charge card accounts.

Accordingly, § 226.52(b)(1)(ii)(C) provides that, when a card issuer has not received the required payment for two or more consecutive billing cycles for a charge card account that requires payment of outstanding balances in full at the end of each billing cycle, the card issuer may impose a late payment fee that does not exceed three percent of the delinquent balance. Like § 226.55(b)(4), § 226.52(b)(1)(ii)(C) measures delinquency from the date on which the required payment is due. However, because charge card payments are generally due upon receipt of the periodic statement but no later than the end of the billing cycle during which the statement is received, § 226.52(b)(1)(ii)(C) applies when the required payment has not been received for two or more consecutive billing cycles (rather than 60 days from the payment due date). In these circumstances, the delinquency is unlikely to be inadvertent because the consumer will have received multiple periodic statements disclosing the amount due. The Board believes that § 226.52(b)(1)(ii)(C) generally provides charge card issuers with flexibility in managing seriously delinquent accounts that is similar to that provided in new TILA Section 171(b)(4) and § 226.55(b)(4) for traditional credit card accounts.

However, the Board believes that, even in these circumstances, it is necessary to place limits on the late payment fee in order to ensure that the amount of the fee is reasonable and proportional to the violation. As discussed above, the Board has not adopted the proposed safe harbor that would have permitted all card issuers to impose penalty fees that did not exceed 5% of the dollar amount associated with the violation. However, the Board believes that a similar approach is appropriate with respect to charge cards that are seriously delinquent. Although a late payment fee equal to 5% of the delinquent amount generally would not have been meaningful for conventional credit cards because the required payments for such accounts are typically a small percentage of the account balance, charge cards typically require payment of the full balance each billing cycle. Thus, for charge card accounts, a fee that equals a percentage of the delinquent amount would be meaningful. However, the Board is concerned that a late payment fee that equals 5% of the delinquent balance would exceed the amount necessary for charge card issuers to effectively manage accounts that becomes seriously delinquent. Accordingly, because the Board understands that a late payment fee of 3% of the delinquent amount is currently sufficient for this purpose, the Board has adopted that standard in § 226.52(b)(1)(ii)(C).

Comment 52(b)(1)(ii)–3 clarifies that, for purposes of § 226.52(b)(1)(ii)(C), the delinquent balance is any previously billed amount that remains unpaid at the time the late payment fee is imposed pursuant to § 226.52(b)(1)(ii)(C). For example, assume that a charge card issuer requires payment of outstanding balances in full at the end of each billing cycle and that the billing cycles for the account begin on the first day of the month and end on the last day of the month. At the end of the June billing cycle, the account has a balance of $1,000. On July 5, the card issuer provides a periodic statement disclosing the $1,000 balance consistent with § 226.7. During the July billing cycle, the account is used for $300 in transactions, increasing the balance to $1,300. At the end of the July billing cycle, no payment has been received and the card issuer imposes a $25 late payment fee consistent with § 226.52(b)(1)(ii)(A). On August 5, the card issuer provides a periodic statement disclosing the $1,325 balance consistent with § 226.7. During the August billing cycle, the account is used for $200 in transactions, increasing the balance to $1,525. At the end of the August billing cycle, no payment has been received. Consistent with § 226.52(b)(1)(ii)(C), the card issuer may impose a late payment fee of $40, which is 3% of the $1,325 balance that was due at the end of the August billing cycle. However, § 226.52(b)(1)(ii)(C) does not permit the card issuer to include the $200 in transactions that occurred during the August billing cycle.

Comment 52(b)(1)(ii)–3 also clarifies that, consistent with § 226.52(b)(2)(ii), a charge card issuer that imposes a fee pursuant to § 226.52(b)(1)(ii)(C) with respect to a late payment may not impose a fee pursuant to § 226.52(b)(1)(ii)(B) with respect to the same late payment. Thus, in the example discussed above, the charge card issuer would be prohibited from imposing the $40 fee pursuant to § 226.52(b)(1)(ii)(C) and a $35 fee pursuant to § 226.52(b)(1)(ii)(B) based on the consumer's failure to pay the $1,325 balance by the end of the August billing cycle.

52(b)(2) Prohibited Fees

Section 226.52(b)(2) prohibits credit card penalty fees that the Board believes to be inconsistent with new TILA Section 149. In particular, these prohibitions are intended to ensure that—consistent with new TILA Section 149(c)(3)—penalty fees are generally reasonable and proportional to the conduct of the cardholder.

52(b)(2)(i) Fees That Exceed Dollar Amount Associated With Violation

Section 226.52(b)(2)(i)(A) prohibits fees based on violations of the terms or other requirements of an account that exceed the dollar amount associated with the violation. In the proposal, the Board stated that this prohibition would be consistent with Congress' intent to prohibit penalty fees that are not reasonable and proportional to the violation. Specifically, the Board observed that penalty fees that exceed the dollar amount associated with the violation do not appear to be proportional to the consumer conduct that resulted in the violation. For example, the Board stated its belief that Congress did not intend to permit issuers to impose a $35 over-the-limit fee when a consumer has exceeded the credit limit by $5.

Comments from individual consumers, consumer groups, and a state attorney general supported the proposed limitation, although some consumer groups suggested that a more stringent limitation—such as 50% of the dollar amount associated with the violation—was warranted for violations involving substantial dollar amounts.

These commenters noted that, if the dollar amount associated with a violation was $100, § 226.52(b)(2)(i)(A) would permit a card issuer to impose a penalty fee of $100. However, the proposed limitation was intended to address fees imposed for violations involving relatively small dollar amounts. To the extent that a violation involves a dollar amount that exceeds the applicable safe harbor in § 226.52(b)(1)(ii), § 226.52(b)(1) would prevent card issuers from imposing unreasonable and disproportionate fees by requiring that a fee that exceeds the applicable safe harbor represent a reasonable proportion of the issuer's costs.

Industry commenters opposed this aspect of the proposed rule on the grounds that, when the dollar amount associated with a violation is small, it could limit the penalty fee to an amount that is neither sufficient to cover the issuer's costs nor to deter future violations. The Board acknowledges that a card issuer could incur costs as a result of a violation that exceed the dollar amount associated with that violation. However, as noted in the proposal, the Board does not believe this will be the case for most violations. Furthermore, to the extent card issuers cannot recover all of their costs when a violation involves a small dollar amount, this limitation will encourage them either to undertake efforts to reduce the costs incurred as a result of violations that involve small dollar amounts or to build those costs into upfront rates, which will result in greater transparency for consumers regarding the cost of using their credit card accounts.

Furthermore, the Board believes that violations involving small dollar amounts are more likely to be inadvertent and therefore the need for deterrence is less pronounced. In addition, the Board believes that consumers are unlikely to change their behavior in reliance on this limitation. Penalty fees will still have a deterrent effect when violations involve small dollar amounts because a card issuer will be permitted to impose a fee that equals the dollar amount associated with the violation (so long as that fee is otherwise consistent with § 226.52(b)). *See* examples in comment 52(b)(2)(i)–1 through –3.

Industry commenters also argued that the proposed rule would require card issuers to charge individualized penalty fees because the amount of the fee is tied to the dollar amount associated with the particular violation. However, unlike individualized consideration of cost, deterrence, or consumer conduct, § 226.52(b)(2)(i)(A) requires a mathematical determination that issuers should generally be able to program their systems to perform automatically. Thus, although § 226.52(b)(2)(i)(A) may require card issuers to incur substantial programming costs at the outset, the Board does not believe that—once this programming is complete—compliance with § 226.52(b)(2)(i)(A) will be overly burdensome. For these reasons, the Board has adopted § 226.52(b)(2)(i)(A) as proposed.

As discussed below, § 226.52(b)(2)(i)(B) and the commentary to § 226.52(b)(2)(i) provide guidance regarding the dollar amounts associated with specific violations. Consistent with the intent of § 226.52(b)(2)(i), the Board generally defines the dollar amount associated with a violation in terms of the consumer conduct that resulted in the violation, rather than the cost to the issuer or the need for deterrence.

A. Dollar Amount Associated With Late Payments

As proposed, comment 52(b)(2)(i)–1 clarified that that the dollar amount associated with a late payment is the amount of the required minimum periodic payment that was not received on or before the payment due date. Thus, for example, a card issuer would be prohibited from charging a late payment fee of $39 based on a consumer's failure to make a $15 required minimum periodic payment by the payment due date. Instead, the maximum late payment fee permitted under § 226.52(b)(2)(i)(A) would be $15.

Consumer group commenters supported the proposed comment. In contrast, industry commenters argued that the dollar amount associated with a late payment is the outstanding balance on the account because that is the amount the issuer stands to lose if the delinquency continues and the account eventually becomes a loss. However, as discussed above, relatively few delinquencies result in losses. Furthermore, the violation giving rise to a late payment fee is the consumer's failure to make the required minimum periodic payment by the applicable payment due date. Accordingly, the Board continues to believe that, for purposes of § 226.52(b)(2)(i), the dollar amount associated with a late payment is the amount of the required minimum periodic payment on which the late payment fee is based.

Industry commenters also requested clarification regarding the application of proposed comment 52(b)(2)(i)–1 in circumstances where a payment that is less than the required minimum periodic payment is received on or prior to the payment due date. The Board has revised the proposed comment in order to clarify that, in these circumstances, the dollar amount associated with the late payment is the full amount of the required minimum periodic payment, rather than the unpaid portion. An illustrative example is provided in comment 52(b)(2)(i)–1.ii.

One industry commenter requested that issuers be provided with flexibility to base the late payment fee on either the required minimum payment for the billing cycle in which the late payment fee is imposed or the required minimum periodic payment for the prior cycle. The Board is concerned that this approach could enable issuers to maximize the amount of the late payment fee by delaying imposition of the fee until a new billing cycle has begun and a larger minimum payment is due.[56] The Board does not believe this outcome would be consistent with the purpose of new TILA Section 149 and § 226.52(b)(2)(i). However, the Board understands that, because of the requirement in § 226.5(b)(2)(ii)(A) that credit card periodic statements be mailed or delivered at least 21 days prior to the payment due date, issuers must set payment due dates near the end of the billing cycle. As a result, there may circumstances where a late payment fee is not imposed until after a new billing cycle has begun. Accordingly, the Board has revised comment 52(b)(2)(i)–1 to clarify that, in such cases, the card issuer must base the late payment fee on the required minimum periodic payment due immediately prior to assessment of the late payment fee. An illustrative example is provided in comment 52(b)(2)(i)–1.iii.

B. Dollar Amount Associated With Returned Payments

Proposed comment 52(b)(2)(i)–2 clarified that, for purposes of § 226.52(b)(2)(i)(A), the dollar amount associated with a returned payment is the amount of the required minimum periodic payment due during the billing

[56] For example, assume that the billing cycles for an account begin on the first day of the month and end on the last day of the month and that the required minimum periodic payment is due on the twenty-eighth day of each month. A $15 minimum payment is due on September 28. If, on September 29, no payment has been received, the card issuer could have an incentive to wait until the October billing cycle has begun and the minimum payment for the October cycle has been calculated. Because—under the minimum payment formulas used by some issuers—the minimum payment for the October cycle would include the $15 payment for the September cycle as well as the amount due for October, a late payment fee based on the October minimum payment would be higher than a fee based on the September payment.

cycle in which the payment is returned to the card issuer. Consumer group commenters supported the proposed comment. In contrast, industry commenters stated that the dollar amount associated with a returned payment should be the amount of the returned payment. The Board considered this approach in the proposed rule. However, the Board was concerned that some returned payments may substantially exceed the amount of the required minimum periodic payment, which would result in § 226.52(b)(2)(i)(A) permitting a returned payment fee that substantially exceeds the late payment fee. For example, if the required minimum periodic payment is $20 and the consumer makes a $100 payment that is returned, this application of § 226.52(b)(2)(i)(A) would have limited the late payment fee to $20 but permitted a $100 returned payment fee. In addition to being anomalous, this result would be inconsistent with the intent of new TILA Section 149. Accordingly, the Board continues to believe that the better approach is to define the dollar amount associated with a returned payment as the required minimum periodic payment due when the payment is returned.

In the proposal, the Board recognized that there may be circumstances in which a payment that is received shortly after a payment due date is not returned until the following billing cycle. In those circumstances, proposed comment 52(b)(2)(i)–2 clarified that the issuer was permitted to base the returned payment fee on the minimum payment due during the billing cycle in which the fee was imposed. For example, assume that the billing cycles for an account begin on the first day of the month and end on the last day of the month and that the payment due date is the twenty-fifth day of the month. A minimum payment of $20 is due on March 25. The card issuer receives a check for $100 on March 31, which is returned to the card issuer for insufficient funds on April 2. The minimum payment due on April 25 is $30. Proposed comment 226.52(b)(2)(i)–2 clarified that, for purposes of § 226.52(b)(2)(i), the dollar amount associated with the returned payment was the minimum payment for the April billing cycle ($30), rather than the minimum payment for the March cycle ($20).

However, one industry commenter noted that the Board's proposed approach could result in consumer confusion because—as illustrated in the prior example—consumers could receive significantly different returned payment fees depending on whether the payment was returned on the last day of a billing cycle or on the first day of the next billing cycle. Furthermore, the Board's proposed guidance regarding the dollar amount associated with returned payment fees is inconsistent with the final guidance in comment 226.52(b)(2)(i)–1, which ties the amount of the late payment fee to the required minimum payment due immediately prior to assessment of the fee. Accordingly, consistent with comment 226.52(b)(2)(i)–1, the Board has revised comment 226.52(b)(2)(i)–2 to clarify that, for purposes of § 226.52(b)(2)(i), the dollar amount associated with a returned payment is the amount of the required minimum periodic payment due immediately prior to the date on which the payment is returned to the card issuer.

Proposed comment 52(b)(2)(i)–2 also clarified that, if a payment has been returned and is submitted again for payment by the card issuer, there is no separate or additional dollar amount associated with a subsequent return of that payment. Thus, § 226.52(b)(2)(i)(B) would prohibit a card issuer from imposing an additional returned payment fee in these circumstances. The Board stated that it would be inconsistent with the consumer conduct factor in new TILA Section 149(c)(3) to permit a card issuer to generate additional returned payment fees by resubmitting a returned payment because resubmission does not involve any additional conduct by the consumer.[57] Commenters generally supported this aspect of the proposal, which is adopted as proposed.

Industry commenters requested guidance regarding a variety of other circumstances involving returned payments. Accordingly, the Board has revised comment 52(b)(2)(i)–2 to provide additional examples illustrating the application of § 226.52(b)(2)(i).

C. Dollar Amount Associated With Extensions of Credit in Excess of Credit Limit

Proposed comment 52(b)(2)(i)–3 clarified that the dollar amount associated with extensions of credit in excess of the credit limit is the total amount of credit extended by the card issuer in excess of that limit as of the date on which the over-the-limit fee is imposed. The comment further clarified that, although § 226.56(j)(1)(i) prohibits a card issuer from imposing more than one over-the-limit fee per billing cycle, the card issuer may choose the date during the billing cycle on which to impose an over-the-limit fee.[58]

A consumer group commenter expressed concern that permitting issuers to choose the date on which an over-the-limit fee is imposed would lead to manipulation. In contrast, an industry commenter requested that card issuers be provided with the flexibility to impose an over-the-limit fee at the end of a billing cycle based on the amount the account was over the credit limit on any day during that cycle. The Board understands that, for operational reasons, some issuers may prefer to wait until the end of the billing cycle to impose an over-the-limit fee. Furthermore, the Board believes that, in these circumstances, it is consistent with the intent of § 226.52(b)(2)(i) to permit the card issuer to base the amount of the over-the-limit fee on the total amount by which the account balance exceed the credit limit during the billing cycle (subject to the limitations in § 226.52(b)(1)). The Board has revised comment 52(b)(2)(i)–3 accordingly.

D. Dollar Amounts Associated With Other Types of Violations

Section 226.52(b)(2)(i)(B) prohibits the imposition of penalty fees in circumstances where there is no dollar amount associated with the violation. As discussed below, proposed § 226.52(b)(2)(i)(B) listed specific circumstances in which a fee would be prohibited because there was no dollar amount associated with the violation.

1. Declined Transaction Fees

Proposed § 226.52(b)(2)(i)(B)(*1*) specifically prohibited a card issuer from imposing a fee based on a transaction that the issuer declined to authorize. Although the imposition of fees based on declined transactions does not appear to be widespread at present, the Board believes that—given the restrictions on the imposition of over-the-limit fees in §§ 226.52(b) and

[57] Although this concern could also be addressed under the prohibition on multiple fees based on a single event or transaction in § 226.52(b)(2)(ii), that provision permits issuers to comply by imposing no more than one penalty fee per billing cycle. Thus, if imposition of an additional returned payment fee were not prohibited under § 226.52(b)(2)(i), the card issuer could impose that fee by resubmitting a payment that is returned late in a billing cycle immediately after the start of the next cycle.

[58] The Board considered whether the dollar amount associated with extensions of credit in excess of the credit limit should be the total amount of credit extended by the card issuer in excess of that limit as of the last day of the billing cycle. However, in the February 2010 Regulation Z Rule, the Board determined with respect to § 226.56(j)(1) that this approach could delay the generation and mailing of the periodic statement, thereby impeding issuers' ability to comply with the 21-day requirement for mailing statements in advance of the payment due date.

226.56—it is important to address this issue in this rulemaking. A card issuer may decline to authorize a transaction because, for example, the transaction would have exceeded the credit limit for the account. Unlike over-the-limit transactions, however, declined transactions do not result in an extension of credit. Thus, there does not appear to be any dollar amount associated with a declined transaction.

In addition, it does not appear that the imposition of a fee for a declined transaction can be justified based on the costs incurred by the card issuer. Unlike returned payments, it is not necessary for a card issuer to incur costs reconciling its systems or arranging for a new payment when a transaction is declined. Furthermore, the Board understands that card issuers generally use a single automated system for determining whether transactions should be authorized or declined. Thus, to the extent that card issuers incur costs designing and administering such systems, they are permitted to recover those costs through over-the-limit fees.

Comments from a federal agency, individual consumers, consumer groups, and a municipal consumer protection agency supported the proposed prohibition on declined transaction fees. As one commenter noted, permitting a card issuer to impose a declined transaction fee would undermine the limitations in new TILA Section 127(k) and § 226.56 by allowing a card issuer to charge a consumer who has declined to authorize the payment of transactions that exceed the credit limit a fee when such transactions are declined.

Some industry commenters opposed § 226.52(b)(2)(i)(B)(*1*), arguing that card issuers incur some costs every time a credit card purchase is submitted for authorization. However, as discussed above, these costs are not unique to declined transactions. Furthermore, one industry commenter conceded that these costs were minimal. Accordingly, § 226.52(b)(2)(i)(B)(*1*) is adopted as proposed.

Several industry commenters requested clarification regarding the dollar amount associated with returning or declining payment of a check that accesses a credit card account because, for example, the transaction would have exceeded the account's credit limit, the account had charged off, or another valid reason.[59] Although the imposition of a fee for a declined access check is similar in some respects to the imposition of a fee for a transaction that the issuer declines to authorize, the Board understands that, unlike other declined transactions, card issuers incur significant costs as a direct result of declining payment on an access check, including the cost of communicating with the merchant or other party that received the check from the consumer. Accordingly, comment 52(b)(2)(i)–4 clarifies that, for purposes of § 226.52(b)(2)(i), the dollar amount associated with a declined access check is the amount of the check. Thus, § 226.52(b)(2)(i)(A) prohibits a card issuer from imposing a fee for a declined access check that exceeds the amount of that check. For example, assume that an access check is used as payment for a $50 transaction, but payment on the check is declined by the card issuer because the transaction would have exceeded the credit limit for the account. For purposes of § 226.52(b)(2)(i), the dollar amount associated with the declined access check is the amount of the check ($50). Thus, § 226.52(b)(2)(i)(A) prohibits the card issuer from imposing a fee that exceeds $50. However, the amount of this fee must also comply with the cost standard in § 226.52(b)(1)(i) or the safe harbors in § 226.52(b)(1)(ii).

2. Inactivity and Closed Account Fees

Proposed § 226.52(b)(2)(i)(B)(*2*) and (*3*) specifically prohibited card issuers from imposing a penalty fee based on, respectively, account inactivity and the closure or termination of an account. The Board believes that these prohibitions are warranted because there does not appear to be any dollar amount associated with this consumer conduct.

As with the prohibition on declined transaction fees, proposed § 226.52(b)(2)(i)(B)(*2*) and (*3*) were supported by a federal agency, individual consumers, consumer groups, and a municipal consumer protection agency but opposed by industry commenters. Industry commenters argued that card issuers receive less revenue from accounts that are not used for a significant number of transactions or are inactive or closed and that these fees cover the cost of administering such accounts (such as providing periodic statements and other required disclosures). However, because card issuers incur these costs with respect to all accounts, the Board does not believe that they constitute a dollar amount associated with a violation. Furthermore, to the extent that an inactive or closed account has a balance, these costs may be recovered through application of an annual percentage rate.[60] Accordingly, § 226.52(b)(2)(i)(B)(*2*) and (*3*) are adopted as proposed.

In response to requests from commenters, the Board has adopted comments 52(b)(2)(i)–5 and –6, which clarify the application of § 226.52(b)(2)(i)(B)(*2*) and (*3*). Comment 52(b)(2)(i)–5 clarifies that § 226.52(b)(2)(i)(B)(*2*) prohibits a card issuer from imposing a fee based on account inactivity (including the consumer's failure to use the account for a particular number or dollar amount of transactions or a particular type of transaction). For example, § 226.52(b)(2)(i)(B)(*2*) prohibits a card issuer from imposing a $50 fee when a consumer fails to use the account for $2,000 in purchases over the course of a year.

Consumer groups and individual consumers requested that the Board clarify that a card issuer cannot circumvent this prohibition by, for example, imposing a $50 annual fee on all accounts but waiving the fee if the consumer uses the account for $2,000 in purchases over the course of a year. In contrast, industry commenters argued that such arrangements should be permitted because they are no different than "cash back" rewards and other incentives provided to encourage consumers to use their accounts. Unlike other types of incentives, however, this arrangement is inconsistent with the intent of § 226.52(b)(2)(i)(B)(*2*) because *only* consumers who do not engage in the requisite level of account activity are ultimately responsible for the fee. Thus, in these circumstances, there is no meaningful distinction between the annual fee and an inactivity fee. Accordingly, comment 52(b)(2)(i)–5 clarifies that this type of arrangement is prohibited. The Board notes that this guidance should not be construed as prohibiting "cash back" rewards or similar incentives commonly offered by card issuers to encourage account usage.

The Board has also adopted comment 52(b)(2)(i)–6, which clarifies the application of § 226.52(b)(2)(i)(B)(*3*). Specifically, this comment clarifies that § 226.52(b)(2)(i)(B)(*3*) prohibits card issuers from imposing a one-time fee on a consumer who closes his or her

[59] The Board understands that, in these circumstances, an access check may described as "returned" or "declined." For clarity and consistency, the Board has used the term "declined access check." However, no substantive distinction is intended.

[60] Industry commenters also argued that inactivity and closed account fees should not be treated as penalty fees because the consumer has not violated the terms of the cardholder agreement by failing to use the account for a certain amount of transactions or by closing the account. However, as discussed above with respect to comment 52(b)–1, the Board believes that these fees are properly subject to § 226.52(b) because they are fees imposed for violating other requirements of the account.

account or from imposing a periodic fee—such as an annual fee, a monthly maintenance fee, or a closed account fee—after an account is closed if that fee was not imposed prior to the closure or termination (even if the fee was disclosed prior to closure or termination). The comment further clarifies that card issuers are prohibited from increasing a periodic fee after an account is closed or terminated but may continue to impose a periodic fee that was imposed before closure or termination.

52(b)(2)(ii) Multiple Fees Based On a Single Event or Transaction

As proposed, § 226.52(b)(2)(ii) prohibited card issuers from imposing more than one penalty fee based on a single event or transaction, although issuers were permitted to comply with this requirement by imposing no more than one penalty fee during a billing cycle. The Board believes that imposing multiple fees based on a single event or transaction is unreasonable and disproportionate to the conduct of the consumer because the same conduct may result in a single violation or multiple violations, depending on how the card issuer categorizes the conduct or on circumstances that may not be in the control of the consumer. For example, if a consumer submits a payment that is returned for insufficient funds or for other reasons, the consumer should not be charged both a returned payment fee and a late payment fee. Similarly, in these circumstances, it does not appear that multiple fees are reasonably necessary to deter the single event or transaction.

Individual consumers, consumer groups, and a state attorney general supported this aspect of the proposal, as did one credit union. However, industry commenters generally opposed this limitation, arguing that it would prevent full recovery of costs, undermine deterrence, and create operational difficulties. As discussed in the proposal, the Board understands that a card issuer may incur greater costs as a result of an event or transaction that causes multiple violations than an event or transaction that causes a single violation. Using the example above, assume that the card issuer incurs costs as a result of the late payment and costs as a result of the returned payment. If the card issuer imposes a late payment fee, § 226.52(b)(2)(ii) prohibits the issuer from recovering the costs incurred as a result of the returned payment by also charging a returned payment fee. However, the Board believes that § 226.52(b)(2)(ii) will only apply in a relatively limited number of circumstances. Furthermore, as discussed above with respect to § 226.52(b)(2)(i), any costs that are not recovered as a result of the application of § 226.52(b)(2)(ii) can instead be recovered through upfront rates or other pricing strategies.

Furthermore, because § 226.52(b)(2)(ii) generally addresses circumstances in which a single act or omission by a consumer results in multiple violations, the Board believes that imposition of a single fee will generally be sufficient to deter such consumer conduct in the future. Finally, in order to reduce the operational burden on card issuers of determining whether multiple violations are caused by a single event or transaction, § 226.52(b)(2)(ii) permits a card issuer to comply by charging no more than one penalty fee per billing cycle. The Board believes that this approach generally provides at least the same degree of protection for consumers as prohibiting multiple fees based on a single event or transaction because fees imposed in different billing cycles will generally be caused by different events or transactions. Accordingly, § 226.52(b)(2)(ii) is adopted as proposed.

Comment 52(b)(2)(ii)–1 provides additional examples of circumstances where multiple penalty fees would be prohibited, as well as examples of circumstances where multiple fees would be permitted. For example, assume that the required minimum periodic payment due on March 25 is $20. On March 25, the card issuer receives a check for $50, but the check is returned for insufficient funds on March 27. The comment clarifies that, consistent with §§ 226.52(b)(1)(ii)(A) and (b)(2)(i)(A), the card issuer may impose a late payment fee of $25 or a returned payment fee of $25. However, the comment also clarifies that § 226.52(b)(2)(ii) prohibits the card issuer from imposing both fees because those fees would be based on a single event or transaction.

The comment provides another example based on the same facts, except that the card issuer receives the $50 check on March 27 and the check is returned for insufficient funds on March 29. The comment clarifies that, as above, § 226.52(b)(2)(ii) prohibits the card issuer from imposing both fees because those fees would be based on a single event or transaction. Industry commenters objected to this example, arguing that—because the payment was late before it was returned—the violations were not based on the same event or transaction. However, as discussed above, § 226.52(b)(2)(ii) is intended to prevent the imposition of multiple fees based on a single act or omission by a consumer. In light of this purpose, the Board believes it would be anomalous for a consumer whose payment is received on the payment due date and then returned to be charged a single fee, while a consumer whose payment is received the following day and then returned to be charged two fees.

Industry commenters also requested that the Board clarify the application of § 226.52(b)(2)(ii) in a number of additional scenarios. Accordingly, the Board has revised comment 52(b)(2)(ii)–1 to provide additional illustrative examples. Otherwise, the comment is adopted as proposed.

Section 226.56 Requirements for Over-the-Limit Transactions

Section 226.56(e)(1)(i) provides that, in the notice informing consumers that their affirmative consent (or opt-in) is required for the card issuer to pay over-the-limit transactions, the issuer must disclose the dollar amount of any fees or charges assessed by the issuer on a consumer's account for an over-the-limit transaction. Model language is provided in Model Forms G–25(A) and G–25(B).

Comment 56(e)–1 states that, if the amount of an over-the-limit fee may vary, such as based on the amount of the over-the-limit transaction, the card issuer may indicate that the consumer may be assessed a fee "up to" the maximum fee. For the reasons discussed below with respect to Model Forms G–25(A) and G–25(B), the Board has amended comment 56(e)–1 to refer to those model forms for guidance on how to disclose the amount of the over-the-limit fee consistent with the substantive restrictions in proposed § 226.52(b).

In addition, because § 226.52(b) imposes additional substantive limitations on over-the-limit fees, the Board has adopted a new comment 56(j)–6, which provides a cross-reference to § 226.52(b). The Board did not receive any significant comment on these aspects of the proposal.

Section 226.59 Reevaluation of Rate Increases

As discussed in the supplementary information to § 226.9(c)(2) and (g), the Credit Card Act added new TILA Section 148, which requires creditors that increase an annual percentage rate applicable to a credit card account under an open-end consumer credit plan, based on factors including the credit risk of the consumer, market conditions, or other factors, to consider changes in such factors in subsequently determining whether to reduce the annual percentage rate. Creditors are

required to maintain reasonable methodologies for assessing these factors. The statute also sets forth a timing requirement for this review. Specifically, at least once every six months, creditors are required to review accounts as to which the annual percentage rate has been increased to assess whether these factors have changed. New TILA Section 148 is effective August 22, 2010 but requires that creditors review accounts on which an annual percentage rate has been increased since January 1, 2009.

New TILA Section 148 requires creditors to reduce the annual percentage rate that was previously increased if a reduction is "indicated" by the review. However, new TILA Section 148(c) expressly provides that no specific amount of reduction in the rate is required. The Board is implementing the substantive requirements of new TILA Section 148 in new § 226.59.

As discussed above, in addition to these substantive requirements, TILA Section 148 also requires creditors to disclose the reasons for an annual percentage rate increase applicable to a credit card under an open-end consumer credit plan in the notice required to be provided 45 days in advance of that increase. The Board is implementing the notice requirements of new TILA Section 148 in § 226.9(c)(2) and (g), which are discussed in the supplementary information to § 226.9.

The Board proposed to apply § 226.59 to "credit card accounts under an open-end (not home-secured) consumer credit plan" as defined in § 226.2(a)(15), consistent with the approach the Board has taken to other provisions of the Credit Card Act that apply to credit card accounts. The Board received no comments on this aspect of the proposal and therefore § 226.59 as adopted applies to credit card accounts under an open-end (not home-secured) consumer credit plan. Therefore, home-equity lines of credit accessed by credit cards and overdraft lines of credit accessed by a debit card are not subject to the new substantive requirements regarding reevaluation of rate increases.

59(a) General Rule

59(a)(1) Evaluation of Increased Rate

Section 226.59(a) of the March 2010 Regulation Z Proposal set forth the general rule regarding the reevaluation of rate increases. Proposed § 226.59(a)(1) generally mirrored the statutory language of TILA Section 148 and stated that if a card issuer increases an annual percentage rate that applies to a credit card account under an open-end (not home-secured) consumer credit plan, based on the credit risk of the consumer, market conditions, or other factors, or increased such a rate on or after January 1, 2009, the card issuer must review changes in such factors and, if appropriate based on its review of such factors, reduce the annual percentage rate applicable to the account.

As discussed below, in other portions of proposed § 226.59 the Board set forth more specific guidance on the factors that must be considered when conducting the review required under § 226.59(a)(1), as well as on the policies and procedures that an issuer must maintain for conducting this evaluation. The Board received a number of comments on these specific aspects of the proposal, but no significant comment on the general rule set forth in § 226.59(a)(1). Accordingly, the Board is adopting § 226.59(a)(1) generally as proposed, with two technical revisions for clarity. As adopted, § 226.59(a)(1)(i) expressly cross-references the guidance regarding factors set forth in paragraph § 226.59(d). In addition, the Board has made one technical amendment to the title of the paragraph.

Proposed § 226.59(a)(1) would have limited the obligation to reevaluate rate increases to those increases for which 45 days' advance notice is required under § 226.9(c)(2) or (g). This limitation was proposed using the Board's authority under TILA Section 105(a) to provide for adjustments and exceptions for any class of transactions as necessary to effectuate the purposes of TILA. 15 U.S.C. 1604(a). In the proposal, the Board noted that this limitation is consistent with the approach Congress adopted in new TILA Section 171(b), which sets forth the exceptions to the 45-day notice requirement for rate increases and significant changes in terms. Several industry commenters stated that this limitation was appropriate and should be retained in the final rule, while the Board received no comments opposing this aspect of the proposal.

The Board believes that Congress did not intend for card issuers to have to reevaluate rate increases in those circumstances where no advance notice is required, for example, rate increases due to fluctuations in the index for a properly-disclosed variable rate plan or rate increases due to the expiration of a properly-disclosed introductory or promotional rate. The Board also notes that creditors do not consider factors in connection with the expiration of a promotional rate or an increase in a variable rate due to fluctuations in the index on which that rate is based. Thus, the Board continues to believe that coverage of such rate increases by § 226.59 would be inconsistent with the purposes of new TILA Section 148. Therefore, the requirements of § 226.59 do not apply to rate increases for which 45 days' advance notice is not required.

The proposal included several comments intended to clarify the scope of proposed § 226.59(a)(1). Proposed comment 59(a)–1 clarified that § 226.59(a) applies both to increases in annual percentage rates imposed on a consumer's account based on circumstances specific to that consumer, such as changes in the consumer's creditworthiness, and to increases in annual percentage rates applied to the account due to factors such as changes in market conditions or the issuer's cost of funds. The Board noted that this is consistent with the intent of TILA Section 148, which is broad in scope and specifically notes "market conditions" as a factor for which rate increases need to be reevaluated. The Board received no comments on proposed comment 59(a)–1.

Accordingly, the Board is adopting proposed comment 59(a)–1 as new comment 59(a)(1)–1. The Board has revised comment 59(a)(1)–1 from the proposal to clarify the applicability of § 226.59(a) to increases in annual percentage rates imposed due to factors that are not specific to the consumer. The comment as adopted states in part that § 226.59(a) applies to increases in annual percentage rates imposed based on factors that are not specific to the consumer, and includes changes in market conditions or the issuer's cost of funds as examples of such factors that are not consumer-specific. This list of examples is not intended to be exhaustive and there may be other factors that are not consumer-specific on which rate increases that would trigger the requirements of § 226.59 could be based.

Proposed comment 59(a)–2 clarified that a card issuer must review changes in factors under § 226.59(a) only if the increased rate is actually imposed on the consumer's account. For example, the proposed comment provided that if a card issuer increases the penalty rate applicable to a consumer's credit card but the consumer's account has no balances that are currently subject to the penalty rate, the card issuer is required to provide a notice pursuant to § 226.9(c)(2) of the change in terms, but the requirements of § 226.59 do not apply. If the consumer's actions later trigger application of the penalty rate, the card issuer must provide 45 days' advance notice pursuant to § 226.9(g) and must, upon imposition of the penalty rate, begin to periodically review and consider factors to

determine whether a rate reduction is appropriate under § 226.59. The Board noted that, until an increased rate is imposed on the consumer's account, the consumer incurs no costs associated with that increased rate. In addition, the Credit Card Act and Regulation Z contain additional protections for consumers against prospective rate increases, including the general prohibition on increasing the rate applicable to an outstanding balance set forth in § 226.55 and the 45-day advance notice requirements in § 226.9(c)(2) and (g). Finally, once an increased rate is imposed on the consumer's account, the card issuer would then be subject to the requirements of § 226.59. The Board received no significant comment on proposed comment 59(a)–2, which is adopted as comment 59(a)(1)–2.

Proposed comment 59(a)–3 clarified how § 226.59(a) applies to certain rate increases imposed prior to the effective date of the rule. Section 226.59(a) and new TILA Section 148 require that card issuers reevaluate rate increases that occurred between January 1, 2009 and August 21, 2010. Proposed comment 59(a)–3 stated that for increases in annual percentage rates on or after January 1, 2009 and prior to August 22, 2010, § 226.59(a) requires a card issuer to review changes in factors and reduce the rate, as appropriate, if the rate increase is of a type for which 45 days' advance notice would currently be required under § 226.9(c)(2) or (g). The requirements of § 226.9(c)(2) and (g), which were first effective on August 20, 2009 and modified by the February 2010 Regulation Z Rule were not applicable during the entire period from January 1, 2009 to August 21, 2010. Therefore, the relevant test for purposes of proposed § 226.59(a)(1) and comment 59(a)–3 is whether the rate increase is or was of a type for which 45 days' advance notice pursuant to § 226.9(c)(2) or (g) would currently be required.

Proposed comment 59(a)–3 further illustrated this requirement by stating, for example, that the requirements of § 226.59 would not apply to a rate increase due to an increase in the index by which a properly-disclosed variable rate is determined in accordance with § 226.9(c)(2)(v)(C) or if the increase occurs upon expiration of a specified period of time and disclosures complying with § 226.9(c)(2)(v)(B) have been provided. The Board received no comments on proposed comment 59(a)–3, which is adopted as comment 59(a)(1)–3.

In the March 2010 Regulation Z Proposal, the Board proposed comment 59(b)–1, which noted, consistent with TILA Section 148, that even in circumstances where a rate reduction is required, § 226.59 does not require that a card issuer decrease the rate to the annual percentage rate that was in effect prior to the rate increase giving rise to the obligation to periodically review the consumer's account. The comment stated that the amount of the rate decrease that is required must be determined based upon the issuer's reasonable policies and procedures. Proposed comment 59(b)–1 set forth an illustrative example, which assumes that a consumer's rate on new purchases is increased from a variable rate of 15.99% to a variable rate of 23.99% based on the consumer's making a required minimum periodic payment five days late. The consumer then makes all of the payments required on the account on time for the six months following the rate increase. The proposed comment noted that the card issuer is not required to decrease the consumer's rate to the 15.99% that applied prior to the rate increase, but that the card issuer's policies and procedures for performing the review required by § 226.59(a) must be reasonable and should take into account any reduction in the consumer's credit risk based upon the consumer's timely payments.

The Board believes that this proposed comment, which primarily focuses on the amount of a required rate decrease, is more properly placed in the commentary to § 226.59(a)(1), which is the paragraph establishing the obligation to reduce the rate. Accordingly, the Board is adopting proposed comment 59(b)–1 as comment 59(a)(1)–4, with several technical changes for clarity. The example set forth in the comment has also been amended for consistency with § 226.59(d)'s guidance on the factors required to be considered in the review. Section 226.59(d) is discussed below in more detail.

Regarding the scope of § 226.59, one issuer asked the Board to clarify whether the reevaluation requirements in § 226.59 apply only to increases in purchase rates or to rates applicable to all types of balances, such as cash advances, balance transfers, or balances subject to penalty rates. The Board believes that it was clear in the proposal, and continues to be clear in the final rule, that § 226.59 generally applies to all types of interest rate increases, not just penalty rate increases. The rule refers broadly to "an increase in an annual percentage rate that applies to a credit card account under an open-end (not home-secured) consumer credit plan," not only to increases in purchase annual percentage rates. Accordingly, examples in the commentary to § 226.59 refer to cash advance rates, penalty rates, balance transfer rates, and temporary rates, in addition to purchase rates.

Another issuer asked the Board to expressly clarify that the obligation to reevaluate rate increases pursuant to § 226.59 does not apply to accounts for which variable rate floors were removed in order to comply with § 226.55(b)(2). The Board believes that no clarification is necessary in the regulation or commentary. The removal of a variable rate floor can only result in a decrease in the interest rate imposed on a consumer's account and therefore would not be a rate increase for purposes of § 226.59.

Finally, one industry trade association urged the Board to limit the scope of § 226.59 to require reviews only of those rate increases that occurred between January 1, 2009 and February 22, 2010, when the majority of the substantive protections in the Credit Card Act became effective. The Board believes that this interpretation would be inconsistent with new TILA Section 148, which imposes an ongoing review requirement when a creditor increases the annual percentage rate applicable to a credit card account. If Congress had intended to limit the review requirement to those rate increases that occurred prior to February 22, 2010, the Board believes that it would have so provided.

59(a)(2) Rate Reductions

Proposed § 226.59(a)(2) addressed the timing requirements for rate reductions required under § 226.59. Proposed § 226.59(a)(2) stated that if a card issuer is required to reduce the rate applicable to an account pursuant to § 226.59(a)(1), the card issuer must reduce the rate not later than 30 days after completion of the evaluation. The Board solicited comment on the operational issues associated with reducing the rate applicable to a consumer's account and whether a different timing standard for how promptly rate changes must be implemented should apply.

A number of issuers and industry trade associations urged the Board to give issuers additional time to implement rate decreases, for operational reasons. Several commenters specifically noted that the 30 day time period would require issuers to make mid-cycle changes, which may be difficult and costly depending on the issuer's processing platforms. Several commenters suggested that the time period for implementing a rate reduction should be 60 days or two billing cycles after

completion of the evaluation. Other commenters indicated that the appropriate time period is 90 days. Finally, several other commenters stated that a 45-day time period would be appropriate. These commenters also noted that a 45-day time period would be consistent with the time period for advance notice of rate increases under § 226.9(c) and (g).

Section 226.59(a)(2)(i) of the final rule provides that if a card issuer is required to reduce the rate applicable to an account pursuant to § 226.59(a)(1), the card issuer must reduce the rate not later than 45 days after completion of the evaluation. The Board believes that intent of new TILA Section 148 is to ensure that the rates on consumers' accounts are reduced promptly when the card issuer's review of factors indicates that a rate reduction is required. Therefore, the Board believes that a longer time period, such as 60 days or 90 days, would not best effectuate the intent of the statute. The Board believes that § 226.59(a)(2)(i), as adopted, strikes the appropriate balance between burden on issuers and benefit to consumers. The 45-day time period may enable issuers to avoid operationally difficult mid-cycle changes, while ensuring that consumers promptly receive the benefit of any rate reduction required by § 226.59.

The March 2010 Regulation Z Proposal did not specify to which balances a rate reduction required by § 226.59(a) must apply. Several commenters requested that the Board provide express guidance regarding the applicability of any required rate reduction, in particular as to whether the reduction is required to apply to existing balances or only to new transactions. One industry commenter stated that issuers should be required to apply the reduced rate only to the outstanding balances that were subject to the rate increase reevaluation rather than to all outstanding balances. Another industry commenter urged the Board to provide flexibility for issuers to apply the reduced rate to: (1) New transactions only; (2) outstanding balances that were subject to the rate increase reevaluation; or (3) new transactions and outstanding balances that were subject to the rate increase reevaluation. This commenter noted that it would be operationally burdensome if issuers were required to reduce the rate applicable to all outstanding balances that were subject to the rate increase. Finally, one issuer stated that creditors should be permitted to implement rate decreases through other means, such as through balance transfer or consolidation offers, which would reduce the consumer's cost of borrowing without changing the annual percentage rate.

The Board is adopting new § 226.59(a)(2)(ii) to clarify to which balances a rate reduction pursuant to § 226.59(a)(1) must apply. Section 226.59(a)(2)(ii) states that any reduction in an annual percentage rate required pursuant to § 226.59(a)(1) shall apply to: (1) Any outstanding balances to which the increased rate described in § 226.59(a)(1) has been applied; and (2) new transactions that occur after the effective date of the rate reduction that would otherwise have been subject to the increased rate. The Board believes the most appropriate reading of new TILA Section 148 is that it is intended to require rate reductions on outstanding balances that were subject to the rate increase, as well as on new transactions. TILA Section 148 expressly requires issuers to reevaluate rate increases that have occurred since January 1, 2009. The Board believes that a rule that permitted issuers to apply reduced rates only to new transactions would not effectuate this "look back" provision, because it would permit rate increases that occurred after January 1, 2009 to remain in effect for the life of any balance already subject to the increased rate. Prior to February 22, 2010, card issuers were permitted to increase rates applicable to outstanding balances as well as new transactions, which is no longer permitted under § 226.55 except in limited circumstances. It would be an anomalous result for the "look back" provision to permit creditors to maintain increased rates on existing balances given that the Credit Card Act prospectively limited the circumstances in which a rate increase can be applied to an outstanding balance. Accordingly, the Board believes that the inclusion of the "look back" provision in TILA Section 148 suggests that Congress intended for any rate reductions apply to outstanding balances that were subject to the rate increase.

Similarly, the Board believes that for rates increased on or after February 22, 2010, the most appropriate reading of new TILA Section 148 is that it requires an issuer to apply any required rate decrease both to any outstanding balances that were subject to the increased rate and to any new transactions that would have been subject to the increased rate. New TILA Section 148 does not distinguish between rate increases imposed prior to February 22, 2010, which could have applied both to outstanding balances and new transactions, and rate increases imposed after February 22, 2010, which in most cases may apply only to new transactions. The Board believes, therefore, that one uniform rule regarding the applicability of rate decreases is appropriate and consistent with the intent of TILA Section 148. A rule that required rate reductions only on new transactions would in effect permit an increased rate to apply to balances subject to the increased rate until they are paid in full. The Board does not believe that this outcome would be consistent with the intent of TILA Section 148.

However, the Board does not believe that the statute requires an issuer to decrease the rates applicable to balances that were not subject to the rate increase giving rise to the review obligation under § 226.59(a). The requirement to reevaluate the rates applicable to a consumer's account is only triggered when a rate increase occurs. If Congress had intended for all issuers to periodically review the rates applicable to consumer credit card accounts, regardless of whether a rate increase occurred, it could have so provided. Given that the review requirement only applies if there is a rate increase, the Board believes the best interpretation of the statute is that any required reduction in rate need only apply to the balances that were subject to that increased rate. Therefore, the final rule does not require that the rate reduction apply to all outstanding balances, but just to those outstanding balances that were subject to the increased rate.

For example, assume that a consumer opens a new credit card account under an open-end (not home-secured) consumer credit plan on January 1 of year one. The rate on purchases is 18%. The consumer makes a $1,000 purchase on June 1 of year one. On January 1 of year two, after providing 45 days' advance notice in accordance with § 226.9(c), the card issuer raises the rate applicable to new purchase transactions to 20%. The consumer makes a $300 purchase on May 1 of year two, which is subject to the 20% rate. On July 1 of year two, the issuer conducts a review of the account in accordance with § 226.59(a) and, based on that review, decreases the rate on purchases from 20% to 17% effective as of August 15 of year two. The consumer makes a $500 purchase on September 1 of year two. Section 226.59(a)(2)(ii) requires the issuer to apply the 17% rate to the $300 purchase and the $500 purchase. The issuer is not required to apply the 17% rate to the $1,000 purchase, which may remain subject to the original 18% rate.

The Board believes that permitting issuers to reduce the interest charges imposed on a consumer's account

through other means, such as balance transfer or other promotional offers, without reducing the annual percentage rate would be inconsistent with the statute, which requires a creditor to consider factors in "determining whether to reduce the annual percentage rate" applicable to a consumer's account. Furthermore, the Board believes that permitting issuers to reduce the interest charges imposed on a consumer's account in such a manner would lack transparency and would make it difficult for an issuer's regulator to assess whether that issuer is in compliance with the rule. For example, it would be difficult to ascertain whether a given promotional rate offer is as beneficial to a consumer as a rate reduction would be, given that it would depend on facts, circumstances, and account usage patterns specific to that consumer.

Section 226.59(a)(2)(ii) requires, in part, that any reduction in rate required pursuant to § 226.59(a)(1) must apply to new transactions that occur after the effective date of the rate reduction, if those transactions would otherwise have been subject to the increased rate described in § 226.59(a)(1). The Board is adopting a new comment 59(a)(2)(ii)–1 to clarify to which new transactions any rate reduction required by § 226.59(a) must apply. A credit card account may have multiple types of balances, for example, purchases, cash advances, and balance transfers, to which different rates apply. The comment sets forth an illustrative example that assumes a new credit card account opened on January 1 of year one has a rate applicable to purchases of 15% and a rate applicable to cash advances and balance transfers of 20%. Effective March 1 of year two, consistent with the limitations in § 226.55 and upon giving notice required by § 226.9(c)(2), the card issuer raises the rate applicable to new purchases to 18% based on market conditions. The only transaction in which the consumer engages in year two is a $1,000 purchase made on July 1. The rate for cash advances remains at 20%. Based on a subsequent review required by § 226.59(a)(1), the card issuer determines that the rate on purchases must be reduced to 16%. Section 226.59(a)(2)(ii) requires that the 16% rate be applied to the $1,000 purchase made on July 1 and to all new purchases. The rate for new cash advances and balance transfers may remain at 20%, because there was no rate increase applicable to those types of transactions and, therefore, the requirements of § 226.59(a) do not apply.

59(b) Policies and Procedures

Proposed § 226.59(b) provided, consistent with new TILA Section 148, that a card issuer must have reasonable written policies and procedures in place to review the factors described in § 226.59. The proposal did not prescribe specific policies and procedures that issuers must use in order to conduct this analysis. The Board stated that requiring such policies and procedures to be reasonable would ensure that issuers undertake due consideration of these factors in order to determine whether a rate reduction is required on a consumer's account. However, the proposal solicited comment on whether more guidance was necessary regarding whether a card issuer's policies and procedures are "reasonable."

Consumer groups and a Federal agency stated that the proposal did not set forth sufficiently specific guidance regarding whether an issuer's policies and procedures are reasonable. These commenters suggested that the Board's rules should provide more rigorous compliance standards regarding the methodologies that issuers must use to reevaluate rate increases. In particular, these commenters urged the Board to require issuers to use an "empirically derived, demonstrably and statistically sound model" or to identify other specific reasonable methodologies to be used in conducting the reevaluation of rate increases. Consumer groups noted that the statutory provision requires issuers to "maintain reasonable methodologies for assessing the factors" used in the reevaluation, and accordingly that the statute prohibits unreasonable methodologies. One consumer group supported the requirement that policies and procedures be written, but stated that the policies and procedures should specify how factors are measured and weighted.

Two state attorneys general also commented on this aspect of the proposal. One expressed concern that the Board's proposed rules would permit banks to perform perfunctory reviews, manipulate the factors used in the reevaluation to justify rate increases, and otherwise deny rate reductions even when there has been a decline in consumer credit risk. This commenter stated that the final rules should expressly require banks to reduce interest rates when justified by the consumer's credit risk, and stated that a review that does not result in interest rate reductions when consumers' credit profiles improve and bank costs decline cannot be considered "reasonable." The second state attorney general expressed concern that the flexible reevaluation standard set forth in the proposal would result in very few interest rate increases being reversed. This commenter urged the Board to adopt clear and transparent reevaluation standards and to rigorously supervise card issuers for compliance with § 226.59.

Several trade associations representing community banks and credit unions indicated that additional guidance regarding the requirement to have reasonable policies and procedures would be helpful to institutions complying with the rule. These commenters urged the Board to publish such guidance for additional public comment.

Other commenters supported the flexible approach in the proposal. One public interest group stated that requiring issuers to maintain written policies and procedures will likely result in greater accountability for financial institutions and more equitable repricing of accounts. Several issuers stated that no additional guidance is necessary regarding "reasonable" policies and procedures and opposed a more prescriptive approach. One of these commenters noted that the concept of "reasonable policies and procedures" is well established in Regulation Z and that issuers do not require additional guidance.

The Board is adopting § 226.59(b) generally as proposed, with one nonsubstantive change for clarity. The Board continues to believe that more prescriptive rules regarding reasonable policies and procedures could unduly burden creditors and raise safety and soundness concerns for financial institutions. Because the particular factors that are the most predictive of the credit risk of a particular consumer or portfolio of consumers may change over time, the appropriate manner in which to weigh those factors may also change. Moreover, the appropriate manner in which to consider or review underwriting factors can vary greatly among institutions. For example, underwriting standards—and thus the appropriate policies and procedures to use when reviewing rate increases—for private label or retail credit cards will differ from the standards used for general purpose credit card accounts.

The Board agrees with commenters that TILA Section 148 requires issuers to perform a meaningful review of rate increases and to decrease rates when appropriate. The Board further agrees with consumer groups that new TILA Section 148 requires that an issuer use reasonable methodologies, and accordingly would not permit an issuer

to use methodologies for the review of rate increases that are unreasonable. However, the Board believes that the requirement that an issuer's policies and procedures be reasonable effectuates this portion of the statute. This requirement will ensure that, although issuers have flexibility to design their own reasonable policies and procedures, they must conduct a meaningful review of factors and reduce the rate in an appropriate manner when required.

The Board is not requiring issuers to utilize a "empirically derived, demonstrably and statistically sound model" for the reevaluation of rate increases. Regulation Z does require the use of such models in other contexts, such as when an issuer uses an estimate of income under § 226.51 as an alternative to obtaining this information directly from a consumer. As noted in the supplementary information to the February 2010 Regulation Z Rule, the Board is aware of various models that have been developed to estimate a consumer's income or assets. In the case of estimating a consumer's income, a third party could develop a model that would meet the "empirically derived, demonstrably and statistically sound" standard that could be used by all, or a large number of, issuers. However, given the issuer and product-specific nature of underwriting, the Board believes that it would not be possible to develop and use a single model for evaluating factors that would be appropriate for all issuers. Accordingly, each issuer would have to develop and test its own model, which would create significant burden, especially for small issuers.

In addition, unlike a model for estimating a consumer's income, which is designed to estimate a single piece of objective data, it is unclear how an "empirically derived, demonstrably and statistically sound model" would operate in the context of the reevaluation of rate increases. The Board believes that to make such a standard feasible, the rule would have to be far more prescriptive regarding permissible assumptions for the model. For the reasons discussed above, the Board is not adopting a prescriptive rule about how an issuer must weigh the factors it considers; for the same reasons, the Board also declines to adopt a prescriptive rule about how an issuer may construct its underwriting models. Furthermore, as discussed in the supplementary information to § 226.52(b) in the context of the proposed deterrence method for determining permissible penalty fees, developing a model for an individual issuer would require testing and periodic verification. In the course of gathering the data necessary to test or periodically verify its model, an issuer may at times need to test a model that is not "empirically derived, demonstrably and statistically sound," which would create the anomalous result that issuers would need to test policies and procedures that are not permitted under the rule.

In addition to the general requirement that an issuer have reasonable policies and procedures, other portions of the final rule address specific practices to further ensure that issuers conduct a meaningful review of rate increases and appropriately implement any required rate decreases. For example, as discussed above, § 226.59(a)(2)(ii) of the final rule expressly requires that a rate reduction be applied both to outstanding balances that were subject to the increased rate and new transactions that would have been subject to the increased rate. In addition, as discussed below, § 226.59(d) of the final rule requires an issuer to consider either: (1) The factors on which it originally based the rate increase; or (2) the factors that the card issuer currently uses when determining the annual percentage rates applicable to similar new credit card accounts. As discussed below, the Board believes that this will ensure that an issuer may not selectively choose to evaluate only those factors that would continue to justify a rate increase for existing consumers.

Several consumer group commenters and one state attorney general urged the Board to establish a data collection requirement for § 226.59. These commenters stated that banks should be required to publicly disclose their review policies and procedures and issue periodic reports on the total number of accounts reviewed, the total number of accounts on which the rate was reduced, and the starting and ending rates of accounts reviewed. The Board believes that such a requirement would be inefficient and overly burdensome and is not necessary to effectuate the purposes of Section 148. In addition, the Board has concerns that public reporting of underwriting factors would require issuers to disclose proprietary information, particularly given that public reporting is not an express requirement of TILA Section 148. An issuer's principal regulator is most familiar with its operations and is in the best position to evaluate its policies and procedures under § 226.59(b).

59(c) Timing

Proposed § 226.59(c) clarified the timing requirements for the reevaluation of rate increases pursuant to § 226.59(a). Consistent with new TILA Section 148(b)(2), proposed § 226.59(c) required a card issuer that is subject to § 226.59(a) to review changes in factors in accordance with § 226.59(a) and (d) not less frequently than once every six months after the initial rate increase. Proposed comment 59(c)–1 would clarify that an issuer has flexibility in determining exactly when to engage in this review for its accounts. Specifically, proposed comment 59(c)–1 stated that an issuer may review all of its accounts at the same time once every six months, may review each account once each six months on a rolling basis based on the date on which the rate was increased for that account, or may otherwise review each account not less frequently than once every six months. The supplementary information to the March 2010 Regulation Z Proposal stated that as long as the consideration of factors required for each account subject to § 226.59 is performed at least once every six months, the Board believes that it is appropriate to provide flexibility to card issuers to decide upon a schedule for reviewing their accounts.

Section 226.59(c) is adopted as proposed, with one nonsubstantive change for clarity. The Board received only two comments on this aspect of the proposal; one issuer stated that the rule should require a review once every six billing cycles rather than once every six months, while another issuer stated that the final rule should require reviews annually rather than biannually. Consistent with the proposal, the final rule requires an issuer to conduct the review described in § 226.59(a) not less frequently than once every six months after the rate increase. New TILA Section 148(b)(2) is clear that the review is required "not less frequently than once every 6 months." A requirement that the review occur not less frequently than once every six billing cycles would mean, for consumers whose billing cycles are two or three months long, that the review only occurs once every 12 or 18 months. The Board does not believe this is consistent with Congress's intent. The Board received no comments on comment 59(c)–1, which also is adopted as proposed.

Proposed comment 59(c)–2 set forth an example of the timing requirements in § 226.59(c). The proposed example assumed that a card issuer increases the rates applicable to one half of its credit card accounts on June 1, 2010, and increases the rates applicable to the other half of its credit card accounts on September 1, 2010. The proposed comment stated that the card issuer may review the rate increases for all of its

credit card accounts on or before December 1, 2010, and at least every six months thereafter. In the alternative, the card issuer may first review the rate increases for the accounts that were repriced on June 1, 2010 on or before December 1, 2010, and may first review the rate increases for the accounts that were repriced on September 1, 2010 on or before March 1, 2011.

The Board received only one comment on proposed comment 59(c)–2. The commenter noted that the dates used in the example in proposed comment 59(c)–2 were inconsistent with comment 59(c)–3, which is discussed below. Comment 59(c)–2 is adopted as proposed, except that the dates in the example have been adjusted to correct this technical error.

Proposed comment 59(c)–3 clarified the timing requirement for increases in annual percentage rates applicable to a credit card account under an open-end (not home-secured) consumer credit plan on or after January 1, 2009 and prior to August 22, 2010. Proposed comment 59(c)–3 stated that § 226.59(c) requires that the first review for such rate increases be conducted prior to February 22, 2011.

Consumer groups and a state attorney general stated that issuers should be required to conduct their first review of rate increases on August 22. These commenters expressed particular concern regarding rate increases imposed between January 1, 2009 and February 22, 2010, the date when the majority of the substantive protections contained in the Credit Card Act went into effect. A federal agency stated that the Board should provide an implementation period of no more than three months from issuance of final rules. In contrast, industry commenters supported proposed comment 59(c)–3, noting that the guidance in the comment is necessary to give creditors the time to develop and implement review policies and procedures based on the final rule prior to conducting their first reevaluations.

The Board is adopting comment 59(c)–3 as proposed. The Board believes that it will take issuers several months to develop and implement their policies and procedures for conducting reviews of rate increases. Accordingly, the Board believes that requiring issuers to complete their first review under § 226.59 on August 22, 2010 would be overly burdensome. For issuers with large or complex credit card portfolios, a requirement that the first review be completed on August 22, 2010 could in effect require those issuers to have implemented procedures to comply with this final rule before it is issued. The Board also believes that this clarification is consistent with the general timing standard under new TILA Section 148, which requires that rate increases generally be reevaluated at least once every six months. Accordingly, the Board believes that six months from the effective date of TILA Section 148, or February 22, 2011, is the appropriate date by which the initial review of rate increases that occurred prior to the effective date of the final rule must take place.

59(d) Factors

Proposed 226.59(d) provided clarification on the factors that a credit card issuer must consider when performing the evaluation of a consumer's account under § 226.59(a). Proposed § 226.59(d) provided that a card issuer is not required to base its review under § 226.59(a) on the same factors on which a rate increase was based. Rather, the proposal would have permitted a card issuer to review either the same factors on which the rate increase was originally based, or to review the factors that it currently uses when determining the annual percentage rates applicable to its consumers' credit card accounts.

The Board explained in the supplementary information to the proposal that it believes it is appropriate to permit card issuers to review the factors they currently consider in advancing credit to new consumers, because a review of these factors may result in the consumer receiving any reduced rate that he or she would receive if applying for a new credit card with the same card issuer. The Board also noted that competition for new consumers is an incentive that may lead an issuer to lower its rates, and if the rates on existing consumers' accounts are assessed using the same factors used for new consumers, existing customers of a card issuer may also benefit from competition in the market.

Proposed § 226.59(d) did not mandate any specific factors that card issuers must consider. Similarly, proposed § 226.59(d) would not have prohibited the consideration of other factors. The Board noted that a prescriptive rule that sets forth certain factors or excludes other factors could inadvertently harm consumers, in part by constraining card issuers' ability to design or utilize new underwriting models and products that could potentially benefit consumers.

Industry commenters strongly supported the approach in § 226.59(d) that would permit a card issuer to either consider the factors on which the rate increase was based or the issuer's current factors. These commenters stated that proposed § 226.59(d) provides appropriate flexibility and urged the Board to avoid mandating the consideration of outdated factors that are no longer relevant. Issuers noted that they already have an incentive to provide the best rates they can justify to their existing cardholders, because if they do not the cardholder may elect to use a different credit card or source of financing. Issuers also indicated that the costs associated with developing and maintaining systems to track and apply factors used in the past to existing reviews would be extremely burdensome.

Several industry commenters urged the Board to clarify that § 226.59(d) permits issuers to review the current factors that apply to similarly situated existing cardholders, not just new consumers. One commenter indicated, for example, that an issuer may have one scorecard that it uses for new applicants and another scorecard that it uses for account reviews. This commenter suggested that an issuer should be permitted to use the account review scorecard when conducting the review under § 226.59. Other industry commenters stated that a card issuer that considers the factors it uses for new accounts in conducting the review under § 226.59 should be permitted to take into account an existing cardholder's payment and performance history on the account, even if the issuer is not able to consider that data when evaluating an application for a new account.

Consumer groups indicated that proposed § 226.59(d) did not adequately limit an issuer's discretion to manipulate and "cherry pick" factors. Consumer groups stated that it is not objectionable to permit an issuer to evaluate old accounts consistently with the manner in which it evaluates new applicants, but that the rule should clarify that issuers do not have the discretion to selectively consider only those factors that would justify maintaining a rate increase. In addition, one city consumer protection agency stated that issuers should be required to take into account all appropriate factors, rather than just factors that are favorable to the issuer.

Consumer groups also urged the Board to adopt more specific guidance identifying factors that are permitted to be used and prohibited from being used in the evaluation. These commenters stated that the rule should expressly distinguish between rate increases imposed on an individual consumer and rate increases applied on a portfolio-wide basis. Consumer groups stated that appropriate factors for consideration for

portfolio-wide rate increases include: (1) Cost of funds, to the extent not reflected in a variable rate; and (2) the issuer's loss rate for that product. Consumer groups indicated that impermissible factors for portfolio-wide rate increases should include: (1) Loss rates for other products; (2) revenue maximization; and (3) the inability to charge increased rates or fees resulting from legal reforms. Consumer groups stated that the only permissible factor for rate increases imposed on an individual consumer's account should be empirically-tested risk factors related to the ability to repay. In addition, one state consumer protection agency stated that, for rate increases based on changes in a consumer's creditworthiness, issuers should be required to evaluate the consumer's credit score, recent payment history, and other factors that indicate whether a consumer's creditworthiness has improved.

Section 226.59(d)(1) of the final rule sets forth the general rule and states that, except as provided in § 226.59(d)(2) (which is discussed below), a card issuer must review either: (1) The factors on which the increase in an annual percentage rate was originally based; or (2) the factors that the card issuer currently considers when determining the annual percentage rates applicable to similar new credit card accounts under an open-end (not home-secured) consumer credit plan. The Board believes that this rule strikes the appropriate balance between providing flexibility for changing underwriting standards and ensuring that consumers receive the benefit of meaningful reviews of rate increases on their accounts. The Board believes that requiring a card issuer to consider the factors that it considers when setting the rates applicable to similar new accounts addresses concerns regarding issuers selectively identifying those factors that would permit them to maintain increased rates on existing accounts. In addition, the Board believes that this rule will permit consumers to benefit from competition among issuers in the market for new customers. Accordingly, the final rule would not permit an issuer that complies with § 226.59 by considering its current factors to use a separate set of factors for existing accounts than it does for new accounts.

Proposed comment 59(d)–3 provided additional clarification on how an issuer should identify the factors to consider when evaluating whether a rate reduction is required. Proposed comment 59(d)–3 stated that if a card issuer evaluates different factors in determining the applicable annual percentage rates for different types of credit card plans, it must review those factors that it considers in determining annual percentage rates for the consumer's type of credit card plan.

Proposed comment 59(d)–3 also set forth several examples to illustrate what constitute "types" of credit card plans. For example, the proposed comment noted that a card issuer may review different factors in determining the annual percentage rate that applies to credit card plans for which the consumer pays an annual fee and receives rewards points than it reviews in determining the rates for credit card plans with no annual fee and no rewards points. Similarly, the comment noted that a card issuer may review different factors in determining the annual percentage rate that applies to private label credit cards than it reviews in determining the rates applicable to credit cards that can be used at a wider variety of merchants. However, the proposed comment stated that a card issuer must review the same factors for credit card accounts with similar features that are offered for similar purposes and may not consider different factors for each of its individual credit card accounts.

One consumer group commenter supported proposed comment 59(d)–3. Three industry commenters urged the Board to withdraw the proposed comment. These commenters noted that issuers may offer many different varieties of private label credit card programs and general purpose credit card programs and that they should be permitted to review different factors with respect to each type of program. One of these commenters specifically asked the Board to confirm that a private label card issuer with multiple card portfolios may comply with the reevaluation requirements based on the terms and conditions of each portfolio independently.

The Board is adopting proposed comment 59(d)–3 generally as proposed, with several technical and wording changes for clarity. The Board continues to believe that this clarification is appropriate to ensure that a credit card issuer considers factors for new accounts that are similar to the existing credit card accounts subject to § 226.59, rather than factors for a dissimilar product that may be underwritten based on different information. However, the Board has included an additional example stating that a card issuer may review different factors in determining the annual percentage rate that applies to private label credit cards usable only at Merchant A than it may review for private label credit cards usable only at Merchant B. The Board believes that this additional example is appropriate to give guidance to issuers that offer several different private label credit card plans with different merchants.

The Board also is adopting a new comment 59(d)–4 to clarify a card issuer's obligations for existing accounts that are not similar to any new accounts offered by the issuer. The comment notes that in some circumstances, a card issuer that complies with § 226.59(a) by reviewing the factors that it currently considers in determining the annual percentage rates applicable to similar new accounts may not be able to identify a class of new accounts that are similar to the existing accounts on which a rate increase has been imposed. For example, consumers may have existing credit card accounts under an open-end (not home-secured) consumer credit plan but the card issuer may no longer offer a product to new consumers with similar characteristics, such as the availability of rewards, size of credit line, or other features. Similarly, some consumers' accounts may have been closed and therefore cannot be used for new transactions, while all new accounts can be used for new transactions. In those circumstances, the comment notes that the card issuer must nonetheless perform a review of the rate increase on the existing customers' accounts. A card issuer does not comply with § 226.59 by maintaining an increased rate without performing such an evaluation. In such circumstances, § 226.59(d)(1)(ii) requires that the card issuer compare the existing accounts to the most closely comparable new accounts that it offers.

The Board understands that, for existing accounts, issuers may possess information about the consumer's payment history or performance that they would not have for all applicants for new credit. For example, a consumer may have made a late payment on a credit card account with the issuer, but the delinquency may not have been reported to a consumer reporting agency, for example because the payment was less than 30 days late. The Board is adopting a new comment 59(d)–5 to clarify that a card issuer that complies with § 226.59(a) by reviewing the factors that it currently considers in determining the rates applicable to similar new accounts may consider the consumer's payment or other account behavior on the existing account only to the same extent and in the same manner that the issuer considers such information when one of its current cardholders applies for a new account with the card issuer. For example, the comment notes that a card issuer might obtain consumer reports for all of its

applicants. The consumer reports contain certain information regarding the applicant's past performance on existing credit card accounts. However, the card issuer may have additional information about an existing cardholder's payment history or account usage that does not appear in the consumer report and that, accordingly, it would not generally have for all new applicants. For example, a consumer may have made a payment that is five days late on his or her account with the card issuer, but this information does not appear on the consumer report. The card issuer may consider this additional information in performing its review under § 226.59(a), but only to the extent and in the manner that it considers such information when a current cardholder applies for a new account with the issuer.

Consistent with the approach in the proposal, the final rule does not mandate or prohibit the consideration of any specific factors. The Board continues to believe that a prescriptive rule would unduly burden issuers, could create safety and soundness issues, and could inadvertently harm consumers, by limiting card issuers' ability to design or utilize new underwriting models and products that could benefit consumers. For issuers that consider the factors they currently use in setting the rates that apply to new accounts, the Board believes that competition for new accounts will create an incentive for issuers to keep rates as low as possible.

In addition to commenting on the Board's general approach to identifying factors relevant to the review under § 226.59, several commenters urged the Board to adopt special provisions for certain types or classes of rate increases. First, consumer groups and one state attorney general urged the Board to adopt a more stringent approach for rate increases imposed between January 1, 2009 and February 22, 2010. Consumer groups noted their concern about these rate increases, which were imposed before many of the substantive protections in the Credit Card Act became effective. Consumer groups stated that, for portfolio-wide rate increases made between January 1, 2009 and February 22, 2010, the rule should include a presumption that the rate must be reduced unless the issuer can demonstrate that the same economic conditions that gave rise to the rate increase still apply. For accounts on which the rate was increased due to an individual consumer's risk profile, consumer groups stated that the rate should be reduced to the original rate if the consumer's credit score exceeds a certain threshold. The state attorney general urged the Board to require issuers to reduce rates that were increased between January 1, 2009 and February 22, 2010, if the review pursuant to § 226.59 indicates that the cardholder has not violated the account terms and has not experienced a decline in creditworthiness.

In contrast, one issuer commented that the review requirement should be applied only to accounts where the rate was increased between January 1, 2009 and February 22, 2010. This issuer stated that the protections of the Credit Card Act render review of accounts on which a rate increase was imposed after February 22, 2010 unnecessary, because a consumer can stop using his or her card for new transactions if the increased rate does not reflect market conditions or the consumer's creditworthiness. In contrast, one other issuer urged the Board to limit the review requirement to rate increases that occurred after February 22, 2010.

The Board agrees with consumer group commenters that a more prescriptive approach is appropriate for some rate increases imposed prior to the February 22, 2010 effective date of the Credit Card Act's substantive limitations on repricing. Accordingly, new § 226.59(d)(2) sets forth a special rule for certain rate increases imposed between January 1, 2009 and February 21, 2010. Section 226.59(d)(2) provides that, when conducting the first two reviews required under § 226.59(a) for rate increases imposed between January 1, 2009 and February 21, 2010, an issuer must consider the factors that it currently considers when determining the annual percentage rates applicable to similar new credit card accounts, unless the rate increase was based solely upon factors specific to the consumer, such as a decline in the consumer's credit risk, the consumer's delinquency or default, or a violation of the terms of the account.

The Board understands that many card issuers raised rates across their credit card portfolios following the enactment of the Credit Card Act but prior to the effective date of many of the substantive protections contained in the statute. Some of these rate increases that occurred prior to February 22, 2010 resulted from issuers adjusting their pricing practices to take into account the limitations that the Credit Card Act imposed on rate increases on existing balances. The Board is concerned that permitting card issuers to review the factors on which the rate increase was based may not result in a meaningful review in these circumstances, because the legal restrictions imposed by the Credit Card Act have continuing application. In other words, if a card issuer were to consider the factors on which the rate increase was based—*i.e.,* the enactment of the Credit Card Act's legal restrictions regarding rate increases—it might determine that a rate decrease is not required.

Accordingly, the Board believes that it is appropriate to require card issuers to consider, for a brief transition period, the factors that they use when setting the rates applicable to similar new accounts for rate increases imposed prior to February 22, 2010, if the rate increase was not based on consumer-specific factors. The Board believes that this will permit existing cardholders whose rates were raised based on general factors, including adjustments to reflect the new limitations on repricing contained in the Credit Card Act, to benefit from competition in the market for new customers. The Board further believes that this rule will help to ensure that a meaningful review is conducted for accounts repriced during the period from January 1, 2009 to February 21, 2010, and that rate increases are not maintained on such accounts if new consumers with comparable characteristics would qualify for an account with a lower rate or rates.

This requirement to consider the factors that an issuer evaluates when setting the rates applicable to similar new accounts applies only during the first two review periods following the effective date of § 226.59 and only for rate increases imposed between January 1, 2009 and February 21, 2010. The Board believes that it is generally consistent with new TILA Section 148 to permit a card issuer to evaluate the same factors on which it originally based the rate increase that triggered the review requirement under § 226.59. Therefore, the Board is not requiring card issuers to indefinitely review rate increases imposed between January 1, 2009 and February 21, 2010 that are not based solely on consumer-specific factors by comparing the account to similar new credit card accounts. However, the Board believes, for the reasons described above, that it is appropriate, for the first two review periods, to require issuers to consider the factors that they use when setting the rates applicable to similar new accounts.

For rate increases that were based solely on consumer behavior or other consumer-specific factors, the final rule applies one uniform standard to rate increases imposed since January 1, 2009 and does not distinguish between rate increases imposed prior to or after

February 22, 2010. The Board does not believe that the concerns articulated above regarding portfolio-wide rate increases apply when the rate increase was based solely upon the consumer's specific behavior on the account or consumer-specific factors such as creditworthiness. Consumer-specific factors, such as a consumer's credit score or payment history on the account, can and do change over time. Accordingly, the Board believes that a consideration of the consumer-specific factors that the issuer considered when imposing the rate increase would result in a meaningful review and, where appropriate, rate decreases. In addition, this approach is consistent with new TILA Section 148, which applies the same review obligations to all rate increases imposed after January 1, 2009. The statute does not distinguish between rate increases that occurred prior to February 22, 2010 and rate increases that occurred after the majority of the substantive protections in the Credit Card Act took effect. Accordingly, the Board believes that absent the special concerns raised by portfolio-wide rate increases described above, it is not appropriate to impose either more or less stringent requirements to rate increases based on the date on which they were imposed.

Second, several commenters stated that the Board should adopt special provisions for rate increases that were imposed as a penalty for violations of the account terms. One consumer group commenter and one state attorney general urged the Board to adopt special rules regarding the removal of penalty rate increases. These commenters indicated that the Board should require issuers to reduce any penalty interest rate to a non-penalty rate if the account has experienced no violations of terms for a period of six months. Two issuers commented that the reevaluation requirement should not apply to accounts that are subject to delinquency pricing for prospective purchases if those accounts receive the benefit of a cure after a certain specified number of on-time payments.

The final rule does not mandate that issuers reduce a penalty rate to a non-penalty rate if there have been no violations of account terms for six months. The Board notes that § 226.55(b)(4) specifically addresses a consumer's right to cure the application of an increased rate, by making the first six minimum payments on time after the effective date of the increase, only for rate increases that are the result of a delinquency of more than 60 days. The Board acknowledged in the supplementary information to the March 2010 Regulation Z Proposal that it may appear to be an anomalous result that a consumer whose rate is increased based on a payment received five days late cannot automatically cure the application of the increased rate by making six timely minimum payments, while a consumer whose account is more than 60 days delinquent has that right under § 226.55(b)(4).

However, the Board continues to believe that this is the appropriate reading of TILA Sections 148 and 171(b)(4), for two reasons. First, a rate increase based on a consumer making a payment that is five days late can only apply to new transactions. Therefore, a consumer has the ability to mitigate the impact of the rate increase by reducing the number of new transactions in which he or she engages. In contrast, a creditor may increase the rate on both existing balances and new transactions when a consumer makes a payment that is more than 60 days late. Second, new TILA Section 171(b)(4) expressly provides the cure right implemented in § 226.55(b)(4) only for payments that are more than 60 days late. Congress could have, but did not, adopt an analogous cure provision for delinquencies of less than 60 days. The Board believes that for other violations of the account terms, Congress intended for the review of factors in TILA Section 148 to be the means by which rate decreases, when appropriate, are required.

Similarly, the Board is not adopting an exception to the review requirements of § 226.59 for an issuer that provides a cure after a specified number of on-time payments or a specified number of months without a violation of the account terms. The Board understands that many issuers do provide such cure periods, even though it is not generally required for penalty rates triggered by delinquencies of less than 60 days or other contractual defaults. While the Board encourages card issuers to offer or continue offering such cure periods, which have a benefit to consumers, the Board believes that it would be inconsistent with TILA Section 148 to provide an exception to § 226.59 in those circumstances. The Board is concerned that providing such an exception would permit issuers to maintain penalty rates on the accounts of consumers whose creditworthiness improves, but who occasionally commit minor violations of the account terms, such as a payment that is one day late or a small over-the-limit transaction, when in some cases those consumers might be eligible for a rate decrease if the issuer reviewed the account in accordance with § 226.59(a).

Proposed comment 59(d)–1 clarified the requirements of § 226.59(d) in the circumstances where a creditor has recently changed the factors that it evaluates in determining annual percentage rates applicable to its credit card accounts. Proposed comment 59(d)–1 noted that a creditor that complies with § 226.59(a) by reviewing the factors it currently considers in determining the annual percentage rates applicable to its credit card accounts may change those factors from time to time. The proposed comment clarified that when a creditor changes the factors it considers in determining the annual percentage rates applicable to its credit card accounts from time to time, it may comply with § 226.59(a) for a brief transition period by reviewing the set of factors it considered immediately prior to the change in factors, or may consider the new factors. The Board noted in the supplementary information to the March 2010 Regulation Z Proposal that this provision is intended to permit a card issuer to consider its prior set of factors only for a brief period after it changes the factors it uses to determine the rates applicable to new accounts, for operational reasons.

The proposed comment set forth an example in which a creditor changes the factors it uses to determine the rates applicable to new credit card accounts on January 1, 2011. The creditor reviews the rates applicable to its existing accounts that have been subject to a rate increase pursuant to § 226.59(a) on January 25, 2011. The proposed comment stated that the creditor complies with § 226.59(a) by reviewing, at its option, either the factors that it considered on December 31, 2010 when determining the rates applicable to its new credit card accounts or the factors that it considers as of January 25, 2011.

In the proposal, the Board solicited comment on whether the rule should establish an express safe harbor regarding what constitutes "a brief transition period" following a change in factors. Issuers who commented on the proposal suggested safe harbors of 60 or 90 days, to provide issuers with adequate time to revise their written policies and procedures and implement the new policy, while conducting ongoing rate evaluations.

The Board believes that a transition period of 60 days following a change in factors is appropriate and has revised comment 59(d)–1 to expressly state that, for purposes of compliance with § 226.59(d), a transition period of 60 days from the change of factors constitutes a brief transition period. The Board believes that it is important that the transition period be brief, to ensure

that consumers' accounts are evaluated by using up-to-date factors. The Board is otherwise adopting comment 59(d)–1 as proposed, with several technical changes to conform to the requirement in § 226.59(d) that an issuer that considers its current factors must consider the factors applicable to similar new accounts. In addition, the dates used in the example in comment 59(d)–1 have been adjusted for consistency with comment 59(c)–3.

Proposed comment 59(d)–2 clarified that the review of factors need not result in existing accounts being subject to the same rates and rate structure as a creditor imposes on new accounts, even if a creditor evaluates the same factors for both types of accounts. For example, the proposed comment noted that a creditor may offer variable rates on new accounts that are computed by adding a margin that depends on various factors to the value of the LIBOR index. The account that the creditor is required to review pursuant to § 226.59(a) may have variable rates that were determined by adding a different margin, depending on different factors, to a prime rate. In performing the review required by § 226.59(a), a creditor may review the factors it uses to determine the rates applicable to its new accounts. If a rate reduction is required, however, the proposed comment stated that the creditor need not base the variable rate for the existing account on the LIBOR index but may continue to use the prime rate. The amount of the rate on the existing account after the reduction, however, as determined by adding the prime rate and margin, must be comparable to the rate, as determined by adding the margin and LIBOR, charged on a new account (except for any promotional rate) for which the factors are comparable. The Board received no significant comments on proposed comment 59(d)–2, which is adopted generally as proposed, with several technical amendments for clarity. In addition, for consistency with the requirements of § 226.55(b)(2), the reference to the prime rate has been changed to refer to a published prime rate. *See* comment 55(b)(2)–2 for additional guidance on when an index is deemed to be outside the card issuer's control.

59(e) Rate Increases Subject to § 226.55(b)(4)

Proposed § 226.59(e) set forth a special timing rule for card issuers that increase a rate pursuant to § 226.55(b)(4) based on the card issuer not receiving the consumer's required minimum periodic payment within 60 days after the due date for that payment. In such circumstances, § 226.55(b)(4)(ii) requires a card issuer to reduce the annual percentage rate to the rate that applied prior to the increase if the consumer makes the first six consecutive required minimum periodic payments on time after the effective date of the increase.

Proposed § 226.59(e) provided that a card issuer is not required to review factors in accordance with § 226.59(a) prior to the sixth payment due date following the effective date of the rate increase when the rate increase results from a consumer's account becoming more than 60 days delinquent. At that time, if the rate has not been decreased based on the consumer making six consecutive timely minimum payments, proposed § 226.59(e) required an issuer to begin performing a review of factors for subsequent six-month periods.

Three issuers stated that the review requirement should not apply to rate increases imposed due to the consumer's failure to make a minimum payment within 60 days of the due date for that payment. These issuers suggested that new TILA Section 171(b)(4)(B), as implemented in § 226.55(b)(4)(ii), is the exclusive mechanism provided by Congress for obtaining a rate decrease if the increase is based on a default of more than 60 days. Consumer groups, on the other hand, supported proposed § 226.59(e) and the requirement that if the consumer fails to qualify for the cure under § 226.55(b)(4)(ii) by making six months of on-time payments, the reevaluation requirements in § 226.59 begin to apply.

The Board is adopting § 226.59(e) generally as proposed, with several technical changes for clarity. The Board believes that it is appropriate that a creditor review a consumer's account under § 226.59(a) after the statutory cure right expires if the consumer's rate has not been reduced. A consumer's credit risk or other factors might change after the cure period expires, warranting a rate reduction at that time. The Board further notes that it would create an anomalous result if new TILA Section 148 provided less protection in respect of a rate increase applicable to both existing balances and new transactions than for rate increases that are applicable only to new transactions.

59(f) Termination of Obligation To Review Factors

TILA Section 148 does not expressly state when the obligation to review factors and determine whether to reduce the annual percentage rate applicable to a consumer's credit card account terminates. Proposed § 226.59(f)(1) and (f)(2) provided that the obligation to review factors under § 226.59(a) ceases to apply if the issuer reduces the annual percentage rate to a rate equal to or less than the rate applicable immediately prior to the increase, or, if the rate applicable immediately prior to the increase was a variable rate, to a rate equal to or less than a variable rate determined by the same index and margin that applied prior the increase. Commenters generally supported this aspect of the proposal. Accordingly, § 226.59(f)(1) and (f)(2) are adopted as proposed.

In the supplementary information to the March 2010 Regulation Z Proposal, the Board noted that proposed § 226.59 could require card issuers to review the annual percentage rates applicable to certain credit card accounts for an extended period of time. Under the proposed rule, an issuer would be required to continue to review a consumer's account each six months unless and until the rate is reduced to the rate in effect prior to the increase. In some circumstances, this could mean that the review required by § 226.59(a) would need to occur each six months for an indefinite period. The Board solicited comment on whether the obligation to review the rate applicable to a consumer's account should terminate after some specific time period elapses following the initial increase, for example after five years. The Board also solicited comment on whether there is significant benefit to consumers from requiring card issuers to continue reviewing factors under § 226.59 even after an extended period of time.

Many issuers and several industry trade associations commented on proposed § 226.59(f). Industry commenters stated that the Board should not require that rate increases be reviewed indefinitely, and indicated that requiring periodic reviews for an indefinite period would increase the cost and complexity associated with compliance and compliance examinations. Industry commenters also indicated that the consumer benefit of requiring rate reviews to continue indefinitely is questionable, particularly given that the costs associated with ongoing reviews would be passed on to consumers in the form of higher fees and rates and more closed accounts. Most issuers requested a specific time limit for the review process. The time periods suggested by commenters ranged from one year to five years after the rate increase. Most issuers advocated a review period of two or three years. Other industry commenters stated that the obligation to review the account should terminate on the date

when the account is at the same pricing offered to new accounts with comparable risk profiles.

Consumer groups, on the other hand, urged the Board not to limit the review obligation under § 226.59 to five years or any other time frame. These commenters noted that accounts are constantly reviewed as a matter of business practice to determine whether to increase a consumer's rate. These commenters also noted that changes in economic conditions or a consumer's creditworthiness can occur over an extended period, in some cases greater than five years, and that the Credit Card Act intended for consumers' accounts to be reevaluated when such factors change regardless of how much time has elapsed since the initial rate increase.

The Board is not adopting a specific time limit for the review obligation under § 226.59. New TILA Section 148 does not expressly create such a time limit. The Board believes that creating such a time limit is not appropriate, because in some cases it may be beneficial to a consumer to have his or her rate reevaluated when market conditions change or the consumer's creditworthiness improves, even if a number of years have elapsed since the rate increase initially giving rise to the review requirement. The Board also believes that many issuers will implement automated systems to perform the periodic reevaluation of rate increases and, accordingly, once these systems are in place, there should not be undue burden associated with the ongoing review of accounts subject to § 226.59.

The Board also believes that it is inappropriate for the review requirement to automatically terminate when the account is at the same pricing offered to new accounts with comparable risk profiles. Issuers that perform the review under § 226.59(a) by considering the factors they use to determine the rates applicable to new accounts under § 226.59(d) will generally be required to adjust the rate based on the review so that it is comparable to the rate offered to similarly situated new consumers. Therefore, if § 226.59(f) permitted the review requirement to terminate when the account is at the same pricing offered to new accounts with comparable risk profiles, a consumer would only receive one six-month review before the requirement terminated. The Board does not believe that this is consistent with the intent of new TILA Section 148, which contemplates ongoing reviews.

The Board acknowledges that this may create seemingly anomalous results. For example, in year one Consumer A may open a credit card account with a rate applicable to purchases of 10%. Due to a change in market conditions, that consumer's rate may be increased in year three to 15%, to the extent permitted by § 226.55. A similarly situated consumer, Consumer B, who applies for credit in year three may also receive a rate on purchases of 15%. The issuer would be required to perform periodic reviews of the rate increase on Consumer A's account. However, Consumer B's account, which also has a 15% rate on purchases, would not be subject to the review requirement. However, the Board believes that this is consistent with new TILA Section 148, which requires that periodic reviews be conducted only if there is a rate increase. Consumer A applied for an account with a 10% rate, so the rate of 15% represents an increase over the initial terms to which the consumer agreed, notwithstanding the fact that Consumer A would receive a 15% rate if applying for a new credit card with the issuer. Consumer B, on the other hand, applied for and received a card with a rate of 15%.

One issuer asked the Board for clarification regarding the applicability of § 226.59(f) to promotional rates that are increased due to a consumer's violation of the account terms. This commenter stated that if a promotional rate has been increased to a penalty rate [61] and the promotional period has subsequently expired, a card issuer should be required to review the penalty rate increase only until the rate is reduced to the standard rate that would have applied upon expiration of the promotion. Other commenters asked the Board more generally to exempt the loss of promotional rates due to violations of the account terms from the requirements of § 226.59. Some of these commenters noted particular concern regarding loss of long-term promotional rates between January 1, 2009 and February 22, 2010, which occurred before the limitations in § 226.55 on the loss of a promotional rate became effective.

The final rule does not exempt the loss of a promotional rate from the requirements of § 226.59. The Board believes that such an exemption would be inappropriate, for several reasons. First, new TILA Section 148 covers all rate increases, including those due to changes in the consumer's creditworthiness or other factors. The Board believes that a loss of a promotional rate due to a violation of the contract terms is properly characterized as a rate increase based on the consumer's creditworthiness or other factors relevant to that individual consumer and therefore is covered by the statute. In addition, it would be difficult to distinguish by regulation between promotional rates and other types of stepped-rate arrangements. For example, an issuer might offer a consumer a 5% rate on purchases for 18 months, after which the rate on purchases will increase to 15%. In contrast, an issuer might offer a consumer a 10% rate on purchases for year one, a 15% rate for year two, and a 20% rate thereafter. It is difficult to identify a principled rationale for distinguishing between these scenarios, and the Board believes that it is appropriate for a review requirement to apply whenever a temporary reduced rate is increased due to a consumer's violation of the contract terms.

The Board also believes that coverage of the loss of a promotional rate is consistent with the purposes of new TILA Section 148. In the case of a long-term promotional rate lasting several years, a consumer might commit a minor violation of the account terms, such as a payment that is one day late or a transaction that exceeds the credit limit by a small amount, resulting in the revocation of that promotional rate to the extent permitted by § 226.55. However, the consumer's creditworthiness might improve over the course of the remaining promotional period, such that it is appropriate to reinstate the promotional rate or otherwise decrease the rate applicable to the consumer's account for the remainder of the promotional period.

However, the Board does believe that it is appropriate to clarify the duration of the review requirement for temporary rates that have expired. Accordingly, the Board is adopting new comment 59(f)–1.i to clarify when the review requirement terminates under § 226.59(f). New comment 59(f)–1.i states that if an annual percentage rate is increased due to revocation of a temporary rate, § 226.59(a) requires that the card issuer periodically review the increased rate. The comment clarifies that in contrast, if the rate increase results from the expiration of a temporary rate previously disclosed in accordance with § 226.9(c)(2)(v)(B), the review requirements in § 226.59(a) do not apply. If a temporary rate is revoked such that the requirements of § 226.59(a) apply, § 226.59(f) permits an issuer to terminate the review of the rate increase if and when the applicable rate is the same as the rate that would have applied if the increase had not occurred.

[61] *See* § 226.55 for limitations on the revocation of promotional rates.

Comment 59(f)–1.ii sets forth several illustrative examples.

The Board also is adopting a new comment 9(c)(2)(v)–12 to clarify the relationship between § 226.9(c)(2)(v)(B) and § 226.59 when a temporary rate has been revoked but subsequently is reinstated based on an issuer's review. The comment notes that § 226.59 requires a card issuer to review rate increases imposed due to the revocation of a temporary rate. In some circumstances, § 226.59 may require an issuer to reinstate a reduced temporary rate based on that review. If, based on a review required by § 226.59, a creditor reinstates a temporary rate that had been revoked, the comment states that a card issuer is not required to provide an additional notice to the consumer when the reinstated temporary rate expires, if the card issuer provided the disclosures required by § 226.9(c)(2)(v)(B) prior to the original commencement of the temporary rate. The comment sets forth an illustrative example.

The Board believes that a card issuer that has provided disclosures of a temporary rate pursuant to § 226.9(c)(2)(v)(B) prior to commencement of the promotion has already notified the consumer of the length of the promotional period and the rate that will apply at the end of the promotional period. Accordingly, the Board does not believe that an additional notice is necessary.

59(g) Acquired Accounts

Proposed § 226.59(g) addressed existing credit card accounts acquired by a card issuer. Proposed § 226.59(g)(1) set forth the general rule that, except as provided in § 226.59(g)(2), the obligation to review changes in factors in § 226.59(a) applies even to such acquired accounts. Consistent with the rule in § 226.59(d), the proposal for acquired accounts permitted a card issuer to review either the factors that the original issuer considered when imposing the rate increase or the factors that the acquiring card issuer currently considers in determining the annual percentage rates applicable to its credit card accounts. The Board noted that in some cases, a card issuer may not know whether accounts that it acquired were subject to a rate increase by the prior issuer. In these cases, the proposal permitted a card issuer complying with § 226.59(g)(1) to review factors in accordance with § 226.59(a) for all of its acquired accounts rather than seeking to identify just those accounts to which a rate increase was applied.

Proposed § 226.59(g)(2) set forth an alternate means for compliance with § 226.59 for acquired accounts. Proposed § 226.59(g)(2) applied if a card issuer reviews all of the credit card accounts it acquires, as soon as reasonably practicable after the acquisition of such accounts, in accordance with the factors that it currently uses in determining the rates applicable to its credit card accounts. Following the card issuer's initial review of its acquired accounts, proposed § 226.59(g)(2)(i) provided that the card issuer generally must review changes in factors for those acquired accounts in accordance with § 226.59(a) only for rate increases imposed as a result of that review. Similarly, proposed § 226.59(g)(2)(ii) provided that the card issuer generally is not required to review changes in factors in accordance with § 226.59(a) for any rate increases made prior to the card issuer's acquisition of such accounts.

Consumer groups supported the coverage of acquired accounts in § 226.59(g)(1), but opposed the alternate means of compliance set forth in proposed § 226.59(g)(2). These commenters stated that an issuer should be able to obtain information regarding past rate increases when it acquires a portfolio of accounts. These commenters believe that the rule should encourage the retention of information about rate increases rather than creating an alternative means of compliance.

One issuer opposed the coverage of acquired accounts in § 226.59(g)(1). This commenter stated that imposing requirements to reevaluate the rates on acquired accounts could have the unintended consequence of chilling the market for portfolio acquisitions. The commenter noted that disclosure of the information necessary to enable an acquiring issuer to conduct reevaluations of rate increases in accordance with § 226.59 could require the selling issuer to reveal proprietary information to a competitor. This commenter stated that the alternative means of compliance in proposed § 226.59(g)(2) is not sufficient to address the issue, because it could result in rate decrease after acquisition. The issuer urged the Board to clarify that accounts acquired from an unaffiliated issuer may be treated like new accounts and rates do not need to be evaluated unless and until the acquiring issuer increases the rate.

Other industry commenters supported the alternative means of compliance in proposed § 226.59(g)(2). These commenters stated that it is unlikely that issuers will have sufficient information about the selling issuer's pricing practices to perform the evaluation based on the factors used by the seller. These commenters noted that in many cases, accounts are being sold because of problems with the selling issuer's underwriting. In addition to being burdensome, these commenters stated that compelling the acquirer to rely on the same factors used by the seller could have the anomalous result of requiring the acquirer to rely on flawed underwriting models or factors.

In addition to the general rule for the alternate means of compliance set forth in § 226.59(g)(2)(i) and (g)(2)(ii), the Board proposed a new § 226.59(g)(2)(iii), which stated that if as a result of the card issuer's review, an account is subject to, or continues to be subject to, an increased rate as a penalty or due to the consumer's delinquency or default, the requirements to review the account under § 226.59(a) would apply. The Board noted that penalty rates are often much higher than the standard rates that apply to consumers' credit card accounts and that the imposition of a penalty rate for an extended period of time can be very costly to a consumer. Accordingly, the requirements to review accounts under proposed § 226.59(a) applied if a card issuer imposes, or continues to impose, a penalty rate on an acquired account. Proposed comment 59(g)(2)–2 set forth an example of the application of § 226.59(g)(2)(iii) when a penalty rate is imposed on an acquired account. The Board received no comments on this aspect of the proposal.

The Board is adopting § 226.59(g) generally as proposed, with several technical and wording changes to conform to the requirements of § 226.59(a) and for clarity. Section 226.59(g)(1) has been revised from the proposal to state that, except as provided in § 226.59(g)(2), § 226.59 applies to credit card accounts that have been acquired by the card issuer from another card issuer. Accordingly, an issuer that complies with § 226.59(g)(1) is subject to the guidance regarding factors in § 226.59(d). Section 226.59(g)(1) clarifies, consistent with the proposal, that a card issuer that complies with § 226.59 by reviewing the factors described in paragraph (d)(1)(i) must review the factors considered by the card issuer from which it acquired the accounts in connection with the rate increase. However, consistent with § 226.59(d)(1)(ii), an issuer may, in the alternative, consider the factors that the issuer currently considers when determining the rates applicable to similar new credit card accounts. The Board continues to believe that permitting an issuer to reevaluate acquired accounts using its own factors is appropriate because a card issuer may

not have full information regarding rate increases imposed by the prior issuer.

The Board notes that the special rule for certain rate increases imposed between January 1, 2009 and February 21, 2010, which is set forth in § 226.59(d)(2), generally applies to acquired accounts. Accordingly, the Board is adopting a new comment 59(g)(1)–1 to clarify the application of § 226.59(d)(2) to acquired accounts. The comment states that if a card issuer acquires accounts on which a rate increase was imposed between January 1, 2009 and February 21, 2010 that was not based solely upon consumer-specific factors, the acquiring card issuer must consider the factors that it currently considers when determining the annual percentage rates applicable to similar new credit card accounts, if it conducts either or both of the first two reviews of such accounts that are required after August 22, 2010 under § 226.59(a).

For example, assume that card issuer A increased the rates applicable to all of its credit card accounts from 15% to 20%, not due to consumer-specific factors, on June 1, 2009. Assume further that card issuer B acquired card issuer A's portfolio of accounts on January 1, 2010. When conducting the first two reviews of such accounts after August 22, 2010, card issuer B must consider the factors that it currently considers when determining the annual percentage rates applicable to similar new credit card accounts.

In the alternative, assume that card issuer A increased the rates applicable to all of its credit card accounts under an open-end (not home-secured) consumer credit plan, not due to consumer-specific factors, on June 1, 2009. Assume that card issuer A conducts the first two reviews of such accounts in accordance with § 226.59(a) and (d)(2) on January 1, 2011 and July 1, 2011 but, based on those reviews, is not required to decrease the rate. Assume that card issuer B acquires card issuer A's portfolio of accounts on August 1, 2011. Because the first two reviews of the acquired accounts were completed by card issuer A, § 226.59(d)(2) does not apply to subsequent rate reevaluations conducted by card issuer B.

The final rule retains the alternative means of compliance for acquired accounts in § 226.59(g)(2). The Board believes that this alternative means of compliance is more appropriate than an exception for acquired accounts, because coverage of acquired accounts is consistent with the purposes of new TILA Section 148. If a card issuer reviews all of the accounts that it acquires in accordance with the factors that it currently uses in determining the rates applicable to its new credit card accounts, this will ensure that acquired accounts are subject to the same rates that would apply if the consumer opened a new credit card account with the acquiring issuer. The Board believes that this will promote fair pricing of acquired accounts. If the card issuer raises the rate applicable to a consumer's account as a result of that review, it will have full information about the rate that applied prior to that increase and therefore the requirements of § 226.59(a) would apply with regard to that rate increase.

The Board notes that any rate increases the acquiring card issuer makes as a result of its review pursuant to § 226.59(g)(2) are subject to the substantive and notice requirements regarding rate increases in §§ 226.9 and 226.55. Consistent with the proposal, § 226.59(g)(2) of the final rule contains an express cross-reference to those sections.

Proposed comments 59(g)(2)–1 and 59(g)(2)–2 set forth examples of the alternative means of compliance in § 226.59(g)(2). The Board received no significant comment on these examples, which are adopted generally as proposed, with several technical changes to conform to the requirements of § 226.59(a) of the final rule.

In the proposal, the Board solicited comment on whether additional guidance is necessary regarding the requirement in § 226.59(g)(2) that the review of acquired accounts occur "as soon as reasonably practicable" after the acquisition of those accounts. One issuer commented that "as soon as reasonably practicable" should permit for a transition period of up to one year. This issuer stated that acquired accounts often have differences in systems, must be migrated to new vendors and processors, and must be adapted to the acquiring issuer's underwriting policies. One other issuer stated that the time in which the acquirer must conduct a reevaluation should be measured from the date of conversion to the acquiring issuer's platform, not the date of acquisition.

The Board understands that converting newly acquired accounts to the acquiring issuer's platform may be a time-consuming process, for the reasons noted by commenters. However, the Board believes that for consistency with new TILA Section 148, issuers using the alternate means of compliance must conduct their initial review no later than six months after the acquisition of a new portfolio. If this were not the case, the alternative means of compliance could in effect delay the review of a consumer's account for longer than the period established by statute. Accordingly, § 226.59(g)(2) of the final rule requires that an issuer using the alternative means of compliance review the accounts it acquires not later than six months after their acquisition.

59(h) Exceptions

March 2010 Regulation Z Proposal

The Board proposed two exceptions to the requirements of § 226.59, using its authority under TILA Section 105(a), which were set forth in proposed § 226.59(h). The first proposed exception applied to rate increases imposed when the requirement to reduce rates pursuant to the Servicemembers Civil Relief Act (SCRA), 50 U.S.C. app. 501 *et seq.,* ceases to apply. Specifically, 50 U.S.C. app. 527(a)(1) provides that "[a]n obligation or liability bearing interest at a rate in excess of 6 percent per year that is incurred by a servicemember, or the servicemember and the servicemember's spouse jointly, before the servicemember enters military service shall not bear interest at a rate in excess of 6 percent. * * * " With respect to credit card accounts, this restriction applies during the period of military service. *See* 50 U.S.C. app. 527(a)(1)(B).[62] Proposed § 226.59(h)(1) stated that the requirements of § 226.59 do not apply to increases in an annual percentage rate that was previously decreased pursuant to 50 U.S.C. app. 527, provided that such a rate increase is made in accordance with § 226.55(b)(6). Section 226.55(b)(6) provides that the rate may be increased when the SCRA ceases to apply, but that the increased rate may not exceed the rate that applied prior to the decrease.

The second proposed exception applied to charged off accounts. Proposed § 226.59(h)(2) provided that the requirements of § 226.59 do not apply to accounts that the card issuer has charged off in accordance with loan-loss provisions. For safety and soundness reasons, card issuers charge off accounts that have serious delinquencies, typically of 180 days or six months. For such accounts, full payment is generally due immediately.

Commenters that addressed proposed § 226.59(h), including several issuers and a consumer group, supported these exceptions. Accordingly, the Board is

[62] 50 U.S.C. app. 527(a)(1)(B) applies to obligations or liabilities that do not consist of a mortgage, trust deed, or other security in the nature of a mortgage.

adopting § 226.59(h)(1) and (h)(2) as proposed.

Other Exceptions

Industry commenters suggested that the Board adopt several additional exceptions to the reevaluation requirements of § 226.59. For example, one commenter urged the Board to adopt an exception from the review requirements for accounts with zero balances, even if there is subsequent use of the account. A second commenter requested an exception for rate increases that were not applied to outstanding balances or where the cardholder was given a right to opt out of the increase. A third comment letter stated that the final rule should include an exception for rate increases that were made for market conditions if a subsequent rate increase has been imposed on the account due to a violation of the account terms by the consumer.

The Board does not believe that these exceptions would be appropriate. The Board notes that new TILA Section 148 is intended to have a broad scope and to require periodic reviews of all types of rate increases, regardless of whether those increases can apply only to new transactions or to existing balances. Furthermore, the Board believes that TILA Section 148 requires that periodic reviews occur even if a consumer's account is subject to multiple or successive rate increases. In this case, the Board notes that an issuer could comply with § 226.59(a) and (d) by performing combined reviews of the increased rate or rates based on the factors it considers when determining the rates applicable to its new credit card accounts (subject to the timing rule in § 226.59(c)).

Appendix G—Open-End Model Forms and Clauses

For consistency with the substantive limitations in proposed § 226.52(b), the Board has amended the model language in Appendix G for the disclosure of late payment fees, over-the-limit fees, and returned payment fees.

Samples G–10(B) & G–10(C)—Applications and Solicitations Samples (Credit Cards) (§ 226.5a(b))

Sample G–10(E)—Applications and Solicitations Sample (Charge Cards) (§ 226.5a(b))

Samples G–17(B) & G–17(C)—Account-Opening Samples (§ 226.6(b)(2))

Sections 226.5a and 226.6 require creditors to disclose late payment fees, over-the-limit fees, and returned payment fees in, respectively, the application and solicitation disclosures and the account-opening disclosures. *See* §§ 226.5a(b)(9), (b)(10), (b)(12); §§ 226.6(b)(2)(viii), (b)(2)(ix), (b)(2)(xi). Model language is provided in Samples G–10(B), G–10(C), and G–10(E) and in G–17(B) and G–17(C). The model language generally reflects current fee practices by disclosing specific amounts for over-the-limit and returned payment fees, while disclosing a lower late payment fee if the account balance is less than or equal to a specified amount ($1,000 in the model forms) and a higher fee if the account balance is more than that amount.[63]

As discussed above, § 226.52(b) establishes new substantive restrictions on the amount of credit card penalty fees, including late payment fees, over-the-limit fees, and returned payment fees. Accordingly, for consistency with § 226.52(b), the Board has amended the model language in Samples G–10(B) and G–10(C) and in G–17(B) and G–17(C) to disclose late payment fees, over-the-limit fees, and returned payment fees as "up to $35." In this model language, $35 represents the maximum fee under the safe harbors in § 226.52(b)(1)(ii)(A)–(B). Card issuers that set their fees based on a cost analysis pursuant to § 226.52(b)(1)(i) would instead disclose the dollar amount that represents a reasonable proportion of the total costs incurred by the issuer as a result of the type of violation. However, consistent with the safe harbor for charge cards in § 226.52(b)(1)(ii)(C), the Board has amended G–10(E) to disclose the late payment fee as: "Up to $35. If you do not pay for two consecutive billing cycles, your fee will be $35 or 3% of the past due amount, whichever is greater."

The Board recognizes that, because the maximum safe harbor fee in § 226.52(b)(1)(ii)(B) only applies when a violation occurs again during the six billing cycles following the initial violation, this disclosure overstates the amount of the penalty fee that will be imposed for the initial violation. For example, an issuer utilizing the safe harbors in § 226.52(b)(1)(ii)(A)–(B) would disclose its late payment fee as "up to $35," even though § 226.52(b)(1)(i)(A) would only permit the card issuer to impose a $25 fee for the first late payment. Nevertheless, a consumer who incorrectly assumes that a $35 penalty fee will be imposed for all violations will not be harmed if—when a violation actually occurs—a lower penalty fee is imposed. Furthermore, disclosing the highest possible penalty fee under the safe harbors in § 226.52(b)(1)(ii)(A)–(B) may deter some consumers from violating the terms or other requirements of an account, which would be consistent with new TILA Section 149(c)(2).

Commenters generally supported this approach, although some expressed concern that consumers would receive incomplete information about how penalty fees are calculated. The Board shares this concern. However, it is unclear whether providing additional detail would increase the possibility of consumer confusion without substantially improving the accuracy of the model disclosures. Nevertheless, the Board notes that an "up to" disclosure is not the only means of accurately disclosing penalty fees in a manner that is substantially similar to the applicable tables in G–10 or G–17 of appendix G.

For example, as discussed above with respect to § 226.7, penalty fees may be accurately disclosed as a range under certain circumstances. Specifically, disclosing the late payment fee as a range from $25 to $35 would be accurate if the issuer utilizes the safe harbors in § 226.52(b)(1)(ii)(A)–(B) and the issuer's minimum payment formula set a minimum payment amount of $25 or higher. Furthermore, because the dollar amount associated with a returned payment for purposes of § 226.52(b)(2)(i) is also the relevant minimum payment, the same range could also accurately describe the returned payment fee in these circumstances. Similarly, a card issuer that complies with the safe harbors in § 226.52(b)(1)(ii)(A)–(B) could accurately disclose its over-the-limit fee as a range from $25 to $35 if the issuer chooses not to impose an over-the-limit fee when the total amount of credit extended in excess of the credit limit is less than $25. In addition, a card issuer could use the same range to accurately describe a declined access check fee if the issuer chose not to impose a fee unless the amount of the access check is $25 or higher.

The Board also notes that, for purposes of §§ 226.5a and 226.6, a card issuer is not precluded from disclosing both the $25 and $35 safe harbor amounts in § 226.52(b)(1)(ii)(A)–(B), provided the disclosure accurately describes the circumstances under which each amount may be imposed. Furthermore, as noted above, the Board previously adopted model language disclosing a lower late payment fee if the account balance is less than or equal to a specified amount and a higher fee if the account balance is more than that amount. This model language reflected the Board's understanding of fee practices prior to enactment of the

[63] Specifically, the model language in Samples G–10(B), G–10(C), G–17(B), and G–17(C) disclosed the late payment fee as follows: "$29 if balance is less than or equal to $1,000; $35 if balance is more than $1,000."

Credit Card Act in general and new TILA § 149 in particular. The Board has not included similar model language in this final rule because it is unclear whether card issuers will continue to impose different penalty fee amounts based on the account balance. However, a card issuer that does so consistent with the limitations in § 226.52(b) may disclose the amounts in the applicable tables consistent with §§ 226.5a and 226.6.

Samples G–18(B), G–18(D), G–18(F), and G–18(G)—Periodic Statement Forms (§ 226.7(b))

As noted above, § 226.7(b)(11)(i)(B) requires card issuers to disclose the amount of any late payment fee and any increased rate that may be imposed on the account as a result of a late payment. Currently, the model language in Sample G–18(B) states: "Late Payment Warning: If we do not receive your minimum payment by the date listed above, you may have to pay a $35 late fee and your APRs may be increased up to the Penalty APR of 28.99%." This language is restated in Samples G–18(D), G–18(F), and G–18(G). Consistent with the amendments to Samples G–10(B), G–10(C), G–17(B), and G–17(C), the Board is amending the late payment warning in Samples G–18(B), G–18(D), G–18(F), and G–18(G) to read as follows: "If we do not receive your minimum payment by the date listed above, you may have to pay a late fee of up to $35 and your APRs may be increased up to the Penalty APR of 28.99%." [64]

Sample G–21—Change-in-Terms Sample (Increase in Fees) (§ 226.9(c)(2))

The Board is amending the model language in Sample G–21 disclosing a change in a late payment fee for consistency with the amendments to Samples G–10(B), G–10(C), G–17(B), and G–17(C).

Model Form G–25(A)—Consent Form for Over-the-Limit Transactions (§ 226.56)

Model Form G–25(B)—Revocation Notice for Periodic Statement Regarding Over-the-Limit Transactions (§ 226.56)

As noted above, § 226.56(e)(1)(i) provides that, in the notice informing consumers that they must affirmatively consent (or opt in) to the card issuer's payment of over-the-limit transactions, the card issuer must disclose the dollar amount of any fees or charges assessed by the issuer on a consumer's account for an over-the-limit transaction. Model language is provided in Model Forms G–25(A) and G–25(B). For consistency with § 226.52(b) and the amendments to Samples G–10(B), G–10(C), G–17(B), and G–17(C) discussed above, the Board is revising Model Forms G–25(A) and G–25(B) to disclose the amount of the over-the-limit fee as "up to $35."

V. Mandatory Compliance Dates

A. *General mandatory compliance date.* The consumer protections in new TILA Sections 148 and 149 go into effect on August 22, 2010. *See* new TILA Section 148(d); new TILA Section 149(b). Accordingly, the final rule is effective August 22, 2010. In addition, the mandatory compliance date for the amendments to §§ 226.9, 226.52, and 226.59 and the amendments to Model Forms G–20 and G–22 is August 22, 2010. The amendments to the change-in-terms disclosures in Model Forms G–18(F) and G–18(G) also have a mandatory compliance date of August 22, 2010. These amendments implement the statutory requirements in new TILA Sections 148 and 149.

B. *Prospective application of new rules.* The final rule is prospective in application. The following paragraphs set forth additional guidance and examples as to how a creditor must comply with the final rule by the relevant mandatory compliance date.

C. *Special mandatory compliance date for amendments to penalty fee disclosures.* The mandatory compliance date for the amendments to the penalty fee disclosures in §§ 226.5a, 226.6, 226.7, and 226.56 and in Model Forms G–10(B), G–10(C), G–10(E), G–17(B), G–17(C), G–18(B), G–18(D), G–18(F), G–18(G), G–21, G–25(A), and G–25(B) is December 1, 2010. Although card issuers may not charge late payment fees, returned payment fees, or over-the-limit fees that are inconsistent with § 226.52(b) after August 22, 2010, the Board understands that it may not be possible for some card issuers to revise the disclosures for such fees prior to August 22. Accordingly, the Board has established a mandatory compliance date of December 1, 2010 for the amendments to the penalty fee disclosure requirements.

Until December 1, 2010, a card issuer complies with §§ 226.5a, 226.6, 226.7, and 226.56 if it discloses an amount for a late payment fee, returned payment fee, over-the-limit fee, or other penalty fee that exceeds the amount permitted by § 226.52(b). For example, a card issuer that imposed a late payment fee of $39 prior to August 22, 2010 may continue to disclose the amount of its late payment fee as $39 until December 1, 2010, even if—consistent with the safe harbors in § 226.52(b)(1)(ii)—the card issuer does not actually impose a fee that exceeds $35. However, the card issuer may begin to disclose the amount of the late payment fee as "up to $35" or otherwise comply with the amendments to §§ 226.5a, 226.6, 226.7, and 226.56 prior to December 1, 2010. Additional guidance and examples as to how a creditor must comply with the final rule are provided below.

The Board recognizes that, for a period of time, some consumers may receive disclosures containing fee amounts that are inconsistent with § 226.52(b). However, a consumer who is told, for example, that a $39 penalty fee will be imposed for late payments will not be harmed if—when he or she pays late—a lower penalty fee is imposed.

D. *Tabular summaries that accompany applications or solicitations (§ 226.5a).* Credit and charge card applications provided or made available to consumers on or after December 1, 2010 must comply with the final rule. For example, if a direct-mail application or solicitation is mailed to a consumer on November 30, 2010, it is not required to comply with the new requirements, even if the consumer does not receive it until December 7, 2010. If a direct-mail application or solicitation is mailed to consumers on or after December 1, 2010, however, it must comply with the final rule. If a card issuer makes an application or solicitation available to the general public, such as "take-one" applications, any new applications or solicitations issued by the card issuer on or after December 1, 2010 must comply with the new rule. However, if a card issuer issues an application or solicitation by making it available to the public prior to December 1, 2010, for example by restocking an in-store display of "take-one" applications on November 15, 2010, those applications need not comply with the new rule, even if a consumer may pick up one of the applications from the display on or after December 1, 2010. Any "take-one" applications that the card issuer uses to restock the display on or after December 1, 2010, however, must comply with the final rule.

E. *Account-opening disclosures (§ 226.6).* Account-opening disclosures furnished on or after December 1, 2010 must comply with the final rule. The relevant date for purposes of this requirement is the date on which the disclosures are furnished, not when the consumer applies for the account. For example, if a consumer applies for an account on November 30, 2010, but the account-opening disclosures are not

[64] The Board notes that no model language is required for charge card accounts because § 226.7(b)(11) does not apply to such accounts. *See* § 226.7(b)(11)(ii)(A).

mailed until December 2, 2010, those disclosures must comply with the final rule. In addition, if the disclosures are furnished by mail, the relevant date is the day on which the disclosures were sent, not the date on which the consumer receives the disclosures. Thus, if a creditor mails the account-opening disclosures on November 30, 2010, even if the consumer receives those disclosures on December 7, 2010, the disclosures are not required to comply with the final rule.

F. *Periodic statements (§ 226.7).* Periodic statements mailed or delivered on or after December 1, 2010 must comply with the final rule's revised penalty fee disclosures. For example, if a card issuer mails a periodic statement to the consumer on November 30, 2010, that statement is not required to comply with the final rule's revised penalty fee disclosures, even if the consumer does not receive the statement until December 7, 2010. However, as discussed below, if the periodic statement contains a notice of a rate increase, the requirements of § 226.9(c)(2)(iv)(A)(*8*) and (g)(3)(i)(A)(*6*) of the final rule apply to that notice if the periodic statement is mailed on or after August 22, 2010.

G. *Subsequent disclosure requirements (§ 226.9).*

Notice of rate increases (§ 226.9(c) and (g)). Sections 226.9(c)(2)(iv)(A)(*8*) and (g)(3)(i)(A)(*6*) of the final rule require that notices disclosing rate increases for credit card accounts under an open-end (not home-secured) consumer credit plan state no more than four principal reasons for the increase. The requirements of § 226.9(c)(2)(iv)(A)(*8*) and (g)(3)(i)(A)(*6*) apply to notices of rate increases mailed or delivered on or after August 22, 2010.

Changes necessary to comply with final rule (§ 226.9(c)). The Board understands that, in order to comply with §§ 226.52(b) and 226.59 by August 22, 2010, card issuers may have to make changes to the account terms set forth in a consumer's credit card agreement or similar legal documents. Card issuers should notify consumers of such changes as soon as reasonably practicable. However, the Board understands that, given the amount of time between issuance of this final rule and the statutory effective date, it may not be possible for some card issuers to comply with the provision in § 226.9(c)(2) stating that any required notice must be provided 45 days in advance of a change that is effective August 22. In these circumstances, the card issuer must comply with the applicable substantive provisions set forth in §§ 226.52(b) and 226.59 on August 22, even if the terms of the account have not been amended consistent with § 226.9(c)(2). Otherwise, the notice requirements in § 226.9(c)(2) could permit card issuers to continue to engage in practices that are inconsistent with §§ 226.52(b) and 226.59 after August 22, which would not be consistent with Congress' intent.

For example, in order to comply with § 226.52(b), card issuers may have to change the terms governing the imposition of fees for violating those terms or other requirements of the account. If the change involves a reduction in the amount of the fee, § 226.9(c)(2)(v)(A) provides that no notice is required under § 226.9(c) (although, as discussed below, notice may be required under § 226.9(e)). However, if a change does not involve a reduction in a fee and a card issuer provides a notice of the change on July 10, 2010, § 226.9(c)(2) technically prohibits the issuer from applying those changes to the account until August 24, 2010. In these circumstances, notwithstanding the 45-day notice requirement in § 226.9(c)(2), the card issuer cannot impose a penalty fee that is inconsistent with § 226.52(b) on or after August 22, 2010.

For these reasons, if § 226.9(c)(2) requires a card issuer to provide notice of a change that is necessary to comply with this final rule, the card issuer is not required to provide that notice 45 days before the effective date of the change. Furthermore, because it would not be appropriate to permit consumers to reject a change that is necessary to comply with this final rule, card issuers are not required to provide consumers with the right to reject pursuant to § 226.9(h) in these circumstances. Additional guidance regarding changes necessary to comply with § 226.52(b) is provided below.

Renewal notices (§ 226.9(e)). As amended by the February 2010 Regulation Z Rule, § 226.9(e), in part, requires card issuers to provide a notice at least 30 days prior to renewal of a credit or charge card if the card issuer has changed or amended any term of a cardholder's account required to be disclosed under § 226.6(b)(1) and (b)(2) that has not previously been disclosed to the cardholder. The Board is aware that as creditors implement changes to their systems and pricing structures to comply with §§ 226.52(b) and 226.59, they may make changes to terms required to be disclosed under § 226.6(b)(1) and (b)(2) for which advance notice is not required under § 226.9(c)(2) or (g). For example, a creditor may decrease its penalty fees to comply with § 226.52(b) or may change its contractual provisions regarding penalty pricing in order to facilitate compliance with § 226.59. To the extent that these changes result in the reduction of finance or other charges, § 226.9(c)(2)(v)(A) provides that advance notice is not required. However, such changes may give rise to the requirement to provide disclosures under § 226.9(e) prior to the scheduled renewal of the card.

The Board understands that an issuer's credit or charge card accounts may renew on a rolling basis, and that, given the short compliance period for this final rule, providing the notice under § 226.9(e) 30 days in advance of renewal may pose significant operational issues for issuers that are making changes to comply or facilitate compliance with new §§ 226.52(b) or §§ 226.59. Accordingly, for a brief transition period after the effective date of this final rule, a card issuer that makes changes to terms required to be disclosed under 226.6(b)(1) and (b)(2) that are not otherwise required to be disclosed in advance under § 226.9(c) or (g) in order to comply or facilitate compliance with § 226.52(b) or § 226.59 may provide the notice under § 226.9(e) as soon as reasonably practicable after such changes become effective. The Board understands that in some cases this will mean that a consumer will receive the notice required under § 226.9(e) less than 30 days before, or even shortly after, the renewal of the account.

This transition guidance is intended to apply only in those circumstances where the renewal notice is required because of changes to terms required to be disclosed under § 226.6(b)(1) or (b)(2) that have not previously been disclosed to the consumer. If the card issuer imposes an annual or other periodic fee for renewal, § 226.9(e) requires that the renewal notice be mailed or delivered at least 30 days or one billing cycle, whichever is less, before the mailing or delivery of the periodic statement on which any renewal fee is initially charged to the account.

The Board understands that some card issuers may both (1) impose an annual or other periodic fee for renewal and (2) make changes to terms required to be disclosed under § 226.6(b)(1) or (b)(2), in order to comply or facilitate compliance with §§ 226.52(b) or 226.59, that have not previously been disclosed to the consumer. In these circumstances, the notice required by § 226.9(e) must be mailed or delivered at least 30 days or one billing cycle, whichever is less, before the mailing or delivery of the periodic statement on which any renewal fee is initially charged to the

account. The Board understands that, for a brief transition period, it may be operationally difficult or impossible for issuers to disclose changes to terms that were made to comply or facilitate compliance with §§ 226.52(b) or 226.59 in such a § 226.9(e) notice. In these circumstances, a card issuer may disclose the changes made to comply with or facilitate compliance with §§ 226.52(b) or 226.59 in the next § 226.9(e) notice that it provides for a subsequent renewal of the account.

H. *Limitations on credit card penalty fees (§ 226.52(b)).*

Generally. The effective date for new TILA Section 149 is August 22, 2010. Accordingly, card issuers must comply with § 226.52(b) beginning on August 22, 2010. However, unlike new TILA Section 148 (which expressly applies to rate increases that occurred prior to its statutory effective date), nothing in new TILA Section 149 indicates that Congress intended the "reasonable and proportional" standard to apply retroactively. Accordingly, § 226.52(b) does not apply to fees imposed prior to August 22, 2010. Furthermore, the Board notes that this final rule should not be construed as suggesting that penalty fees imposed prior to August 22, 2010 were unreasonable.

Fees based on costs (§ 226.52(b)(1)(i)). A card issuer that begins imposing penalty fees pursuant to § 226.52(b)(1)(i) on August 22, 2010 must have previously determined that the dollar amount of the fee represents a reasonable proportion of the total costs incurred by the card issuer as a result of that type of violation.

Safe harbors (§ 226.52(b)(1)(ii)). The Board understands that some card issuers will not be able to perform the cost analysis required by § 226.52(b)(1)(i) prior to August 22, 2010 and will therefore be required to comply with the safe harbors in § 226.52(b)(1)(ii) for a period of time. In these circumstances, the card issuer may impose penalty fees that are consistent with the safe harbors in § 226.52(b)(1)(ii) beginning on August 22, 2010, even if corresponding amendments to the terms of the account have not yet been made consistent with the advance notice requirements in § 226.9(c)(2) (as applicable). Furthermore, because it would not be appropriate to permit consumers to reject changes to account terms that are consistent with the safe harbors in § 226.52(b)(1)(ii), card issuers are not required to provide consumers with the right to reject pursuant to § 226.9(h) in these circumstances.

If a card issuer utilizes the safe harbors in § 226.52(b)(1)(ii), the first penalty fee imposed on or after August 22, 2010 generally must comply with the $25 safe harbor in § 226.52(b)(1)(ii)(A). For example, if the required minimum periodic payment due on August 25 is late, the amount of the late payment fee cannot exceed $25, even if the payment due on July 25 was also late. As discussed above, the safe harbors in § 226.52(b)(1)(ii)(A)–(B) are designed to balance the statutory factors of cost, deterrence, and consumer conduct by limiting the fee for an initial violation to $25 while permitting an increased fee of $35 for additional violations of the same type during the next six billing cycles. Thus, it would be inconsistent with this purpose to permit a card issuer to impose a $35 penalty fee after August 22 based on a violation that occurred prior to August 22.

However, the safe harbor in § 226.52(b)(1)(ii)(C) is intended to permit charge card issuers to effectively manage seriously delinquent accounts. Thus, § 226.52(b)(1)(ii)(C) applies once the required payment for a charge card account has not been received for two or more consecutive billing cycles, even if the delinquency began prior to August 22, 2010. For example, assume that a charge card issuer requires payment of outstanding balances in full at the end of each billing cycle and that the billing cycles for the account begin on the first day of the month and end on the last day of the month. If the required payment due at the end of the July 2010 billing cycle has not been received by the end of the August 2010 billing cycle, § 226.52(b)(1)(ii)(C) permits the charge card issuer to impose a late payment fee that does not exceed 3% of the delinquent balance.

Closed account fees (§ 226.52(b)(2)(i)(B)(3)). Section 226.52(b)(2)(i)(B)(*3*) prohibits a card issuer from imposing a fee based on the closure or termination of an account. Comment 226.52(b)(2)(i)–6 clarifies that § 226.52(b)(2)(i)(B)(*3*) does not prohibit a card issuer from continuing to impose a periodic fee that was imposed before the account was closed or terminated. Similarly, to the extent that a permissible periodic fee was charged on a closed account prior to August 22, 2010, § 226.52(b)(2)(i)(B)(*3*) does not prohibit a card issuer from continuing to impose that fee with respect to that account after August 22 (although the card issuer is not permitted to increase the amount of the fee).

The Board notes that, effective February 22, 2010, § 226.55(d)(1) prohibited card issuers from imposing a periodic fee based solely on the balance on a closed account (such as a closed account fee) if that fee was not charged before the account was closed. *See* comment 55(d)–1. In other words, beginning on February 22, card issuers were no longer permitted to begin charging a periodic fee when an account with a balance was closed.

Accordingly, § 226.52(b)(2)(i)(B)(*3*) does not, for example, prohibit a card issuer that imposed a $10 monthly closed account fee on a specific account prior to August 22 from continuing to charge that $10 monthly fee after August 22. However, consistent with § 226.55(d)(1), the card issuer must have begun charging the $10 monthly fee to the account prior to February 22.

Multiple fees based on a single event or transaction (§ 226.52(b)(2)(ii)). Beginning on August 22, 2010, § 226.52(b)(2)(ii) prohibits card issuers from imposing more than one penalty fee based on a single event or transaction. However, § 226.52(b)(2)(ii) permits card issuers to comply with this prohibition by imposing no more than one penalty fee during a billing cycle. A card issuer that uses this method to comply with § 226.52(b)(2)(ii) is not required to determine whether multiple penalty fees were imposed during a billing cycle that begins prior to August 22, 2010.

I. *Requirements for over-the-limit transactions (§ 226.56).* Notices provided pursuant to § 226.56 on or after December 1, 2010 must comply with the final rule. For example, if a creditor mails an opt-in notice to a consumer on November 30, 2010, that notice is not required to comply with the final rule, even if the consumer does not receive the notice until December 7, 2010. However, if a card issuer mails an opt-in notice to a consumer on December 1, that notice must comply with the final rule.

J. *Reevaluation of rate increases (§ 226.59).* Section 226.59 generally requires that rate increases be reviewed in accordance with that section no less frequently than once every six months. As discussed in comment 59(c)–3, the review of annual percentage rates increased on or after January 1, 2009 and prior to August 22, 2010 must be completed prior to February 22, 2011. For annual percentage rates increased on or after August 22, 2010, any review required by § 226.59 must be completed within six months of the effective date of the increase.

VI. Regulatory Flexibility Analysis

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) requires an agency to perform an initial and final regulatory flexibility analysis on the impact a rule is expected to have on small entities.

The Board received no significant comments addressing the initial regulatory flexibility analysis. Therefore, based on its analysis and for the reasons stated below, the Board has concluded that this final rule will have a significant economic impact on a substantial number of small entities. Accordingly, the Board has prepared the following final regulatory flexibility analysis pursuant to section 604 of the RFA.

1. *Statement of the need for, and objectives of, the final rule.* The final rule implements new substantive requirements and updates to disclosure provisions in the Credit Card Act, which establishes fair and transparent practices relating to the extension of open-end consumer credit plans. The supplementary information above describes in detail the reasons, objectives, and legal basis for each component of the final rule.

2. *Summary of the significant issues raised by public comment in response to the Board's initial analysis, the Board's assessment of such issues, and a statement of any changes made as a result of such comments.* As discussed above, the Board's initial regulatory flexibility analysis reached the preliminary conclusion that the proposed rule would have a significant economic impact on a substantial number of small entities. *See* 75 FR 12354–12355 (Mar. 15, 2010). The Board received no comments specifically addressing this analysis.

3. *Small entities affected by the final rule.* All creditors that offer credit card accounts under open-end (not home-secured) consumer credit plans are subject to the final rule. The Board is relying on the analysis in the January 2009 FTC Act Rule, in which the Board, the OTS, and the NCUA estimated that approximately 3,500 small entities offer credit card accounts. *See* 74 FR 5549–5550 (January 29, 2009). The Board acknowledges, however, that the total number of small entities likely to be affected by the final rule is unknown, in part because the estimate in the January 2009 FTC Act Rule does not include card issuers that are not banks, savings associations, or credit unions.

4. *Recordkeeping, reporting, and compliance requirements.* The final rule does not impose any new recordkeeping or reporting requirements. The final rule, however, imposes new compliance requirements. The compliance requirements of this final rule are described above in **IV. Section-by-Section Analysis**. The Board notes that the precise costs to small entities to conform their open-end credit disclosures to the final rule and the costs of updating their systems to comply with the rule are difficult to predict. These costs depend on a number of factors that are unknown to the Board, including, among other things, the specifications of the current systems used by such entities to prepare and provide disclosures and administer credit card accounts, the complexity of the terms of the credit card products that they offer, and the range of such product offerings.

Provisions Regarding Consumer Credit Card Accounts

This subsection summarizes several of the amendments to Regulation Z and their likely impact on small entities that offer open-end credit. More information regarding these and other changes can be found in **IV. Section-by-Section Analysis**.

Sections 226.5a and 226.6 require creditors to disclose late payment fees, over-the-limit fees, and returned payment fees in, respectively, the application and solicitation disclosures and the account-opening disclosures. For consistency with § 226.52(b) (discussed below), the final rule amends §§ 226.5a(a)(2)(iv) and 226.6(b)(1)(i) to require creditors (including creditors that are small entities) to use bold text when disclosing maximum limits on fees in the application and solicitation table and the account-opening table, respectively. Creditors that are small entities are already required to provide this information so the Board does not anticipate any significant additional burden on small entities by requiring the use of bold text. In order to reduce the burden on small entities, the Board has provided model forms which can be used to comply with the final rule.

Section 226.7(b)(11)(i)(B) generally requires card issuers (including issuers that are small entities) to disclose the amount of any late payment fee and any increased rate that may be imposed on the account as a result of a late payment. Previously, if a range of late payment fees could be assessed, § 226.7(b)(11)(i)(B) permitted card issuers to disclose the highest fee and, at the card issuer's option, an indication that the fee imposed could be lower (such as a disclosure that the late payment fee is "up to $35"). For consistency with § 226.52(b) (discussed below), the final rule amends § 226.7(b)(11)(i)(B) to clarify that it is no longer optional to disclose an indication that the late payment fee may be lower than the disclosed amount. However, § 226.7(b)(11)(i)(B) already requires card issuers to disclose late payment fee information on the periodic statement so the Board does not anticipate any significant additional burden on small entities. The Board also seeks to reduce the burden on small entities by providing model forms which can be used to ease compliance with the final rule.

Under the final rule, §§ 226.9(c)(2)(iv)(A)(*8*) and 226.9(g)(3)(i)(A)(*6*) generally require card issuers (including issuers that are small entities) to disclose no more than four reasons for an annual percentage rate increase in the notice required to be provided 45 days in advance of that increase. Although §§ 226.9(c) and (g) already require card issuers to provide 45 days' notice prior to an annual percentage rate increase, §§ 226.9(c)(2)(iv)(A)(*8*) and 226.9(g)(3)(i)(A)(*6*) may require some small entities to establish processes and alter their systems in order to comply with the provision. The cost of such change will depend on the size of the institution and the composition of its portfolio. In order to reduce the burden on small entities, the Board has provided model forms which can be used to comply with the final rule.

The final rule amends § 226.52 by creating a new § 226.52(b), which generally limits the dollar amount of penalty fees imposed by card issuers (including issuers that are small entities). Specifically, credit card penalty fees must be based on an analysis of the costs incurred by the issuer as a result of violations of the terms or other requirements of an account or on one of the safe harbors established by the final rule. In addition, § 226.52(b) prohibits penalty fees that exceed the dollar amount associated with the violation and certain types of penalty fees without an associated dollar amount. As discussed above, compliance with § 226.52(b) will require card issuers that are small entities to conform certain penalty fee disclosures already required under §§ 226.5a, 226.6, and 226.7.[65]

The final rule creates a new § 226.59, which generally requires card issuers (including issuers that are small entities) to reevaluate an increased annual percentage rate no less than every six months. In addition, § 226.59 requires card issuers (including issuers that are small entities) to reduce the annual percentage rate, if appropriate based on such reevaluation. Section 226.59 will require some small entities

[65] In addition, compliance with § 226.52(b) will require card issuers that are small entities to revise the disclosure of over-the-limit fees in the notice provided pursuant to 226.56. In order to assist card issuers in complying with the final rule, the Board has revised the model language for these disclosures.

to establish processes and alter their systems in order to comply with the provision. The cost of such change will depend on the size of the institution and the composition of its portfolio. In addition, this provision will reduce revenue that some small entities derive from finance charges.

Accordingly, the Board believes that, in the aggregate, the provisions of its final rule will have a significant economic impact on a substantial number of small entities.

5. *Other federal rules.* The Board has not identified any federal rules that duplicate, overlap, or conflict with the Board's revisions to Regulation Z.

6. *Significant alternatives to the final revisions.* The provisions of the final rule implement the statutory requirements of the Credit Card Act that go into effect on August 22, 2010. The Board sought to avoid imposing additional burden, while effectuating the statute in a manner that is beneficial to consumers. In particular, in order to reduce the burden of revising penalty fee disclosures, the Board has established a mandatory compliance date of December 1, 2010 for the amendments to §§ 226.5a, 226.6, 226.7, and 226.56. The Board did not receive any comment on any significant alternatives, consistent with the Credit Card Act, which would minimize impact of the final rule on small entities.

VII. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3506; 5 CFR part 1320 appendix A.1), the Board reviewed the final rule under the authority delegated to the Board by the Office of Management and Budget (OMB). The collection of information that is required by this final rule is found in 12 CFR part 226. The Federal Reserve may not conduct or sponsor, and an organization is not required to respond to, this information collection unless the information collection displays a currently valid OMB control number. The OMB control number is 7100–0199.[66]

This information collection is required to provide benefits for consumers and is mandatory (15 U.S.C. 1601 *et seq.*). The respondents/recordkeepers are creditors and other entities subject to Regulation Z, including for-profit financial institutions. TILA and Regulation Z are intended to ensure effective disclosure of the costs and terms of credit to consumers. For open-end credit, creditors are required, among other things, to disclose information about the initial costs and terms and to provide periodic statements of account activity, notices of changes in terms, and statements of rights concerning billing error procedures. Regulation Z requires specific types of disclosures for credit and charge card accounts and home-equity plans. TILA and Regulation Z also contain rules concerning credit advertising. Creditors are required to retain evidence of compliance for twenty-four months (§ 226.25), but Regulation Z does not specify the types of records that must be retained.

Under the PRA, the Federal Reserve accounts for the paperwork burden associated with Regulation Z for the state member banks and other creditors supervised by the Federal Reserve that engage in lending covered by Regulation Z and, therefore, are respondents under the PRA. Appendix I of Regulation Z defines the Federal Reserve-regulated institutions as: state member banks, branches and agencies of foreign banks (other than federal branches, federal agencies, and insured state branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25A of the Federal Reserve Act. Other federal agencies account for the paperwork burden on other entities subject to Regulation Z. To ease the burden and cost of complying with Regulation Z (particularly for small entities), the Federal Reserve provides model forms, which are appended to the regulation.

As discussed in **I. Background**, a notice of proposed rulemaking (NPR) was published in the **Federal Register** on March 15, 2010 (75 FR 12334). The comment period for the Board's preliminary PRA analysis expired on May 14, 2010. No comments specifically addressing the paperwork burden estimates were received; therefore, the estimates will remain unchanged as published in the NPR.

Under sections §§ 226.5a(a)(2)(iv) and 226.6(b)(1)(i), the use of bold text is required when disclosing maximum limits on fees in the application and solicitation table and the account-opening table, respectively. The Board anticipates that creditors will incorporate, with little change, the formatting change with the disclosures already required under §§ 226.5a(a)(2)(iv) and 226.6(b)(1)(i). In an effort to reduce burden, the Board has amended Appendix G–18 to provide guidance on complying with the final rule.

Under § 226.7(b)(11)(i)(B), a card issuer is required to disclose the amount of any late payment fee and any increased rate that may be imposed on the account as a result of a late payment. Previously, if a range of late payment fees could be assessed, § 226.7(b)(11)(i)(B) permitted card issuers to disclose the highest fee and, at the card issuer's option, an indication that the fee imposed could be lower (such as a disclosure that the late payment fee is "up to $35"). For consistency with § 226.52(b) (discussed below), the final rule amends § 226.7(b)(11)(i)(B) to clarify that it is no longer optional to disclose an indication that the late payment fee may be lower than the disclosed amount. The Board anticipates that card issuers, with little additional burden, will incorporate the final rule's disclosure requirement with the disclosures already required under § 226.7(b)(11)(i)(B). In an effort to reduce burden, the Board amends Appendix G–18 to provide guidance on an "up to" disclosure.

Under §§ 226.9(c)(2)(iv)(A)(*8*) and 226.9(g)(3)(i)(A)(*6*), a card issuer is required to disclose no more than four reasons for an annual percentage rate increase in the notice required to be provided 45 days in advance of that increase. The Board anticipates that card issuers, with little additional burden, will incorporate the final rule's disclosure requirement with the disclosures already required under § 226.9(c) and § 226.9(g). In an effort to reduce burden, the Board has amended Appendix G–18 to provide guidance on complying with the final rule.

Section 226.52(b) generally limits the dollar amount of penalty fees imposed by card issuers. Specifically, credit card penalty fees must be based on an analysis of the costs incurred by the issuer as a result of violations of the terms or other requirements of an account or on one of the safe harbors established by the final rule. In addition, § 226.52(b) prohibits penalty fees that exceed the dollar amount associated with the violation and certain types of penalty fees without an associated dollar amount. As discussed above, compliance with § 226.52(b) will require card issuers to conform certain penalty fee disclosures already required under §§ 226.5a, 226.6, and 226.7.[67]

The Board estimates that the final rule will impose a one-time increase in the

[66] In 2009, the information collection was re-titled—Reporting, Recordkeeping and Disclosure Requirements associated with Regulation Z (Truth in Lending) and Regulation AA (Unfair or Deceptive Acts or Practices).

[67] In addition, compliance with § 226.52(b) will require card issuers that are small entities to revise the disclosure of over-the-limit fees in the notice provided pursuant to 226.56. In order to assist card issuers in complying with the final rule, the Board has revised the model language in Appendix G–18 for these disclosures.

total annual burden under Regulation Z. The 1,138 respondents will take, on average, 40 hours to update their systems to comply with the disclosure requirements addressed in this final rule. The total annual burden is estimated to increase by 45,520 hours, from 1,442,594 to 1,488,114 hours.[68]

The total one-time burden increase represents averages for all respondents regulated by the Federal Reserve. The Federal Reserve expects that the amount of time required to implement the changes adopted by the final rule for a given financial institution or entity may vary based on the size and complexity of the respondent.

The other Federal financial agencies: The Office of the Comptroller of the Currency (OCC), the Office of Thrift Supervision (OTS), the Federal Deposit Insurance Corporation (FDIC), and the National Credit Union Administration (NCUA) are responsible for estimating and reporting to OMB the total paperwork burden for the domestically chartered commercial banks, thrifts, and federal credit unions and U.S. branches and agencies of foreign banks for which they have primary administrative enforcement jurisdiction under TILA Section 108(a), 15 U.S.C. 1607(a). These agencies are permitted, but are not required, to use the Board's burden estimation methodology. Using the Board's method, the total current estimated annual burden for the approximately 16,200 domestically chartered commercial banks, thrifts, and federal credit unions and U.S. branches and agencies of foreign banks supervised by the Federal Reserve, OCC, OTS, FDIC, and NCUA under TILA will be approximately 18,962,245 hours. The final rule will impose a one-time increase in the estimated annual burden for such institutions by 648,000 hours to 19,610,245 hours. The above estimates represent an average across all respondents; the Board expects variations between institutions based on their size, complexity, and practices.

The Board has a continuing interest in the public's opinion of the collection of information. Comments on the collection of information should be sent to Michelle Shore, Federal Reserve Board Clearance Officer, Division of Research and Statistics, Mail Stop 95–A, Board of Governors of the Federal Reserve System, Washington, DC 20551, with copies of such comments sent to the Office of Management and Budget, Paperwork Reduction Project (7100–0199), Washington, DC 20503.

List of Subjects in 12 CFR Part 226

Advertising, Consumer protection, Federal Reserve System, Reporting and recordkeeping requirements, Truth in Lending.

Text of Final Revisions

For the reasons set forth in the preamble, the Board is amending Regulation Z, 12 CFR part 226, as set forth below:

PART 226—TRUTH IN LENDING (REGULATION Z)

■ 1. In § 226.5a, revise paragraph (a)(2)(iv) to read as follows:

§ 226.5a Credit and charge card applications and solicitations.

(a) * * *

(2) * * *

(iv) When a tabular format is required, any annual percentage rate required to be disclosed pursuant to paragraph (b)(1) of this section, any introductory rate required to be disclosed pursuant to paragraph (b)(1)(ii) of this section, any rate that will apply after a premium initial rate expires required to be disclosed under paragraph (b)(1)(iii) of this section, and any fee or percentage amounts or maximum limits on fee amounts disclosed pursuant to paragraphs (b)(2), (b)(4), (b)(8) through (b)(13) of this section must be disclosed in bold text. However, bold text shall not be used for: The amount of any periodic fee disclosed pursuant to paragraph (b)(2) of this section that is not an annualized amount; and other annual percentage rates or fee amounts disclosed in the table.

* * * * *

■ 2. In § 226.6, revise paragraph (b)(1)(i) to read as follows:

§ 226.6 Account-opening disclosures.

* * * * *

(b) * * *

(1) * * *

(i) *Highlighting.* In the table, any annual percentage rate required to be disclosed pursuant to paragraph (b)(2)(i) of this section; any introductory rate permitted to be disclosed pursuant to paragraph (b)(2)(i)(B) or required to be disclosed under paragraph (b)(2)(i)(F) of this section, any rate that will apply after a premium initial rate expires permitted to be disclosed pursuant to paragraph (b)(2)(i)(C) or required to be disclosed pursuant to paragraph (b)(2)(i)(F), and any fee or percentage amounts or maximum limits on fee amounts disclosed pursuant to paragraphs (b)(2)(ii), (b)(2)(iv), (b)(2)(vii) through (b)(2)(xii) of this section must be disclosed in bold text. However, bold text shall not be used for: The amount of any periodic fee disclosed pursuant to paragraph (b)(2) of this section that is not an annualized amount; and other annual percentage rates or fee amounts disclosed in the table.

* * * * *

■ 3. In § 226.7, revise paragraph (b)(11)(i)(B) to read as follows:

§ 226.7 Periodic statement.

* * * * *

(b) * * *

(11) * * *

(i) * * *

(B) The amount of any late payment fee and any increased periodic rate(s) (expressed as an annual percentage rate(s)) that may be imposed on the account as a result of a late payment. If a range of late payment fees may be assessed, the card issuer may state the range of fees, or the highest fee and an indication that the fee imposed could be lower. If the rate may be increased for more than one feature or balance, the card issuer may state the range of rates or the highest rate that could apply and at the issuer's option an indication that the rate imposed could be lower.

* * * * *

■ 4. In § 226.9, revise paragraphs (c)(2) and (g) to read as follows:

§ 226.9 Subsequent disclosure requirements.

* * * * *

(c) * * *

(2) *Rules affecting open-end (not home-secured) plans*—(i) *Changes where written advance notice is required*—(A) *General.* For plans other than home-equity plans subject to the requirements of § 226.5b, except as provided in paragraphs (c)(2)(i)(B), (c)(2)(iii) and (c)(2)(v) of this section, when a significant change in account terms as described in paragraph (c)(2)(ii) of this section is made to a term required to be disclosed under § 226.6(b)(3), (b)(4) or (b)(5) or the required minimum periodic payment is increased, a creditor must provide a written notice of the change at least 45 days prior to the effective date of the change to each consumer who may be affected. The 45-day timing requirement does not apply if the consumer has agreed to a particular change; the notice shall be given, however, before the effective date of the change. Increases in the rate applicable to a consumer's

[68] The burden estimate for this rulemaking does *not* include the burden addressing changes to implement the following provisions announced in separate rulemakings:

1. Closed-End Mortgages (Docket No. R–1366) (74 FR 43232).

2. Home-Equity Lines of Credit (Docket No. R–1367) (74 FR 43428).

3. Notification of the sale or transfer of mortgage loans (Docket No. R–1378) (74 FR 60143).

account due to delinquency, default or as a penalty described in paragraph (g) of this section that are not due to a change in the contractual terms of the consumer's account must be disclosed pursuant to paragraph (g) of this section instead of paragraph (c)(2) of this section.

(B) *Changes agreed to by the consumer.* A notice of change in terms is required, but it may be mailed or delivered as late as the effective date of the change if the consumer agrees to the particular change. This paragraph (c)(2)(i)(B) applies only when a consumer substitutes collateral or when the creditor can advance additional credit only if a change relatively unique to that consumer is made, such as the consumer's providing additional security or paying an increased minimum payment amount. The following are not considered agreements between the consumer and the creditor for purposes of this paragraph (c)(2)(i)(B): The consumer's general acceptance of the creditor's contract reservation of the right to change terms; the consumer's use of the account (which might imply acceptance of its terms under state law); the consumer's acceptance of a unilateral term change that is not particular to that consumer, but rather is of general applicability to consumers with that type of account; and the consumer's request to reopen a closed account or to upgrade an existing account to another account offered by the creditor with different credit or other features.

(ii) *Significant changes in account terms.* For purposes of this section, a "significant change in account terms" means a change to a term required to be disclosed under § 226.6(b)(1) and (b)(2), an increase in the required minimum periodic payment, or the acquisition of a security interest.

(iii) *Charges not covered by § 226.6(b)(1) and (b)(2).* Except as provided in paragraph (c)(2)(vi) of this section, if a creditor increases any component of a charge, or introduces a new charge, required to be disclosed under § 226.6(b)(3) that is not a significant change in account terms as described in paragraph (c)(2)(ii) of this section, a creditor may either, at its option:

(A) Comply with the requirements of paragraph (c)(2)(i) of this section; or

(B) Provide notice of the amount of the charge before the consumer agrees to or becomes obligated to pay the charge, at a time and in a manner that a consumer would be likely to notice the disclosure of the charge. The notice may be provided orally or in writing.

(iv) *Disclosure requirements*—(A) *Significant changes in account terms.* If a creditor makes a significant change in account terms as described in paragraph (c)(2)(ii) of this section, the notice provided pursuant to paragraph (c)(2)(i) of this section must provide the following information:

(*1*) A summary of the changes made to terms required by § 226.6(b)(1) and (b)(2), a description of any increase in the required minimum periodic payment, and a description of any security interest being acquired by the creditor;

(*2*) A statement that changes are being made to the account;

(*3*) For accounts other than credit card accounts under an open-end (not home-secured) consumer credit plan subject to § 226.9(c)(2)(iv)(B), a statement indicating the consumer has the right to opt out of these changes, if applicable, and a reference to additional information describing the opt-out right provided in the notice, if applicable;

(*4*) The date the changes will become effective;

(*5*) If applicable, a statement that the consumer may find additional information about the summarized changes, and other changes to the account, in the notice;

(*6*) If the creditor is changing a rate on the account, other than a penalty rate, a statement that if a penalty rate currently applies to the consumer's account, the new rate described in the notice will not apply to the consumer's account until the consumer's account balances are no longer subject to the penalty rate;

(*7*) If the change in terms being disclosed is an increase in an annual percentage rate, the balances to which the increased rate will be applied. If applicable, a statement identifying the balances to which the current rate will continue to apply as of the effective date of the change in terms; and

(*8*) If the change in terms being disclosed is an increase in an annual percentage rate for a credit card account under an open-end (not home-secured) consumer credit plan, a statement of no more than four principal reasons for the rate increase, listed in their order of importance.

(B) *Right to reject for credit card accounts under an open-end (not home-secured) consumer credit plan.* In addition to the disclosures in paragraph (c)(2)(iv)(A) of this section, if a card issuer makes a significant change in account terms on a credit card account under an open-end (not home-secured) consumer credit plan, the creditor must generally provide the following information on the notice provided pursuant to paragraph (c)(2)(i) of this section. This information is not required to be provided in the case of an increase in the required minimum periodic payment, an increase in a fee as a result of a reevaluation of a determination made under § 226.52(b)(1)(i) or an adjustment to the safe harbors in § 226.52(b)(1)(ii) to reflect changes in the Consumer Price Index, a change in an annual percentage rate applicable to a consumer's account, a change in the balance computation method applicable to consumer's account necessary to comply with § 226.54, or when the change results from the creditor not receiving the consumer's required minimum periodic payment within 60 days after the due date for that payment:

(*1*) A statement that the consumer has the right to reject the change or changes prior to the effective date of the changes, unless the consumer fails to make a required minimum periodic payment within 60 days after the due date for that payment;

(*2*) Instructions for rejecting the change or changes, and a toll-free telephone number that the consumer may use to notify the creditor of the rejection; and

(*3*) If applicable, a statement that if the consumer rejects the change or changes, the consumer's ability to use the account for further advances will be terminated or suspended.

(C) *Changes resulting from failure to make minimum periodic payment within 60 days from due date for credit card accounts under an open-end (not home-secured) consumer credit plan.* For a credit card account under an open-end (not home-secured) consumer credit plan:

(*1*) If the significant change required to be disclosed pursuant to paragraph (c)(2)(i) of this section is an increase in an annual percentage rate or a fee or charge required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) based on the consumer's failure to make a minimum periodic payment within 60 days from the due date for that payment, the notice provided pursuant to paragraph (c)(2)(i) of this section must state that the increase will cease to apply to transactions that occurred prior to or within 14 days of provision of the notice, if the creditor receives six consecutive required minimum periodic payments on or before the payment due date, beginning with the first payment due following the effective date of the increase.

(*2*) If the significant change required to be disclosed pursuant to paragraph (c)(2)(i) of this section is an increase in a fee or charge required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or

(b)(2)(xii) based on the consumer's failure to make a minimum periodic payment within 60 days from the due date for that payment, the notice provided pursuant to paragraph (c)(2)(i) of this section must also state the reason for the increase.

(D) *Format requirements*—(*1*) *Tabular format.* The summary of changes described in paragraph (c)(2)(iv)(A)(*1*) of this section must be in a tabular format (except for a summary of any increase in the required minimum periodic payment), with headings and format substantially similar to any of the account-opening tables found in G–17 in appendix G to this part. The table must disclose the changed term and information relevant to the change, if that relevant information is required by § 226.6(b)(1) and (b)(2). The new terms shall be described in the same level of detail as required when disclosing the terms under § 226.6(b)(2).

(*2*) *Notice included with periodic statement.* If a notice required by paragraph (c)(2)(i) of this section is included on or with a periodic statement, the information described in paragraph (c)(2)(iv)(A)(*1*) of this section must be disclosed on the front of any page of the statement. The summary of changes described in paragraph (c)(2)(iv)(A)(*1*) of this section must immediately follow the information described in paragraph (c)(2)(iv)(A)(*2*) through (c)(2)(iv)(A)(*7*) and, if applicable, paragraphs (c)(2)(iv)(A)(*8*), (c)(2)(iv)(B), and (c)(2)(iv)(C) of this section, and be substantially similar to the format shown in Sample G–20 or G–21 in appendix G to this part.

(*3*) *Notice provided separately from periodic statement.* If a notice required by paragraph (c)(2)(i) of this section is not included on or with a periodic statement, the information described in paragraph (c)(2)(iv)(A)(*1*) of this section must, at the creditor's option, be disclosed on the front of the first page of the notice or segregated on a separate page from other information given with the notice. The summary of changes required to be in a table pursuant to paragraph (c)(2)(iv)(A)(*1*) of this section may be on more than one page, and may use both the front and reverse sides, so long as the table begins on the front of the first page of the notice and there is a reference on the first page indicating that the table continues on the following page. The summary of changes described in paragraph (c)(2)(iv)(A)(*1*) of this section must immediately follow the information described in paragraph (c)(2)(iv)(A)(*2*) through (c)(2)(iv)(A)(*7*) and, if applicable, paragraphs (c)(2)(iv)(A)(*8*), (c)(2)(iv)(B), and (c)(2)(iv)(C), of this section, substantially similar to the format shown in Sample G–20 or G–21 in appendix G to this part.

(v) *Notice not required.* For open-end plans (other than home equity plans subject to the requirements of § 226.5b) a creditor is not required to provide notice under this section:

(A) When the change involves charges for documentary evidence; a reduction of any component of a finance or other charge; suspension of future credit privileges (except as provided in paragraph (c)(2)(vi) of this section) or termination of an account or plan; when the change results from an agreement involving a court proceeding; when the change is an extension of the grace period; or if the change is applicable only to checks that access a credit card account and the changed terms are disclosed on or with the checks in accordance with paragraph (b)(3) of this section;

(B) When the change is an increase in an annual percentage rate upon the expiration of a specified period of time, provided that:

(*1*) Prior to commencement of that period, the creditor disclosed in writing to the consumer, in a clear and conspicuous manner, the length of the period and the annual percentage rate that would apply after expiration of the period;

(*2*) The disclosure of the length of the period and the annual percentage rate that would apply after expiration of the period are set forth in close proximity and in equal prominence to the first listing of the disclosure of the rate that applies during the specified period of time; and

(*3*) The annual percentage rate that applies after that period does not exceed the rate disclosed pursuant to paragraph (c)(2)(v)(B)(*1*) of this paragraph or, if the rate disclosed pursuant to paragraph (c)(2)(v)(B)(*1*) of this section was a variable rate, the rate following any such increase is a variable rate determined by the same formula (index and margin) that was used to calculate the variable rate disclosed pursuant to paragraph (c)(2)(v)(B)(*1*);

(C) When the change is an increase in a variable annual percentage rate in accordance with a credit card agreement that provides for changes in the rate according to operation of an index that is not under the control of the creditor and is available to the general public; or

(D) When the change is an increase in an annual percentage rate, a fee or charge required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii), or the required minimum periodic payment due to the completion of a workout or temporary hardship arrangement by the consumer or the consumer's failure to comply with the terms of such an arrangement, provided that:

(*1*) The annual percentage rate or fee or charge applicable to a category of transactions or the required minimum periodic payment following any such increase does not exceed the rate or fee or charge or required minimum periodic payment that applied to that category of transactions prior to commencement of the arrangement or, if the rate that applied to a category of transactions prior to the commencement of the workout or temporary hardship arrangement was a variable rate, the rate following any such increase is a variable rate determined by the same formula (index and margin) that applied to the category of transactions prior to commencement of the workout or temporary hardship arrangement; and

(*2*) The creditor has provided the consumer, prior to the commencement of such arrangement, with a clear and conspicuous disclosure of the terms of the arrangement (including any increases due to such completion or failure). This disclosure must generally be provided in writing. However, a creditor may provide the disclosure of the terms of the arrangement orally by telephone, provided that the creditor mails or delivers a written disclosure of the terms of the arrangement to the consumer as soon as reasonably practicable after the oral disclosure is provided.

(vi) *Reduction of the credit limit.* For open-end plans that are not subject to the requirements of § 226.5b, if a creditor decreases the credit limit on an account, advance notice of the decrease must be provided before an over-the-limit fee or a penalty rate can be imposed solely as a result of the consumer exceeding the newly decreased credit limit. Notice shall be provided in writing or orally at least 45 days prior to imposing the over-the-limit fee or penalty rate and shall state that the credit limit on the account has been or will be decreased.

* * * * *

(g) *Increase in rates due to delinquency or default or as a penalty*—(1) *Increases subject to this section.* For plans other than home-equity plans subject to the requirements of § 226.5b, except as provided in paragraph (g)(4) of this section, a creditor must provide a written notice to each consumer who may be affected when:

(i) A rate is increased due to the consumer's delinquency or default; or

(ii) A rate is increased as a penalty for one or more events specified in the

account agreement, such as making a late payment or obtaining an extension of credit that exceeds the credit limit.

(2) *Timing of written notice.* Whenever any notice is required to be given pursuant to paragraph (g)(1) of this section, the creditor shall provide written notice of the increase in rates at least 45 days prior to the effective date of the increase. The notice must be provided after the occurrence of the events described in paragraphs (g)(1)(i) and (g)(1)(ii) of this section that trigger the imposition of the rate increase.

(3)(i) *Disclosure requirements for rate increases*—(A) *General.* If a creditor is increasing the rate due to delinquency or default or as a penalty, the creditor must provide the following information on the notice sent pursuant to paragraph (g)(1) of this section:

(*1*) A statement that the delinquency or default rate or penalty rate, as applicable, has been triggered;

(*2*) The date on which the delinquency or default rate or penalty rate will apply;

(*3*) The circumstances under which the delinquency or default rate or penalty rate, as applicable, will cease to apply to the consumer's account, or that the delinquency or default rate or penalty rate will remain in effect for a potentially indefinite time period;

(*4*) A statement indicating to which balances the delinquency or default rate or penalty rate will be applied;

(*5*) If applicable, a description of any balances to which the current rate will continue to apply as of the effective date of the rate increase, unless a consumer fails to make a minimum periodic payment within 60 days from the due date for that payment; and

(*6*) For a credit card account under an open-end (not home-secured) consumer credit plan, a statement of no more than four principal reasons for the rate increase, listed in their order of importance.

(B) *Rate increases resulting from failure to make minimum periodic payment within 60 days from due date.* For a credit card account under an open-end (not home-secured) consumer credit plan, if the rate increase required to be disclosed pursuant to paragraph (g)(1) of this section is an increase pursuant to § 226.55(b)(4) based on the consumer's failure to make a minimum periodic payment within 60 days from the due date for that payment, the notice provided pursuant to paragraph (g)(1) of this section must also state that the increase will cease to apply to transactions that occurred prior to or within 14 days of provision of the notice, if the creditor receives six consecutive required minimum periodic payments on or before the payment due date, beginning with the first payment due following the effective date of the increase.

(ii) *Format requirements.* (A) If a notice required by paragraph (g)(1) of this section is included on or with a periodic statement, the information described in paragraph (g)(3)(i) of this section must be in the form of a table and provided on the front of any page of the periodic statement, above the notice described in paragraph (c)(2)(iv) of this section if that notice is provided on the same statement.

(B) If a notice required by paragraph (g)(1) of this section is not included on or with a periodic statement, the information described in paragraph (g)(3)(i) of this section must be disclosed on the front of the first page of the notice. Only information related to the increase in the rate to a penalty rate may be included with the notice, except that this notice may be combined with a notice described in paragraph (c)(2)(iv) or (g)(4) of this section.

(4) *Exception for decrease in credit limit.* A creditor is not required to provide a notice pursuant to paragraph (g)(1) of this section prior to increasing the rate for obtaining an extension of credit that exceeds the credit limit, provided that:

(i) The creditor provides at least 45 days in advance of imposing the penalty rate a notice, in writing, that includes:

(A) A statement that the credit limit on the account has been or will be decreased.

(B) A statement indicating the date on which the penalty rate will apply, if the outstanding balance exceeds the credit limit as of that date;

(C) A statement that the penalty rate will not be imposed on the date specified in paragraph (g)(4)(i)(B) of this section, if the outstanding balance does not exceed the credit limit as of that date;

(D) The circumstances under which the penalty rate, if applied, will cease to apply to the account, or that the penalty rate, if applied, will remain in effect for a potentially indefinite time period;

(E) A statement indicating to which balances the penalty rate may be applied; and

(F) If applicable, a description of any balances to which the current rate will continue to apply as of the effective date of the rate increase, unless the consumer fails to make a minimum periodic payment within 60 days from the due date for that payment; and

(ii) The creditor does not increase the rate applicable to the consumer's account to the penalty rate if the outstanding balance does not exceed the credit limit on the date set forth in the notice and described in paragraph (g)(4)(i)(B) of this section.

(iii)(A) If a notice provided pursuant to paragraph (g)(4)(i) of this section is included on or with a periodic statement, the information described in paragraph (g)(4)(i) of this section must be in the form of a table and provided on the front of any page of the periodic statement; or

(B) If a notice required by paragraph (g)(4)(i) of this section is not included on or with a periodic statement, the information described in paragraph (g)(4)(i) of this section must be disclosed on the front of the first page of the notice. Only information related to the reduction in credit limit may be included with the notice, except that this notice may be combined with a notice described in paragraph (c)(2)(iv) or (g)(1) of this section.

* * * * *

■ 5. Section 226.52(b) is added to read as follows:

§ 226.52 Limitations on fees.

* * * * *

(b) *Limitations on penalty fees.* A card issuer must not impose a fee for violating the terms or other requirements of a credit card account under an open-end (not home-secured) consumer credit plan unless the dollar amount of the fee is consistent with paragraphs (b)(1) and (b)(2) of this section.

(1) *General rule.* Except as provided in paragraph (b)(2) of this section, a card issuer may impose a fee for violating the terms or other requirements of a credit card account under an open-end (not home-secured) consumer credit plan if the dollar amount of the fee is consistent with either paragraph (b)(1)(i) or (b)(1)(ii) of this section.

(i) *Fees based on costs.* A card issuer may impose a fee for violating the terms or other requirements of an account if the card issuer has determined that the dollar amount of the fee represents a reasonable proportion of the total costs incurred by the card issuer as a result of that type of violation. A card issuer must reevaluate this determination at least once every twelve months. If as a result of the reevaluation the card issuer determines that a lower fee represents a reasonable proportion of the total costs incurred by the card issuer as a result of that type of violation, the card issuer must begin imposing the lower fee within 45 days after completing the reevaluation. If as a result of the reevaluation the card issuer determines that a higher fee represents a reasonable proportion of the total costs incurred by

the card issuer as a result of that type of violation, the card issuer may begin imposing the higher fee after complying with the notice requirements in § 226.9.

(ii) *Safe harbors.* A card issuer may impose a fee for violating the terms or other requirements of an account if the dollar amount of the fee does not exceed:

(A) For the first violation of a particular type, $25.00, adjusted annually by the Board to reflect changes in the Consumer Price Index;

(B) For an additional violation of the same type during the next six billing cycles, $35.00, adjusted annually by the Board to reflect changes in the Consumer Price Index; or

(C) When a card issuer has not received the required payment for two or more consecutive billing cycles for a charge card account that requires payment of outstanding balances in full at the end of each billing cycle, three percent of the delinquent balance.

(2) *Prohibited fees*—(i) *Fees that exceed dollar amount associated with violation.* (A) *Generally.* A card issuer must not impose a fee for violating the terms or other requirements of a credit card account under an open-end (not home-secured) consumer credit plan that exceeds the dollar amount associated with the violation.

(B) *No dollar amount associated with violation.* A card issuer must not impose a fee for violating the terms or other requirements of a credit card account under an open-end (not home-secured) consumer credit plan when there is no dollar amount associated with the violation. For purposes of paragraph (b)(2)(i) of this section, there is no dollar amount associated with the following violations:

(*1*) Transactions that the card issuer declines to authorize;

(*2*) Account inactivity; and

(*3*) The closure or termination of an account.

(ii) *Multiple fees based on a single event or transaction.* A card issuer must not impose more than one fee for violating the terms or other requirements of a credit card account under an open-end (not home-secured) consumer credit plan based on a single event or transaction. A card issuer may, at its option, comply with this prohibition by imposing no more than one fee for violating the terms or other requirements of an account during a billing cycle.

■ 6. Section 226.59 is added to read as follows:

§ 226.59 Reevaluation of rate increases.

(a) *General rule*—(1) *Evaluation of increased rate.* If a card issuer increases an annual percentage rate that applies to a credit card account under an open-end (not home-secured) consumer credit plan, based on the credit risk of the consumer, market conditions, or other factors, or increased such a rate on or after January 1, 2009, and 45 days' advance notice of the rate increase is required pursuant to § 226.9(c)(2) or (g), the card issuer must:

(i) Evaluate the factors described in paragraph (d) of this section; and

(ii) Based on its review of such factors, reduce the annual percentage rate applicable to the consumer's account, as appropriate.

(2) *Rate reductions*—(i) *Timing.* If a card issuer is required to reduce the rate applicable to an account pursuant to paragraph (a)(1) of this section, the card issuer must reduce the rate not later than 45 days after completion of the evaluation described in paragraph (a)(1).

(ii) *Applicability of rate reduction.* Any reduction in an annual percentage rate required pursuant to paragraph (a)(1) of this section shall apply to:

(A) Any outstanding balances to which the increased rate described in paragraph (a)(1) of this section has been applied; and

(B) New transactions that occur after the effective date of the rate reduction that would otherwise have been subject to the increased rate.

(b) *Policies and procedures.* A card issuer must have reasonable written policies and procedures in place to conduct the review described in paragraph (a) of this section.

(c) *Timing.* A card issuer that is subject to paragraph (a) of this section must conduct the review described in paragraph (a)(1) of this section not less frequently than once every six months after the rate increase.

(d) *Factors*—(1) *In general.* Except as provided in paragraph (d)(2) of this section, a card issuer must review either:

(i) The factors on which the increase in an annual percentage rate was originally based; or

(ii) The factors that the card issuer currently considers when determining the annual percentage rates applicable to similar new credit card accounts under an open-end (not home-secured) consumer credit plan.

(2) *Rate increases imposed between January 1, 2009 and February 21, 2010.* For rate increases imposed between January 1, 2009 and February 21, 2010, an issuer must consider the factors described in paragraph (d)(1)(ii) when conducting the first two reviews required under paragraph (a) of this section, unless the rate increase subject to paragraph (a) of this section was based solely upon factors specific to the consumer, such as a decline in the consumer's credit risk, the consumer's delinquency or default, or a violation of the terms of the account.

(e) *Rate increases subject to § 226.55(b)(4).* If an issuer increases a rate applicable to a consumer's account pursuant to § 226.55(b)(4) based on the card issuer not receiving the consumer's required minimum periodic payment within 60 days after the due date, the issuer is not required to perform the review described in paragraph (a) of this section prior to the sixth payment due date after the effective date of the increase. However, if the annual percentage rate applicable to the consumer's account is not reduced pursuant to § 226.55(b)(4)(ii), the card issuer must perform the review described in paragraph (a) of this section. The first such review must occur no later than six months after the sixth payment due following the effective date of the rate increase.

(f) *Termination of obligation to review factors.* The obligation to review factors described in paragraph (a) and (d) of this section ceases to apply:

(1) If the issuer reduces the annual percentage rate applicable to a credit card account under an open-end (not home-secured) consumer credit plan to the rate applicable immediately prior to the increase, or, if the rate applicable immediately prior to the increase was a variable rate, to a variable rate determined by the same formula (index and margin) that was used to calculate the rate applicable immediately prior to the increase; or

(2) If the issuer reduces the annual percentage rate to a rate that is lower than the rate described in paragraph (f)(1) of this section.

(g) *Acquired accounts*—(1) *General.* Except as provided in paragraph (g)(2) of this section, this section applies to credit card accounts that have been acquired by the card issuer from another card issuer. A card issuer that complies with this section by reviewing the factors described in paragraph (d)(1)(i) must review the factors considered by the card issuer from which it acquired the accounts in connection with the rate increase.

(2) *Review of acquired portfolio.* If, not later than six months after the acquisition of such accounts, a card issuer reviews all of the credit card accounts it acquires in accordance with the factors that it currently considers in determining the rates applicable to its similar new credit card accounts:

(i) Except as provided in paragraph (g)(2)(iii), the card issuer is required to conduct reviews described in paragraph

(a) of this section only for rate increases that are imposed as a result of its review under this paragraph. See §§ 226.9 and 226.55 for additional requirements regarding rate increases on acquired accounts.

(ii) Except as provided in paragraph (g)(2)(iii) of this section, the card issuer is not required to conduct reviews in accordance with paragraph (a) of this section for any rate increases made prior to the card issuer's acquisition of such accounts.

(iii) If as a result of the card issuer's review, an account is subject to, or continues to be subject to, an increased rate as a penalty, or due to the consumer's delinquency or default, the requirements of paragraph (a) of this section apply.

(h) *Exceptions*—(1) *Servicemembers Civil Relief Act exception.* The requirements of this section do not apply to increases in an annual percentage rate that was previously decreased pursuant to 50 U.S.C. app. 527, provided that such a rate increase is made in accordance with § 226.55(b)(6).

(2) *Charged off accounts.* The requirements of this section do not apply to accounts that the card issuer has charged off in accordance with loan-loss provisions.

■ 7. Appendix G to part 226 is amended by revising Forms G–10(B), G–10(C), G–10(E), G–17(B), G–17(C), G–18(B), G–18(D), G–18(F), G–18(G), G–20, G–21, G–22, G–25(A), and G–25(B).

Appendix G To Part 226—Open-End Model Forms And Clauses

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BILLING CODE 6210–01–P

G-10(B) Applications and Solicitations Sample (Credit Cards)

Interest Rates and Interest Charges	
Annual Percentage Rate (APR) for Purchases	**8.99%** to **19.99%** when you open your account, based on your creditworthiness. After that, your APR will vary with the market based on the Prime Rate.
APR for Balance Transfers	**15.99%** This APR will vary with the market based on the Prime Rate.
APR for Cash Advances	**21.99%** This APR will vary with the market based on the Prime Rate.
Penalty APR and When it Applies	**28.99%** This APR may be applied to your account if you: 1) Make a late payment; 2) Go over your credit limit twice in a six-month period; 3) Make a payment that is returned; or 4) Do any of the above on another account that you have with us. **How Long Will the Penalty APR Apply?:** If your APRs are increased for any of these reasons, the Penalty APR will apply until you make six consecutive minimum payments when due.
How to Avoid Paying Interest on Purchases	Your due date is at least 25 days after the close of each billing cycle. We will not charge you any interest on purchases if you pay your entire balance by the due date each month.
Minimum Interest Charge	If you are charged interest, the charge will be no less than $1.50.
For Credit Card Tips from the Federal Reserve Board	To learn more about factors to consider when applying for or using a credit card, visit the website of the Federal Reserve Board at **http://www.federalreserve.gov/creditcard**.

Fees	
Annual Fee	**None**
Transaction Fees	
• Balance Transfer	Either **$5** or **3%** of the amount of each transfer, whichever is greater (maximum fee: **$100**).
• Cash Advance	Either **$5** or **3%** of the amount of each cash advance, whichever is greater.
• Foreign Transaction	**2%** of each transaction in U.S. dollars.
Penalty Fees	
• Late Payment	Up to **$35**.
• Over-the-Credit Limit	Up to **$35**.
• Returned Payment	Up to **$35**.
Other Fees	
• Required Account Protector Plan	**$0.79** per $100 of balance at the end of each statement period. See back for details.

How We Will Calculate Your Balance: We use a method called "average daily balance (including new purchases)."

G-10(C) Applications and Solicitations (Credit Cards)

Interest Rates and Interest Charges	
Annual Percentage Rate (APR) for Purchases	**8.99%, 10.99%, or 12.99%** introductory APR for one year, based on your creditworthiness. After that, your APR will be **14.99%**. This APR will vary with the market based on the Prime Rate.
APR for Balance Transfers	**15.99%** This APR will vary with the market based on the Prime Rate
APR for Cash Advances	**21.99%** This APR will vary with the market based on the Prime Rate.
Penalty APR and When it Applies	**28.99%** This APR may be applied to your account if you: 1) Make a late payment; 2) Go over your credit limit; 3) Make a payment that is returned; or 4) Do any of the above on another account that you have with us. **How Long Will the Penalty APR Apply?:** If your APRs are increased for any of these reasons, the Penalty APR will apply until you make six consecutive minimum payments when due.
How to Avoid Paying Interest on Purchases	Your due date is at least 25 days after the close of each billing cycle. We will not charge you any interest on purchases if you pay your entire balance by the due date each month.
Minimum Interest Charge	If you are charged interest, the charge will be no less than $1.50.
For Credit Card Tips from the Federal Reserve Board	To learn more about factors to consider when applying for or using a credit card, visit the website of the Federal Reserve Board at **http://www.federalreserve.gov/creditcard**.

Fees	
Set-up and Maintenance Fees	NOTICE: Some of these set-up and maintenance fees will be assessed before you begin using your card and will reduce the amount of credit you initially have available. For example, if you are assigned the minimum credit limit of $250, your initial available credit will be only about $209 (or about $204 if you choose to have an additional card).
• Annual Fee	**$20**
• Account Set-up Fee	**$20** (one-time fee)
• Participation Fee	**$12** annually ($1 per month)
• Additional Card Fee	**$5** annually (if applicable)
Transaction Fees	
• Balance Transfer	Either **$5** or **3%** of the amount of each transfer, whichever is greater (maximum fee: **$100**).
• Cash Advance	Either **$5** or **3%** of the amount of each cash advance, whichever is greater.
• Foreign Transaction	**2%** of each transaction in U.S. dollars.
Penalty Fees	
• Late Payment	Up to **$35**.
• Over-the-Credit Limit	Up to **$35**.
• Returned Payment	Up to **$35**.

How We Will Calculate Your Balance: We use a method called "average daily balance (including new purchases)."

Loss of Introductory APR: We may end your introductory APR and apply the Penalty APR if you make a late payment.

* * * * *

G-10(E) Applications and Solicitations Sample (Charge Cards)

Payment Information
All charges made on this charge card are due and payable when you receive your periodic statement.

Fees	
Annual Fee	**$50**
Transaction Fees	
• Balance Transfer	Either **$5** or **3%** of the amount of each transfer, whichever is greater (maximum fee: **$100**).
• Cash Advance	Either **$5** or **3%** of the amount of each cash advance, whichever is greater.
Penalty Fees	
• Late Payment	Up to **$35**. If you do not pay for two consecutive billing cycles, your fee will be **$35** or **3%** of the past due amount, whichever is greater.
• Over-the-Credit Limit	Up to **$35**.
• Returned Payment	Up to **$35**.

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G-17(B) Account-Opening Sample

Interest Rates and Interest Charges	
Annual Percentage Rate (APR) for Purchases	**8.99%** This APR will vary with the market based on the Prime Rate.
APR for Balance Transfers	**15.99%** This APR will vary with the market based on the Prime Rate.
APR for Cash Advances	**21.99%** This APR will vary with the market based on the Prime Rate.
Penalty APR and When it Applies	**28.99%** This APR may be applied to your account if you: 1) Make a late payment; 2) Go over your credit limit twice in a six-month period; 3) Make a payment that is returned; or 4) Do any of the above on another account that you have with us. **How Long Will the Penalty APR Apply?:** If your APRs are increased for any of these reasons, the Penalty APR will apply until you make six consecutive minimum payments when due.
Paying Interest	Your due date is at least 25 days after the close of each billing cycle. We will not charge you any interest on purchases if you pay your entire balance by the due date each month. We will begin charging interest on cash advances and balance transfers on the transaction date.
Minimum Interest Charge	If you are charged interest, the charge will be no less than $1.50.
For Credit Card Tips from the Federal Reserve Board	To learn more about factors to consider when applying for or using a credit card, visit the website of the Federal Reserve Board at **http://www.federalreserve.gov/creditcard**.

Fees	
Annual Fee	**None**
Transaction Fees	
• Balance Transfer	Either **$5** or **3%** of the amount of each transfer, whichever is greater (maximum fee: **$100**).
• Cash Advance	Either **$5** or **3%** of the amount of each cash advance, whichever is greater.
• Foreign Transaction	**2%** of each transaction in U.S. dollars.
Penalty Fees	
• Late Payment	Up to **$35**.
• Over-the-Credit Limit	Up to **$35**.
• Returned Payment	Up to **$35**.
Other Fees	
• Required Account Protector Plan	**$0.79** per $100 of balance at the end of each statement period. See back for details.

How We Will Calculate Your Balance: We use a method called "average daily balance (including new purchases)." See your account agreement for more details.

Billing Rights: Information on your rights to dispute transactions and how to exercise those rights is provided in your account agreement.

G-17(C) Account-Opening Sample

Interest Rates and Interest Charges	
Annual Percentage Rate (APR) for Purchases	**8.99%** introductory APR for one year. After that, your APR will be **14.99%**. This APR will vary with the market based on the Prime Rate.
APR for Balance Transfers	**15.99%** This APR will vary with the market based on the Prime Rate.
APR for Cash Advances	**21.99%** This APR will vary with the market based on the Prime Rate.
Penalty APR and When it Applies	**28.99%** This APR may be applied to your account if you: 1) Make a late payment; 2) Go over your credit limit; 3) Make a payment that is returned; or 4) Do any of the above on another account that you have with us. **How Long Will the Penalty APR Apply?:** If your APRs are increased for any of these reasons, the Penalty APR will apply until you make six consecutive minimum payments when due.
Paying Interest	Your due date is at least 25 days after the close of each billing cycle. We will not charge you any interest on purchases if you pay your entire balance by the due date each month. We will begin charging interest on cash advances and balance transfers on the transaction date.
Minimum Interest Charge	If you are charged interest, the charge will be no less than $1.50.
For Credit Card Tips from the Federal Reserve Board	To learn more about factors to consider when applying for or using a credit card, visit the website of the Federal Reserve Board at **http://www.federalreserve.gov/creditcard**.

Fees	
Set-up and Maintenance Fees	NOTICE: Some of these set-up and maintenance fees will be assessed before you begin using your card and will reduce the amount of credit you initially have available. Based on your initial credit limit of $250, your initial available credit will be only about $209 (or about $204 if you choose to have an additional card). You may still reject this plan, provided that you have not yet used the account or paid a fee after receiving a billing statement. If you do reject the plan, you are not responsible for any fees or charges.
• Annual Fee	**$20**
• Account Set-up Fee	**$20** (one-time fee)
• Participation Fee	**$12** annually ($1 per month)
• Additional Card Fee	**$5** annually (if applicable)
Transaction Fees	
• Balance Transfer	Either **$5** or **3%** of the amount of each transfer, whichever is greater (maximum fee: **$100**).
• Cash Advance	Either **$5** or **3%** of the amount of each cash advance, whichever is greater.
• Foreign Transaction	**2%** of each transaction in U.S. dollars.
Penalty Fees	
• Late Payment	Up to **$35**.
• Over-the-Credit Limit	Up to **$35**.
• Returned Payment	Up to **$35**.

How We Will Calculate Your Balance: We use a method called "average daily balance (including new purchases)." See your account agreement for more details.

Loss of Introductory APR: We may end your introductory APR and apply the Penalty APR if you make a late payment.

Billing Rights: Information on your rights to dispute transactions and how to exercise those rights is provided in your account agreement.

BILLING CODE 6210–01–C

G–18(B)—Late Payment Fee Sample

Late Payment Warning: If we do not receive your minimum payment by the date listed above, you may have to pay a late fee of up to $35 and your APRs may be increased up to the Penalty APR of 28.99%.

* * * * *

G-18(D) Periodic Statement New Balance, Due Date, Late Payment and Minimum Payment Sample (Credit Cards)

Payment Information	
New Balance	$1,784.53
Minimum Payment Due	$53.00
Payment Due Date	4/20/12

Late Payment Warning: If we do not receive your minimum payment by the date listed above, you may have to pay a late fee of up to **$35** and your APRs may be increased up to the Penalty APR of 28.99%.

Minimum Payment Warning: If you make only the minimum payment each period, you will pay more in interest and it will take you longer to pay off your balance. For example:

If you make no additional charges using this card and each month you pay...	You will pay off the balance shown on this statement in about...	And you will end up paying an estimated total of...
Only the minimum payment	10 years	$3,284
$62	3 years	$2,232 *(Savings=$1,052)*

If you would like information about credit counseling services, call 1-800-xxx-xxxx.

* * * * *

G-18(F) Periodic Statement Form

Page 1 of 2

XXX Bank Credit Card Account Statement
Account Number XXXX XXXX XXXX XXXX
February 21, 2012 to March 22, 2012

Summary of Account Activity

Previous Balance	$535.07
Payments	-$450.00
Other Credits	-$13.45
Purchases	+$529.57
Balance Transfers	+$785.00
Cash Advances	+$318.00
Past Due Amount	+$0.00
Fees Charged	**+$69.45**
Interest Charged	**+$10.89**
New Balance	$1,784.53
Credit limit	$2,000.00
Available credit	$215.47
Statement closing date	3/22/2012
Days in billing cycle	30

QUESTIONS?
Call Customer Service 1-XXX-XXX-XXXX
Lost or Stolen Credit Card 1-XXX-XXX-XXXX

Payment Information

New Balance	$1,784.53
Minimum Payment Due	$53.00
Payment Due Date	4/20/12

Late Payment Warning: If we do not receive your minimum payment by the date listed above, you may have to pay a late fee of up to $35 and your APRs may be increased up to the Penalty APR of 28.99%.

Minimum Payment Warning: If you make only the minimum payment each period, you will pay more in interest and it will take you longer to pay off your balance. For example:

If you make no additional charges using this card and each month you pay...	You will pay off the balance shown on this statement in about...	And you will end up paying an estimated total of...
Only the minimum payment	10 years	$3,284
$62	3 years	$2,232 *(Savings=$1,052)*

If you would like information about credit counseling services, call 1-800-XXX-XXXX.

Please send billing inquiries and correspondence to:
PO Box XXXX, Anytown, Anystate XXXXX

Important Changes to Your Account Terms

The following is a summary of changes that are being made to your account terms. Changes to APRs described below are due to changes in market conditions. For more detailed information, please refer to the booklet enclosed with this statement.

These changes will impact your account as follows:

Transactions made on or after 4/9/12: As of 5/10/12, changes to APRs described below will apply to these transactions.

Transactions made before 4/9/12: Current APRs will continue to apply to these transactions.

If you are already being charged a higher Penalty APR for purchases: In this case, changes to APRs described below will not go into effect at this time. These changes will go into effect when the Penalty APR no longer applies to your account.

Revised Terms, as of 5/10/12	
APR for Purchases	16.99%

Transactions

Reference Number	Trans Date	Post Date	Description of Transaction or Credit	Amount
5884186PS0388W6YM	2/22	2/23	Store #1	$2.05
05444000G0ZLV72VL	2/24	2/25	Store #2	$12.11
55541860705RDYD0X	2/24	2/25	Store #3	$4.63
55432860808W90M0	2/24	2/25	Store #4	$114.95
054830709LYMRPT4L	2/24	2/25	Store #5	$7.35
854338203FS8OO0Z5	2/25	2/25	Pymt Thank You	$450.00–

(transactions continued on next page)

NOTICE: SEE REVERSE SIDE FOR IMPORTANT INFORMATION

Page 1 of 2

Please detach this portion and return with your payment to insure proper credit. Retain upper portion for your records.

Account Number:	**XXXX XXXX XXXX XXXX**
New Balance	**$1,784.53**
Minimum Payment Due	**$53.00**
Payment Due Date	**4/20/12**
AMOUNT ENCLOSED:	**$**

Please indicate address change and additional cardholder requests on the reverse side.

XXX Bank
P.O. Box XXXX
Anytown, Anystate XXXXX

G-18(F) Periodic Statement Form (contd.)

XXX Bank Credit Card Account Statement
Account Number XXXX XXXX XXXX XXXX
February 21, 2012 to March 22, 2012

Page 2 of 2

Transactions (cont.)

Reference Number	Trans Date	Post Date	Description of Transaction or Credit	Amount
564891561545KOSHD	2/25	2/26	Store #6	$14.35
841517877845AKOJIO	2/25	2/26	Store #7	$40.35
895848561561894KOH	2/26	2/27	Store #8	$27.68
1871556189456SAMKL	2/26	2/27	Store #9	$124.76
1542202074TWWZV48	2/26	2/26	Cash Advance	$121.50
2564894185189LKDFID	2/27	2/28	Store #10	$32.87
4545754784KOHUIOS	2/27	3/1	Balance Transfer	$785.00
14547847586KDDL564	2/28	2/28	Cash Advance	$196.50
2564561023184102315	2/28	3/1	Store #11	$14.76
55542818705RASD0X	3/1	3/2	Store #12	$3.76
289189194ASDS8744	3/1	3/3	Store #13	$13.45
17810541784104578 4	3/2	3/6	Store #14	$2.35
045148714518979874	3/4	3/5	Store #13	$13.45–
8456152156181SDSA	3/5	3/12	Store #15	$25.00
31289105205648AWD	3/11	3/12	Store #16	$7.34
04518478415615ASD	3/11	3/16	Store #17	$10.56
0547810544898718AF	3/15	3/17	Store #18	$24.50
0564894132168 48OP	3/16	3/17	Store #19	$8.76
054894561564ASDW	3/17	3/18	Store #20	$14.23
5648974891AD98156	3/19	3/20	Store #21	$23.76
			Fees	
9525156489SFD4545Q	2/23	2/23	Late Fee	$35.00
56415615647OJSNDS	2/26	2/26	Cash Advance Fee	$5.00
84151564SADS8745H	2/27	2/27	Balance Transfer Fee	$23.55
2564891561894515 16L	2/28	2/28	Cash Advance Fee	$5.90
			TOTAL FEES FOR THIS PERIOD	**$69.45**
			Interest Charged	
			Interest Charge on Purchases	$6.31
			Interest Charge on Cash Advances	$4.58
			TOTAL INTEREST FOR THIS PERIOD	**$10.89**

2012 Totals Year-to-Date	
Total fees charged in 2012	$90.14
Total interest charged in 2012	$18.27

Interest Charge Calculation

Your **Annual Percentage Rate (APR)** is the annual interest rate on your account.

Type of Balance	Annual Percentage Rate (APR)	Balance Subject to Interest Rate	Interest Charge
Purchases	14.99% (v)	$512.14	$6.31
Cash Advances	21.99% (v)	$253.50	$4.58
Balance Transfers	0.00%	$637.50	$0.00

(v) = Variable Rate

G-18(G) Periodic Statement Form

Page 1 of 2

XXX Bank Credit Card Account Statement
Account Number XXXX XXXX XXXX XXXX
February 21, 2012 to March 22, 2012

Summary of Account Activity

Previous Balance	$80.52
Payments	-$50.00
Other Credits	+$0.00
Purchases	+$52.13
Balance Transfers	+$0.00
Cash Advances	+$0.00
Past Due Amount	+$0.00
Fees Charged	**+$37.00**
Interest Charged	**+$0.00**
New Balance	$119.65
Credit limit	$2,000.00
Available credit	$1,880.35
Statement closing date	3/22/2012
Days in billing cycle	30

QUESTIONS?
Call Customer Service 1-XXX-XXX-XXXX
Lost or Stolen Credit Card 1-XXX-XXX-XXXX

Payment Information

New Balance	$119.65
Minimum Payment Due	$10.00
Payment Due Date	4/20/12

Late Payment Warning: If we do not receive your minimum payment by the date listed above, you may have to pay a late fee of up to $35 and your APRs may be increased up to the Penalty APR of 28.99%.

Minimum Payment Warning: If you make only the minimum payment each period, you will pay more in interest and it will take you longer to pay off your balance. For example:

If you make no additional charges using this card and each month you pay...	You will pay off the balance shown on this statement in about...	And you will end up paying an estimated total of...
Only the minimum payment	14 months	$130

If you would like information about credit counseling services, call 1-800-XXX-XXXX.

Please send billing inquiries and correspondence to:
PO Box XXXX, Anytown, Anystate XXXXX

Notice of Changes to Your Interest Rates

You have triggered the Penalty APR of 28.99% by making a late payment.

Transactions made on or after 4/9/12: As of 5/10/12, the Penalty APR will apply to these transactions. We may keep the APR at this level indefinitely.

Transactions made before 4/9/12: Current rates will continue to apply to these transactions. However, if you become more than 60 days late on your account, the Penalty APR will apply to those transactions as well.

Transactions

Reference Number	Trans Date	Post Date	Description of Transaction or Credit	Amount
			Payments and Other Credits	
854338203FS8OO0Z5	2/25	2/25	Pymt Thank You	$50.00–
			Purchases	
5884186PS0388W6YM	2/22	2/23	Store #1	$2.05
0544400060ZLV72VL	2/24	2/25	Store #2	$2.11
55541860705RDYD0X	2/24	2/25	Store #3	$4.63
554328608008W90M0	2/24	2/25	Store #4	$4.95
054830709LYMRPT4L	2/24	2/25	Store #5	$7.35
564891561545KOSHD	2/25	2/26	Store #6	$4.35
841517877845AKOJIO	2/25	2/26	Store #7	$2.35
895848561561894KOH	2/26	2/27	Store #8	$7.68
1871556189456SAMKL	2/26	2/27	Store #9	$4.76
2564894185189LKDFID	2/27	2/28	Store #10	$2.87
55542818705RASD0X	3/1	3/2	Store #11	$3.76
178105417841045784	3/2	3/6	Store #12	$2.35
8456152156181SDSA	3/5	3/12	Store #13	$2.92

(transactions continued on next page)

NOTICE: SEE REVERSE SIDE FOR IMPORTANT INFORMATION

Page 1 of 2

Please detach this portion and return with your payment to insure proper credit. Retain upper portion for your records.

Account Number:	**XXXX XXXX XXXX XXXX**
New Balance	**$119.65**
Minimum Payment Due	**$10.00**
Payment Due Date	**4/20/12**

Please indicate address change and additional cardholder requests on the reverse side.

AMOUNT ENCLOSED: $

XXX Bank
P.O. Box XXXX
Anytown, Anystate XXXXX

* * * * *

G-18(G) Periodic Statement Form (contd.)

XXX Bank Credit Card Account Statement
Account Number XXXX XXXX XXXX XXXX
February 21, 2012 to March 22, 2012

Page 2 of 2

Transactions (cont.)

Reference Number	Trans Date	Post Date	Description of Transaction or Credit	Amount
			Fees	
9525156489SFD4545Q	2/23	2/23	Late Fee	$35.00
56415615647OJSNDS	3/22	3/22	Minimum Charge	$2.00
			TOTAL FEES FOR THIS PERIOD	**$37.00**
			Interest Charged	
			Interest Charge on Purchases	$0.00
			Interest Charge on Cash Advances	$0.00
			TOTAL INTEREST FOR THIS PERIOD	**$0.00**

2012 Totals Year-to-Date	
Total fees charged in 2012	$90.14
Total interest charged in 2012	$18.27

Interest Charge Calculation

Your **Annual Percentage Rate (APR)** is the annual interest rate on your account.

Type of Balance	Annual Percentage Rate (APR)	Balance Subject to Interest Rate	Interest Charge
Purchases	14.99% (v)	$113.80	$0.00
Cash Advances	21.99% (v)	$0.00	$0.00
Balance Transfers	0.00%	$0.00	$0.00

(v) = Variable Rate

G-20 Change-in-Terms Sample (Increase in Annual Percentage Rate)

Important Changes to Your Account Terms

The following is a summary of changes that are being made to your account terms. Changes to APRs described below are due to changes in market conditions. For more detailed information, please refer to the booklet enclosed with this statement.

These changes will impact your account as follows:

Transactions made on or after 4/9/12: As of 5/10/12, changes to APRs described below will apply to these transactions.

Transactions made before 4/9/12: Current APRs will continue to apply to these transactions.

If you are already being charged a higher Penalty APR for purchases: In this case, changes to APRs described below will not go into effect at this time. These changes will go into effect when the Penalty APR no longer applies to your account.

Revised Terms, as of 5/10/12	
APR for Purchases	16.99%

G-21 Change-in-Terms Sample (Increase in Fees)

Important Changes to Your Account Terms

The following is a summary of changes that are being made to your account terms. These changes will take effect on 5/10/12. For more detailed information, please refer to the booklet enclosed with this statement.

You have the right to reject these changes, unless you become more than 60 days late on your account. However, if you do reject these changes you will not be able to use your account for new transactions. You can reject the changes by calling us at 1-800-xxx-xxxx.

Revised Terms, as of 5/10/12	
Late Payment Fee	Up to **$35**.
Returned Payment Fee	Up to **$35**.

* * * * *

G-22 Penalty Rate Increase Sample (Payment 60 or Fewer Days Late)

Notice of Changes to Your Interest Rates

You have triggered the Penalty APR of 28.99% by making a late payment. This change will impact your account as follows:

Transactions made on or after 4/9/12: As of 5/10/12, the Penalty APR will apply to these transactions. We may keep the APR at this level indefinitely.

Transactions made before 4/9/12: Current rates will continue to apply to these transactions. However, if you become more than 60 days late on your account, the Penalty APR will apply to those transactions as well.

G–25(A)—Consent Form for Over-the-Credit Limit Transactions

Your choice regarding over-the-credit limit coverage

Unless you tell us otherwise, we will decline any transaction that causes you to go over your credit limit. If you want us to authorize these transactions, you can request over-the-credit limit coverage.

If you have over-the-credit limit coverage and you go over your credit limit, we will charge you a fee of up to $35. We may also increase your APRs to the Penalty APR of XX.XX%. You will only pay one fee per billing cycle, even if you go over your limit multiple times in the same cycle.

Even if you request over-the-credit limit coverage, in some cases we may still decline a transaction that would cause you to go over your limit, such as if you are past due or significantly over your credit limit.

If you want over-the-limit coverage and to allow us to authorize transactions that go over your credit limit, please:

—Call us at [telephone number];
—Visit [Web site]; or
—Check or initial the box below, and return the form to us at [address].

__ I want over-the-limit coverage. I understand that if I go over my credit limit, my APRs may be increased and I will be charged a fee of up to $35. [I have the right to cancel this coverage at any time.]

[__ I *do not* want over-the-limit coverage. I understand that transactions that exceed my credit limit will not be authorized.]

Printed Name: _____
Date: _____
[Account Number]: _____

G–25(B)—Revocation Notice for Periodic Statement Regarding Over-the-Credit Limit Transactions

You currently have over-the-credit limit coverage on your account, which means that we pay transactions that cause you go to over your credit limit. If you do go over your credit limit, we will charge you a fee of up to $35. We may also increase your APRs. To remove over-the-credit-limit coverage from your account, call us at 1–800-xxxxxxx or visit [insert web site]. [You may also write us at: [insert address].]

[You may also check or initial the box below and return this form to us at: [insert address].

__ I want to cancel over-the-limit coverage for my account.

Printed Name: _____
Date: _____
[Account Number]: _____

■ 8. In Supplement I to Part 226:

■ A. Under *Section 226.5a—Credit and Charge Card Applications and Solicitations,* under *5a(a) General rules,* under *5a(a)(2) Form of disclosures; tabular format,* paragraph 5.ii. is revised.

■ B. Under *Section 226.9–Subsequent Disclosure Requirements:*

■ (i) Under *9(c) Change in terms,* the heading *9(c)(2)(iv) Significant charges in account terms* is removed.

■ (ii) Under *9(c) Change in terms,* under *9(c)(2)(iv) Disclosure requirements,* paragraphs 1. through 10. are revised and paragraph 11. is added.

■ (iii) Under *9(c) Change in terms,* under *9(c)(2)(v) Notice not required,* paragraph 12. is added.

■ (iii) Under *9(g) Increase in rates due to delinquency or default or as a penalty,* paragraphs 1. through 6. are revised and paragraph 7. is added.

■ C. Under *Section 226.52—Limitations on Fees, 52(b) Limitations on penalty fees* is added.

■ D. Under *Section 226.56—Requirements for over-the-limit transactions:*

■ (i) Under *56(e) Content,* paragraph 1. is revised; and

■ (ii) Under *56(j) Prohibited practices,* paragraph 6. is added.

■ E. *Section 226.59–Reevaluation of Rate Increases* is added.

Supplement I to Part 226—Official Staff Interpretations

* * * * *

Section 226.5a—Credit and Charge Card Applications and Solicitations

* * * * *

5a(a) General rules.

* * * * *

5a(a)(2) Form of disclosures; tabular format.

* * * * *

5. * * *

ii. *Maximum limits on fees.* Section 226.5a(a)(2)(iv) provides that any maximum limits on fee amounts must be disclosed in bold text. For example, assume that, consistent with § 226.52(b)(1)(ii), a card issuer's late payment fee will not exceed $35. The maximum limit of $35 for the late payment fee must be highlighted in bold. Similarly, assume an issuer will charge a cash advance fee of $5 or 3 percent of the cash advance transaction amount, whichever is greater, but the fee will not exceed $100. The maximum limit of $100 for the cash advance fee must be highlighted in bold.

* * * * *

Section 226.9—Subsequent Disclosure Requirements

* * * * *

9(c) Change in terms.

* * * * *

9(c)(2)(iv) Disclosure requirements.

1. *Changing margin for calculating a variable rate.* If a creditor is changing a margin used to calculate a variable rate, the creditor must disclose the amount of the new rate (as calculated using the new margin) in the table described in § 226.9(c)(2)(iv), and include a reminder that the rate is a variable rate. For example, if a creditor is changing the margin for a variable rate that uses the prime rate as an index, the creditor must disclose in the table the new rate (as calculated using the new margin) and indicate that the rate varies with the market based on the prime rate.

2. *Changing index for calculating a variable rate.* If a creditor is changing the index used to calculate a variable rate, the creditor must disclose the amount of the new rate (as calculated using the new index) and indicate that the rate varies and how the rate is determined, as explained in § 226.6(b)(2)(i)(A). For example, if a creditor is changing from using a prime rate to using the LIBOR in calculating a variable rate, the creditor would disclose in the table the new rate (using the new index) and indicate that the rate varies with the market based on the LIBOR.

3. *Changing from a variable rate to a non-variable rate.* If a creditor is changing a rate applicable to a consumer's account from a variable rate to a non-variable rate, the creditor must provide a notice as otherwise required under § 226.9(c) even if the variable rate at the time of the change is higher than the non-variable rate.

4. *Changing from a non-variable rate to a variable rate.* If a creditor is changing a rate applicable to a consumer's account from a non-variable rate to a variable rate, the creditor must provide a notice as otherwise required under § 226.9(c) even if the non-variable rate is higher than the variable rate at the time of the change.

5. *Changes in the penalty rate, the triggers for the penalty rate, or how long the penalty rate applies.* If a creditor is changing the amount of the penalty rate, the creditor must also redisclose the triggers for the penalty rate and the information about how long the penalty rate applies even if those terms are not changing. Likewise, if a creditor is changing the triggers for the penalty rate, the creditor must redisclose the amount of the penalty rate and information about how long the penalty rate applies. If a creditor is changing how long the penalty rate applies, the creditor must redisclose the amount of the penalty rate and the triggers for the penalty rate, even if they are not changing.

6. *Changes in fees.* If a creditor is changing part of how a fee that is disclosed in a tabular format under § 226.6(b)(1) and (b)(2) is determined, the creditor must redisclose all relevant information related to that fee regardless of whether this other information is changing. For example, if a creditor currently charges a cash advance fee of "Either $5 or 3% of the transaction amount, whichever is greater. (Max: $100)," and the creditor is only changing the minimum dollar amount from $5 to $10, the issuer must redisclose the other information related to how the fee is determined. For example, the creditor in this example would disclose the following: "Either $10 or 3% of the transaction amount, whichever is greater. (Max: $100)."

7. *Combining a notice described in § 226.9(c)(2)(iv) with a notice described in § 226.9(g)(3).* If a creditor is required to provide a notice described in § 226.9(c)(2)(iv) and a notice described in § 226.9(g)(3) to a consumer, the creditor may combine the two notices. This would occur if penalty pricing has been triggered, and other terms are changing on the consumer's account at the same time.

8. *Content.* Sample G–20 contains an example of how to comply with the requirements in § 226.9(c)(2)(iv) when a variable rate is being changed to a non-variable rate on a credit card account. The sample explains when the new rate will apply to new transactions and to which balances the current rate will continue to apply. Sample G–21 contains an example of how to comply with the requirements in § 226.9(c)(2)(iv) when the late payment fee on a credit card account is being increased, and the returned payment fee is also being increased. The sample discloses the consumer's right to reject the changes in accordance with § 226.9(h).

9. *Clear and conspicuous standard.* See comment 5(a)(1)-1 for the clear and conspicuous standard applicable to disclosures required under § 226.9(c)(2)(iv)(A)(*1*).

10. *Terminology.* See § 226.5(a)(2) for terminology requirements applicable to disclosures required under § 226.9(c)(2)(iv)(A)(*1*).

11. *Reasons for increase.* i. *In general.* Section 226.9(c)(2)(iv)(A)(*8*) requires card issuers to disclose the principal reason(s) for increasing an annual percentage rate applicable to a credit card account under an open-end (not home-secured) consumer credit plan. The regulation does not mandate a minimum number of reasons that must be disclosed. However, the specific reasons disclosed under § 226.9(c)(2)(iv)(A)(*8*) are required to relate to and accurately describe the principal factors actually considered by the card issuer in increasing the rate. A card issuer may describe the reasons for the increase in general terms. For example, the notice of a rate increase triggered by a decrease of 100 points in a consumer's credit score may state that the increase is due to "a decline in your creditworthiness" or "a decline in your credit score." Similarly, a notice of a rate increase triggered by a 10% increase in the card issuer's cost of funds may be disclosed as "a change in market conditions." In some circumstances, it may be appropriate for a card issuer to combine the disclosure of several reasons in one statement. However, § 226.9(c)(2)(iv)(A)(*8*) requires that the notice specifically disclose any violation of the terms of the account on which the rate is being increased, such as a late payment or a returned payment, if such violation of the account terms is one of the four principal reasons for the rate increase.

ii. *Example.* Assume that a consumer made a late payment on the credit card account on which the rate increase is being imposed, made a late payment on a credit card account with another card issuer, and the consumer's credit score decreased, in part due to such late payments. The card issuer may disclose the reasons for the rate increase as a decline in the consumer's credit score and the consumer's late payment on the account subject to the increase. Because the late payment on the credit card account with the other issuer also likely contributed to the decline in the consumer's credit score, it is not required to be separately disclosed. However, the late payment on the credit card account on which the rate increase is being imposed must be specifically disclosed even if that late payment also contributed to the decline in the consumer's credit score.

9(c)(2)(v) Notice not required.

* * * * *

12. *Temporary rates—relationship to § 226.59.* i. *General.* Section 226.59 requires a card issuer to review rate increases imposed due to the revocation of a temporary rate. In some circumstances, § 226.59 may require an issuer to reinstate a reduced temporary rate based on that review. If, based on a review required by § 226.59, a creditor reinstates a temporary rate that had been revoked, the card issuer is not required to provide an additional notice to the consumer when the reinstated temporary rate expires, if the card issuer provided the disclosures required by § 226.9(c)(2)(v)(B) prior to the original commencement of the temporary rate. See § 226.55 and the associated commentary for guidance on the permissibility and applicability of rate increases.

ii. *Example.* A consumer opens a new credit card account under an open-end (not home-secured) consumer credit plan on January 1, 2011. The annual percentage rate applicable to purchases is 18%. The card issuer offers the consumer a 15% rate on purchases made between January 1, 2012 and January 1, 2014. Prior to January 1, 2012, the card issuer discloses, in accordance with § 226.9(c)(2)(v)(B), that the rate on purchases made during that period will increase to the standard 18% rate on January 1, 2014. In March 2012, the consumer makes a payment that is ten days late. The card issuer, upon providing 45 days' advance notice of the change under § 226.9(g), increases the rate on new purchases to 18% effective as of June 1, 2012. On December 1, 2012, the issuer performs a review of the consumer's account in accordance with § 226.59. Based on that review, the card issuer is required to reduce the rate to the original 15% temporary rate as of January 15, 2013. On January 1, 2014, the card issuer may increase the rate on purchases to 18%, as previously disclosed prior to January 1, 2012, without providing an additional notice to the consumer.

* * * * *

9(g) Increase in rates due to delinquency or default or as a penalty.

1. *Relationship between § 226.9(c) and (g) and § 226.55—examples.* Card issuers subject to § 226.55 are prohibited from increasing the annual percentage rate for a category of transactions on any consumer credit card account unless specifically permitted by one of the exceptions in § 226.55(b). See comments 55(a)–1 and 55(b)–3 and the commentary to § 226.55(b)(4) for examples that illustrate the relationship between the notice requirements of § 226.9(c) and (g) and § 226.55.

2. *Affected consumers.* If a single credit account involves multiple consumers that may be affected by the change, the creditor should refer to § 226.5(d) to determine the number of notices that must be given.

3. *Combining a notice described in § 226.9(g)(3) with a notice described in § 226.9(c)(2)(iv).* If a creditor is required to provide notices pursuant to both § 226.9(c)(2)(iv) and (g)(3) to a consumer, the creditor may combine the two notices. This would occur when penalty pricing has been triggered, and other terms are changing on the consumer's account at the same time.

4. *Content.* Sample G–22 contains an example of how to comply with the requirements in § 226.9(g)(3)(i) when the rate on a consumer's credit card account is being increased to a penalty rate as described in § 226.9(g)(1)(ii), based on a late payment that is not more than 60 days late. Sample G–23 contains an example of how to comply with the requirements in § 226.9(g)(3)(i) when the rate increase is triggered by a delinquency of more than 60 days.

5. *Clear and conspicuous standard.* See comment 5(a)(1)–1 for the clear and conspicuous standard applicable to disclosures required under § 226.9(g).

6. *Terminology.* See § 226.5(a)(2) for terminology requirements applicable to disclosures required under § 226.9(g).

7. *Reasons for increase.* See comment 9(c)(2)(iv)–11 for guidance on disclosure of the reasons for a rate increase for a credit card account under an open-end (not home-secured) consumer credit plan.

* * * * *

Section 226.52—Limitations on Fees

* * * * *

52(b) Limitations on penalty fees.

1. *Fees for violating the account terms or other requirements.* For purposes of

§ 226.52(b), a fee includes any charge imposed by a card issuer based on an act or omission that violates the terms of the account or any other requirements imposed by the card issuer with respect to the account, other than charges attributable to periodic interest rates. Accordingly, for purposes of § 226.52(b), a fee does not include charges attributable to an increase in an annual percentage rate based on an act or omission that violates the terms or other requirements of an account.

i. The following are examples of fees that are subject to the limitations in § 226.52(b) or are prohibited by § 226.52(b):

A. Late payment fees and any other fees imposed by a card issuer if an account becomes delinquent or if a payment is not received by a particular date.

B. Returned payment fees and any other fees imposed by a card issuer if a payment received via check, automated clearing house, or other payment method is returned.

C. Any fee or charge for an over-the-limit transaction as defined in § 226.56(a), to the extent the imposition of such a fee or charge is permitted by § 226.56.

D. Any fee imposed by a card issuer if payment on a check that accesses a credit card account is declined.

E. Any fee or charge for a transaction that the card issuer declines to authorize. *See* § 226.52(b)(2)(i)(B).

F. Any fee imposed by a card issuer based on account inactivity (including the consumer's failure to use the account for a particular number or dollar amount of transactions or a particular type of transaction). *See* § 226.52(b)(2)(i)(B).

G. Any fee imposed by a card issuer based on the closure or termination of an account. *See* § 226.52(b)(2)(i)(B).

ii. The following are examples of fees to which § 226.52(b) does not apply:

A. Balance transfer fees.

B. Cash advance fees.

C. Foreign transaction fees.

D. Annual fees and other fees for the issuance or availability of credit described in § 226.5a(b)(2), except to the extent that such fees are based on account inactivity. *See* § 226.52(b)(2)(i)(B).

E. Fees for insurance described in § 226.4(b)(7) or debt cancellation or debt suspension coverage described in § 226.4(b)(10) written in connection with a credit transaction, provided that such fees are not imposed as a result of a violation of the account terms or other requirements of an account.

F. Fees for making an expedited payment (to the extent permitted by § 226.10(e)).

G. Fees for optional services (such as travel insurance).

H. Fees for reissuing a lost or stolen card.

2. *Rounding to nearest whole dollar.* A card issuer may round any fee that complies with § 226.52(b) to the nearest whole dollar. For example, if § 226.52(b) permits a card issuer to impose a late payment fee of $21.50, the card issuer may round that amount up to the nearest whole dollar and impose a late payment fee of $22. However, if the late payment fee permitted by § 226.52(b) were $21.49, the card issuer would not be permitted to round that amount up to $22, although the card issuer could round that amount down and impose a late payment fee of $21.

52(b)(1) General rule.

1. *Relationship between § 226.52(b)(1)(i), (b)(1)(ii), and (b)(2).*

i. *Relationship between § 226.52(b)(1)(i) and (b)(1)(ii).* A card issuer may impose a fee for violating the terms or other requirements of an account pursuant to either § 226.52(b)(1)(i) or (b)(1)(ii).

A. A card issuer that complies with the safe harbors in § 226.52(b)(1)(ii) is not required to determine that its fees represent a reasonable proportion of the total costs incurred by the card issuer as a result of a type of violation under § 226.52(b)(1)(i).

B. A card issuer may impose a fee for one type of violation pursuant to § 226.52(b)(1)(i) and may impose a fee for a different type of violation pursuant to § 226.52(b)(1)(ii). For example, a card issuer may impose a late payment fee of $30 based on a cost determination pursuant to § 226.52(b)(1)(i) but impose returned payment and over-the-limit fees of $25 or $35 pursuant to the safe harbors in § 226.52(b)(1)(ii).

C. A card issuer that previously based the amount of a penalty fee for a particular type of violation on a cost determination pursuant to § 226.52(b)(1)(i) may begin to impose a penalty fee for that type of violation that is consistent with § 226.52(b)(1)(ii) at any time (subject to the notice requirements in § 226.9), provided that the first fee imposed pursuant to § 226.52(b)(1)(ii) is consistent with § 226.52(b)(1)(ii)(A). For example, assume that a late payment occurs on January 15 and that, based on a cost determination pursuant to § 226.52(b)(1)(i), the card issuer imposes a $30 late payment fee. Another late payment occurs on July 15. The card issuer may impose another $30 late payment fee pursuant to § 226.52(b)(1)(i) or may impose a $25 late payment fee pursuant to § 226.52(b)(1)(ii)(A). However, the card issuer may not impose a $35 late payment fee pursuant to § 226.52(b)(1)(ii)(B). If the card issuer imposes a $25 fee pursuant to § 226.52(b)(1)(ii)(A) for the July 15 late payment and another late payment occurs on September 15, the card issuer may impose a $35 fee for the September 15 late payment pursuant to § 226.52(b)(1)(ii)(B).

ii. *Relationship between § 226.52(b)(1) and (b)(2).* Section 226.52(b)(1) does not permit a card issuer to impose a fee that is inconsistent with the prohibitions in § 226.52(b)(2). For example, if § 226.52(b)(2)(i) prohibits the card issuer from imposing a late payment fee that exceeds $15, § 226.52(b)(1)(ii) does not permit the card issuer to impose a higher late payment fee.

52(b)(1)(i) Fees based on costs.

1. *Costs incurred as a result of violations.* Section 226.52(b)(1)(i) does not require a card issuer to base a fee on the costs incurred as a result of a specific violation of the terms or other requirements of an account. Instead, for purposes of § 226.52(b)(1)(i), a card issuer must have determined that a fee for violating the terms or other requirements of an account represents a reasonable proportion of the costs incurred by the card issuer as a result of that type of violation. A card issuer may make a single determination for all of its credit card portfolios or may make separate determinations for each portfolio. The factors relevant to this determination include:

i. The number of violations of a particular type experienced by the card issuer during a prior period of reasonable length (for example, a period of twelve months).

ii. The costs incurred by the card issuer during that period as a result of those violations.

iii. At the card issuer's option, the number of fees imposed by the card issuer as a result of those violations during that period that the card issuer reasonably estimates it will be unable to collect. *See* comment 52(b)(1)(i)–5.

iv. At the card issuer's option, reasonable estimates for an upcoming period of changes in the number of violations of that type, the resulting costs, and the number of fees that the card issuer will be unable to collect. *See* illustrative examples in comments 52(b)(1)(i)–6 through –9.

2. *Amounts excluded from cost analysis.* The following amounts are not costs incurred by a card issuer as a result of violations of the terms or other requirements of an account for purposes of § 226.52(b)(1)(i):

i. Losses and associated costs (including the cost of holding reserves against potential losses and the cost of funding delinquent accounts).

ii. Costs associated with evaluating whether consumers who have not violated the terms or other requirements of an account are likely to do so in the future (such as the costs associated with underwriting new accounts). However, once a violation of the terms or other requirements of an account has occurred, the costs associated with preventing additional violations for a reasonable period of time are costs incurred by a card issuer as a result of violations of the terms or other requirements of an account for purposes of § 226.52(b)(1)(i).

3. *Third party charges.* As a general matter, amounts charged to the card issuer by a third party as a result of a violation of the terms or other requirements of an account are costs incurred by the card issuer for purposes of § 226.52(b)(1)(i). For example, if a card issuer is charged a specific amount by a third party for each returned payment, that amount is a cost incurred by the card issuer as a result of returned payments. However, if the amount is charged to the card issuer by an affiliate or subsidiary of the card issuer, the card issuer must have determined that the charge represents a reasonable proportion of the costs incurred by the affiliate or subsidiary as a result of the type of violation. For example, if an affiliate of a card issuer provides collection services to the card issuer on delinquent accounts, the card issuer must have determined that the amounts charged to the card issuer by the affiliate for such services represent a reasonable proportion of the costs incurred by the affiliate as a result of late payments.

4. *Amounts charged by other card issuers.* The fact that a card issuer's fees for violating the terms or other requirements of an account are comparable to fees assessed by other card issuers does not satisfy the requirements of § 226.52(b)(1)(i).

5. *Uncollected fees.* For purposes of § 226.52(b)(1)(i), a card issuer may consider

fees that it is unable to collect when determining the appropriate fee amount. Fees that the card issuer is unable to collect include fees imposed on accounts that have been charged off by the card issuer, fees that have been discharged in bankruptcy, and fees that the card issuer is required to waive in order to comply with a legal requirement (such as a requirement imposed by 12 CFR part 226 or 50 U.S.C. app. 527). However, fees that the card issuer chooses not to impose or chooses not to collect (such as fees the card issuer chooses to waive at the request of the consumer or under a workout or temporary hardship arrangement) are not relevant for purposes of this determination. *See* illustrative examples in comments 52(b)(2)(i)–6 through –9.

6. *Late payment fees.*

i. *Costs incurred as a result of late payments.* For purposes of § 226.52(b)(1)(i), the costs incurred by a card issuer as a result of late payments include the costs associated with the collection of late payments, such as the costs associated with notifying consumers of delinquencies and resolving delinquencies (including the establishment of workout and temporary hardship arrangements).

ii. *Examples.*

A. *Late payment fee based on past delinquencies and costs.* Assume that, during year one, a card issuer experienced 1 million delinquencies and incurred $26 million in costs as a result of those delinquencies. For purposes of § 226.52(b)(1)(i), a $26 late payment fee would represent a reasonable proportion of the total costs incurred by the card issuer as a result of late payments during year two.

B. *Adjustment based on fees card issuer is unable to collect.* Same facts as above except that the card issuer imposed a late payment fee for each of the 1 million delinquencies experienced during year one but was unable to collect 25% of those fees (in other words, the card issuer was unable to collect 250,000 fees, leaving a total of 750,000 late payments for which the card issuer did collect or could have collected a fee). For purposes of § 226.52(b)(2)(i), a late payment fee of $35 would represent a reasonable proportion of the total costs incurred by the card issuer as a result of late payments during year two.

C. *Adjustment based on reasonable estimate of future changes.* Same facts as paragraphs A. and B. above except the card issuer reasonably estimates that—based on past delinquency rates and other factors relevant to potential delinquency rates for year two—it will experience a 2% decrease in delinquencies during year two (in other words, 20,000 fewer delinquencies for a total of 980,000). The card issuer also reasonably estimates that it will be unable to collect the same percentage of fees (25%) during year two as during year one (in other words, the card issuer will be unable to collect 245,000 fees, leaving a total of 735,000 late payments for which the card issuer will be able to collect a fee). The card issuer also reasonably estimates that—based on past changes in costs incurred as a result of delinquencies and other factors relevant to potential costs for year two—it will experience a 5% increase in costs during year two (in other words, $1.3 million in additional costs for a total of $27.3 million). For purposes of § 226.52(b)(1)(i), a $37 late payment fee would represent a reasonable proportion of the total costs incurred by the card issuer as a result of late payments during year two.

7. *Returned payment fees.*

i. *Costs incurred as a result of returned payments.* For purposes of § 226.52(b)(1)(i), the costs incurred by a card issuer as a result of returned payments include:

A. Costs associated with processing returned payments and reconciling the card issuer's systems and accounts to reflect returned payments;

B. Costs associated with investigating potential fraud with respect to returned payments; and

C. Costs associated with notifying the consumer of the returned payment and arranging for a new payment.

ii. *Examples.*

A. *Returned payment fee based on past returns and costs.* Assume that, during year one, a card issuer experienced 150,000 returned payments and incurred $3.1 million in costs as a result of those returned payments. For purposes of § 226.52(b)(1)(i), a $21 returned payment fee would represent a reasonable proportion of the total costs incurred by the card issuer as a result of returned payments during year two.

B. *Adjustment based on fees card issuer is unable to collect.* Same facts as above except that the card issuer imposed a returned payment fee for each of the 150,000 returned payments experienced during year one but was unable to collect 15% of those fees (in other words, the card issuer was unable to collect 22,500 fees, leaving a total of 127,500 returned payments for which the card issuer did collect or could have collected a fee). For purposes of § 226.52(b)(2)(i), a returned payment fee of $24 would represent a reasonable proportion of the total costs incurred by the card issuer as a result of returned payments during year two.

C. *Adjustment based on reasonable estimate of future changes.* Same facts as paragraphs A. and B. above except the card issuer reasonably estimates that—based on past returned payment rates and other factors relevant to potential returned payment rates for year two—it will experience a 2% increase in returned payments during year two (in other words, 3,000 additional returned payments for a total of 153,000). The card issuer also reasonably estimates that it will be unable to collect 25% of returned payment fees during year two (in other words, the card issuer will be unable to collect 38,250 fees, leaving a total of 114,750 returned payments for which the card issuer will be able to collect a fee). The card issuer also reasonably estimates that—based on past changes in costs incurred as a result of returned payments and other factors relevant to potential costs for year two—it will experience a 1% decrease in costs during year two (in other words, a $31,000 reduction in costs for a total of $3.069 million). For purposes of § 226.52(b)(1)(i), a $27 returned payment fee would represent a reasonable proportion of the total costs incurred by the card issuer as a result of returned payments during year two.

8. *Over-the-limit fees.*

i. *Costs incurred as a result of over-the-limit transactions.* For purposes of § 226.52(b)(1)(i), the costs incurred by a card issuer as a result of over-the-limit transactions include:

A. Costs associated with determining whether to authorize over-the-limit transactions; and

B. Costs associated with notifying the consumer that the credit limit has been exceeded and arranging for payments to reduce the balance below the credit limit.

ii. *Costs not incurred as a result of over-the-limit transactions.* For purposes of § 226.52(b)(1)(i), costs associated with obtaining the affirmative consent of consumers to the card issuer's payment of transactions that exceed the credit limit consistent with § 226.56 are not costs incurred by a card issuer as a result of over-the-limit transactions.

iii. *Examples.*

A. *Over-the-limit fee based on past fees and costs.* Assume that, during year one, a card issuer authorized 600,000 over-the-limit transactions and incurred $4.5 million in costs as a result of those over-the-limit transactions. However, because of the affirmative consent requirements in § 226.56, the card issuer was only permitted to impose 200,000 over-the-limit fees during year one. For purposes of § 226.52(b)(1)(i), a $23 over-the-limit fee would represent a reasonable proportion of the total costs incurred by the card issuer as a result of over-the-limit transactions during year two.

B. *Adjustment based on fees card issuer is unable to collect.* Same facts as above except that the card issuer was unable to collect 30% of the 200,000 over-the-limit fees imposed during year one (in other words, the card issuer was unable to collect 60,000 fees, leaving a total of 140,000 over-the-limit transactions for which the card issuer did collect or could have collected a fee). For purposes of § 226.52(b)(2)(i), an over-the-limit fee of $32 would represent a reasonable proportion of the total costs incurred by the card issuer as a result of over-the-limit transactions during year two.

C. *Adjustment based on reasonable estimate of future changes.* Same facts as paragraphs A. and B. above except the card issuer reasonably estimates that—based on past over-the-limit transaction rates, the percentages of over-the-limit transactions that resulted in an over-the-limit fee in the past (consistent with § 226.56), and factors relevant to potential changes in those rates and percentages for year two—it will authorize approximately the same number of over-the-limit transactions during year two (600,000) and impose approximately the same number of over-the-limit fees (200,000). The card issuer also reasonably estimates that it will be unable to collect the same percentage of fees (30%) during year two as during year one (in other words, the card issuer was unable to collect 60,000 fees, leaving a total of 140,000 over-the-limit transactions for which the card issuer will be able to collect a fee). The card issuer also reasonably estimates that—based on past changes in costs incurred as a result of over-the-limit transactions and other factors

relevant to potential costs for year two—it will experience a 6% decrease in costs during year two (in other words, a $270,000 reduction in costs for a total of $4.23 million). For purposes of § 226.52(b)(1)(i), a $30 over-the-limit fee would represent a reasonable proportion of the total costs incurred by the card issuer as a result of over-the-limit transactions during year two.

9. *Declined access check fees.*

i. *Costs incurred as a result of declined access checks.* For purposes of § 226.52(b)(1)(i), the costs incurred by a card issuer as a result of declining payment on a check that accesses a credit card account include:

A. Costs associated with determining whether to decline payment on access checks;

B. Costs associated with processing declined access checks and reconciling the card issuer's systems and accounts to reflect declined access checks;

C. Costs associated with investigating potential fraud with respect to declined access checks; and

D. Costs associated with notifying the consumer and the merchant or other party that accepted the access check that payment on the check has been declined.

ii. *Example.* Assume that, during year one, a card issuer declined 100,000 access checks and incurred $2 million in costs as a result of those declined checks. The card issuer imposed a fee for each declined access check but was unable to collect 10% of those fees (in other words, the card issuer was unable to collect 10,000 fees, leaving a total of 90,000 declined access checks for which the card issuer did collect or could have collected a fee). For purposes of § 226.52(b)(1)(i), a $22 declined access check fee would represent a reasonable proportion of the total costs incurred by the card issuer as a result of declined access checks during year two.

52(b)(1)(ii) Safe harbors.

1. *Multiple violations of same type.* Section 226.52(b)(1)(ii)(A) permits a card issuer to impose a fee that does not exceed $25 for the first violation of a particular type. For a subsequent violation of the same type during the next six billing cycles, § 226.52(b)(1)(ii)(B) permits the card issuer to impose a fee that does not exceed $35.

i. *Next six billing cycles.* A fee may be imposed pursuant to § 226.52(b)(1)(ii)(B) if, during the six billing cycles following the billing cycle in which a violation occurred, another violation of the same type occurs.

A. *Late payments.* For purposes of § 226.52(b)(1)(ii), a late payment occurs during the billing cycle in which the payment may first be treated as late consistent with the requirements of 12 CFR Part 226 and the terms or other requirements of the account.

B. *Returned payments.* For purposes of § 226.52(b)(1)(ii), a returned payment occurs during the billing cycle in which the payment is returned to the card issuer.

C. *Transactions that exceed the credit limit.* For purposes of § 226.52(b)(1)(ii), a transaction that exceeds the credit limit for an account occurs during the billing cycle in which the transaction occurs or is authorized by the card issuer.

D. *Declined access checks.* For purposes of § 226.52(b)(1)(ii), a check that accesses a credit card account is declined during the billing cycle in which the card issuer declines payment on the check.

ii. *Relationship to §§ 226.52(b)(2)(ii) and 226.56(j)(1)(i).* If multiple violations are based on the same event or transaction such that § 226.52(b)(2)(ii) prohibits the card issuer from imposing more than one fee, the event or transaction constitutes a single violation for purposes of § 226.52(b)(1)(ii). Furthermore, consistent with § 226.56(j)(1)(i), no more than one violation for exceeding an account's credit limit can occur during a single billing cycle for purposes of § 226.52(b)(1)(ii).

iii. *Examples:* The following examples illustrate the application of § 226.52(b)(1)(ii)(A) and (b)(1)(ii)(B) with respect to credit card accounts under an open-end (not home-secured) consumer credit plan that are not charge card accounts. For purposes of these examples, assume that the billing cycles for the account begin on the first day of the month and end on the last day of the month and that the payment due date for the account is the twenty-fifth day of the month.

A. *Violations of same type (late payments).* A required minimum periodic payment of $50 is due on March 25. On March 26, a late payment has occurred because no payment has been received. Accordingly, consistent with § 226.52(b)(1)(ii)(A), the card issuer imposes a $25 late payment fee on March 26. In order for the card issuer to impose a $35 late payment fee pursuant to § 226.52(b)(1)(ii)(B), a second late payment must occur during the April, May, June, July, August, or September billing cycles.

(1) The card issuer does not receive any payment during the March billing cycle. A required minimum periodic payment of $100 is due on April 25. On April 20, the card issuer receives a $50 payment. No further payment is received during the April billing cycle. Accordingly, consistent with § 226.52(b)(1)(ii)(B), the card issuer may impose a $35 late payment fee on April 26. Furthermore, the card issuer may impose a $35 late payment fee for any late payment that occurs during the May, June, July, August, September, or October billing cycles.

(2) Same facts as in paragraph A. above. On March 30, the card issuer receives a $50 payment and the required minimum periodic payments for the April, May, June, July, August, and September billing cycles are received on or before the payment due date. A required minimum periodic payment of $60 is due on October 25. On October 26, a late payment has occurred because the required minimum periodic payment due on October 25 has not been received. However, because this late payment did not occur during the six billing cycles following the March billing cycle, § 226.52(b)(1)(ii) only permits the card issuer to impose a late payment fee of $25.

B. *Violations of different types (late payment and over the credit limit).* The credit limit for an account is $1,000. Consistent with § 226.56, the consumer has affirmatively consented to the payment of transactions that exceed the credit limit. A required minimum periodic payment of $30 is due on August 25. On August 26, a late payment has occurred because no payment has been received. Accordingly, consistent with § 226.52(b)(1)(ii)(A), the card issuer imposes a $25 late payment fee on August 26. On August 30, the card issuer receives a $30 payment. On September 10, a transaction causes the account balance to increase to $1,150, which exceeds the account's $1,000 credit limit. On September 11, a second transaction increases the account balance to $1,350. On September 23, the card issuer receives the $50 required minimum periodic payment due on September 25, which reduces the account balance to $1,300. On September 30, the card issuer imposes a $25 over-the-limit fee, consistent with § 226.52(b)(1)(ii)(A). On October 26, a late payment has occurred because the $60 required minimum periodic payment due on October 25 has not been received. Accordingly, consistent with § 226.52(b)(1)(ii)(B), the card issuer imposes a $35 late payment fee on October 26.

C. *Violations of different types (late payment and returned payment).* A required minimum periodic payment of $50 is due on July 25. On July 26, a late payment has occurred because no payment has been received. Accordingly, consistent with § 226.52(b)(1)(ii)(A), the card issuer imposes a $25 late payment fee on July 26. On July 30, the card issuer receives a $50 payment. A required minimum periodic payment of $50 is due on August 25. On August 24, a $50 payment is received. On August 27, the $50 payment is returned to the card issuer for insufficient funds. In these circumstances, § 226.52(b)(2)(ii) permits the card issuer to impose either a late payment fee or a returned payment fee but not both because the late payment and the returned payment result from the same event or transaction. Accordingly, for purposes of § 226.52(b)(1)(ii), the event or transaction constitutes a single violation. However, if the card issuer imposes a late payment fee, § 226.52(b)(1)(ii)(B) permits the issuer to impose a fee of $35 because the late payment occurred during the six billing cycles following the July billing cycle. In contrast, if the card issuer imposes a returned payment fee, the amount of the fee may be no more than $25 pursuant to § 226.52(b)(1)(ii)(A).

2. *Adjustments based on Consumer Price Index.* For purposes of § 226.52(b)(1)(ii)(A) and (b)(1)(ii)(B), the Board shall calculate each year price level adjusted amounts using the Consumer Price Index in effect on June 1 of that year. When the cumulative change in the adjusted minimum value derived from applying the annual Consumer Price level to the current amounts in § 226.52(b)(1)(ii)(A) and (b)(1)(ii)(B) has risen by a whole dollar, those amounts will be increased by $1.00. Similarly, when the cumulative change in the adjusted minimum value derived from applying the annual Consumer Price level to the current amounts in § 226.52(b)(1)(ii)(A) and (b)(1)(ii)(B) has decreased by a whole dollar, those amounts will be decreased by $1.00. The Board will publish adjustments to the amounts in § 226.52(b)(1)(ii)(A) and (b)(1)(ii)(B).

3. *Delinquent balance for charge card accounts.* Section 226.52(b)(1)(ii)(C) provides

that, when a charge card issuer that requires payment of outstanding balances in full at the end of each billing cycle has not received the required payment for two or more consecutive billing cycles, the card issuer may impose a late payment fee that does not exceed three percent of the delinquent balance. For purposes of § 226.52(b)(1)(ii)(C), the delinquent balance is any previously billed amount that remains unpaid at the time the late payment fee is imposed pursuant to § 226.52(b)(1)(ii)(C). Consistent with § 226.52(b)(2)(ii), a charge card issuer that imposes a fee pursuant to § 226.52(b)(1)(ii)(C) with respect to a late payment may not impose a fee pursuant to § 226.52(b)(1)(ii)(B) with respect to the same late payment. The following examples illustrate the application of § 226.52(b)(1)(ii)(C):

i. Assume that a charge card issuer requires payment of outstanding balances in full at the end of each billing cycle and that the billing cycles for the account begin on the first day of the month and end on the last day of the month. At the end of the June billing cycle, the account has a balance of $1,000. On July 5, the card issuer provides a periodic statement disclosing the $1,000 balance consistent with § 226.7. During the July billing cycle, the account is used for $300 in transactions, increasing the balance to $1,300. At the end of the July billing cycle, no payment has been received and the card issuer imposes a $25 late payment fee consistent with § 226.52(b)(1)(ii)(A). On August 5, the card issuer provides a periodic statement disclosing the $1,325 balance consistent with § 226.7. During the August billing cycle, the account is used for $200 in transactions, increasing the balance to $1,525. At the end of the August billing cycle, no payment has been received. Consistent with § 226.52(b)(1)(ii)(C), the card issuer may impose a late payment fee of $40, which is 3% of the $1,325 balance that was due at the end of the August billing cycle. Section 226.52(b)(1)(ii)(C) does not permit the card issuer to include the $200 in transactions that occurred during the August billing cycle.

ii. Same facts as above except that, on August 25, a $100 payment is received. Consistent with § 226.52(b)(1)(ii)(C), the card issuer may impose a late payment fee of $37, which is 3% of the unpaid portion of the $1,325 balance that was due at the end of the August billing cycle ($1,225).

iii. Same facts as in paragraph A. above except that, on August 25, a $200 payment is received. Consistent with § 226.52(b)(1)(ii)(C), the card issuer may impose a late payment fee of $34, which is 3% of the unpaid portion of the $1,325 balance that was due at the end of the August billing cycle ($1,125). In the alternative, the card issuer may impose a late payment fee of $35 consistent with § 226.52(b)(1)(ii)(B). However, § 226.52(b)(2)(ii) prohibits the card issuer from imposing both fees.

52(b)(2) Prohibited fees.

1. *Relationship to § 226.52(b)(1).* A card issuer does not comply with § 226.52(b) if it imposes a fee that is inconsistent with the prohibitions in § 226.52(b)(2). Thus, the prohibitions in § 226.52(b)(2) apply even if a fee is consistent with § 226.52(b)(1)(i) or (b)(1)(ii). For example, even if a card issuer has determined for purposes of § 226.52(b)(1)(i) that a $27 fee represents a reasonable proportion of the total costs incurred by the card issuer as a result of a particular type of violation, § 226.52(b)(2)(i) prohibits the card issuer from imposing that fee if the dollar amount associated with the violation is less than $27. Similarly, even if § 226.52(b)(1)(ii) permits a card issuer to impose a $25 fee, § 226.52(b)(2)(i) prohibits the card issuer from imposing that fee if the dollar amount associated with the violation is less than $25.

52(b)(2)(i) Fees that exceed dollar amount associated with violation.

1. *Late payment fees.* For purposes of § 226.52(b)(2)(i), the dollar amount associated with a late payment is the amount of the required minimum periodic payment due immediately prior to assessment of the late payment fee. Thus, § 226.52(b)(2)(i)(A) prohibits a card issuer from imposing a late payment fee that exceeds the amount of that required minimum periodic payment. For example:

i. Assume that a $15 required minimum periodic payment is due on September 25. The card issuer does not receive any payment on or before September 25. On September 26, the card issuer imposes a late payment fee. For purposes of § 226.52(b)(2)(i), the dollar amount associated with the late payment is the amount of the required minimum periodic payment due on September 25 ($15). Thus, under § 226.52(b)(2)(i)(A), the amount of that fee cannot exceed $15 (even if a higher fee would be permitted under § 226.52(b)(1)).

ii. Same facts as above except that, on September 25, the card issuer receives a $10 payment. No further payments are received. On September 26, the card issuer imposes a late payment fee. For purposes of § 226.52(b)(2)(i), the dollar amount associated with the late payment is the full amount of the required minimum periodic payment due on September 25 ($15), rather than the unpaid portion of that payment ($5). Thus, under § 226.52(b)(2)(i)(A), the amount of the late payment fee cannot exceed $15 (even if a higher fee would be permitted under § 226.52(b)(1)).

iii. Assume that a $15 required minimum periodic payment is due on October 28 and the billing cycle for the account closes on October 31. The card issuer does not receive any payment on or before November 3. On November 3, the card issuer determines that the required minimum periodic payment due on November 28 is $50. On November 5, the card issuer imposes a late payment fee. For purposes of § 226.52(b)(2)(i), the dollar amount associated with the late payment is the amount of the required minimum periodic payment due on October 28 ($15), rather than the amount of the required minimum periodic payment due on November 28 ($50). Thus, under § 226.52(b)(2)(i)(A), the amount of that fee cannot exceed $15 (even if a higher fee would be permitted under § 226.52(b)(1)).

2. *Returned payment fees.* For purposes of § 226.52(b)(2)(i), the dollar amount associated with a returned payment is the amount of the required minimum periodic payment due immediately prior to the date on which the payment is returned to the card issuer. Thus, § 226.52(b)(2)(i)(A) prohibits a card issuer from imposing a returned payment fee that exceeds the amount of that required minimum periodic payment. However, if a payment has been returned and is submitted again for payment by the card issuer, there is no additional dollar amount associated with a subsequent return of that payment and § 226.52(b)(2)(i)(B) prohibits the card issuer from imposing an additional returned payment fee. For example:

i. Assume that the billing cycles for an account begin on the first day of the month and end on the last day of the month and that the payment due date is the twenty-fifth day of the month. A minimum payment of $15 is due on March 25. The card issuer receives a check for $100 on March 23, which is returned to the card issuer for insufficient funds on March 26. For purposes of § 226.52(b)(2)(i), the dollar amount associated with the returned payment is the amount of the required minimum periodic payment due on March 25 ($15). Thus, § 226.52(b)(2)(i)(A) prohibits the card issuer from imposing a returned payment fee that exceeds $15 (even if a higher fee would be permitted under § 226.52(b)(1)). Furthermore, § 226.52(b)(2)(ii) prohibits the card issuer from assessing both a late payment fee and a returned payment fee in these circumstances. *See* comment 52(b)(2)(ii)–1.

ii. Same facts as above except that the card issuer receives the $100 check on March 31 and the check is returned for insufficient funds on April 2. The minimum payment due on April 25 is $30. For purposes of § 226.52(b)(2)(i), the dollar amount associated with the returned payment is the amount of the required minimum periodic payment due on March 25 ($15), rather than the amount of the required minimum periodic payment due on April 25 ($30). Thus, § 226.52(b)(2)(i)(A) prohibits the card issuer from imposing a returned payment fee that exceeds $15 (even if a higher fee would be permitted under § 226.52(b)(1)). Furthermore, § 226.52(b)(2)(ii) prohibits the card issuer from assessing both a late payment fee and a returned payment fee in these circumstances. *See* comment 52(b)(2)(ii)–1.

iii. Same facts as paragraph i. above except that, on March 28, the card issuer presents the $100 check for payment a second time. On April 1, the check is again returned for insufficient funds. Section 226.52(b)(2)(i)(B) prohibits the card issuer from imposing a returned payment fee based on the return of the payment on April 1.

iv. Assume that the billing cycles for an account begin on the first day of the month and end on the last day of the month and that the payment due date is the twenty-fifth day of the month. A minimum payment of $15 is due on August 25. The card issuer receives a check for $15 on August 23, which is not returned. The card issuer receives a check for $50 on September 5, which is returned to the card issuer for insufficient funds on September 7. Section 226.52(b)(2)(i)(B) does not prohibit the card issuer from imposing a returned payment fee in these circumstances. Instead, for purposes of § 226.52(b)(2)(i), the

dollar amount associated with the returned payment is the amount of the required minimum periodic payment due on August 25 ($15). Thus, § 226.52(b)(2)(i)(A) prohibits the card issuer from imposing a returned payment fee that exceeds $15 (even if a higher fee would be permitted under § 226.52(b)(1)).

3. *Over-the-limit fees.* For purposes of § 226.52(b)(2)(i), the dollar amount associated with extensions of credit in excess of the credit limit for an account is the total amount of credit extended by the card issuer in excess of the credit limit during the billing cycle in which the over-the-limit fee is imposed. Thus, § 226.52(b)(2)(i)(A) prohibits a card issuer from imposing an over-the-limit fee that exceeds that amount. Nothing in § 226.52(b) permits a card issuer to impose an over-the-limit fee if imposition of the fee is inconsistent with § 226.56. The following examples illustrate the application of § 226.52(b)(2)(i)(A) to over-the-limit fees:

i. Assume that the billing cycles for a credit card account with a credit limit of $5,000 begin on the first day of the month and end on the last day of the month. Assume also that, consistent with § 226.56, the consumer has affirmatively consented to the payment of transactions that exceed the credit limit. On March 1, the account has a $4,950 balance. On March 6, a $60 transaction is charged to the account, increasing the balance to $5,010. On March 25, a $5 transaction is charged to the account, increasing the balance to $5,015. On the last day of the billing cycle (March 31), the card issuer imposes an over-the-limit fee. For purposes of § 226.52(b)(2)(i), the dollar amount associated with the extensions of credit in excess of the credit limit is the total amount of credit extended by the card issuer in excess of the credit limit during the March billing cycle ($15). Thus, § 226.52(b)(2)(i)(A) prohibits the card issuer from imposing an over-the-limit fee that exceeds $15 (even if a higher fee would be permitted under § 226.52(b)(1)).

ii. Same facts as above except that, on March 26, the card issuer receives a payment of $20, reducing the balance below the credit limit to $4,995. Nevertheless, for purposes of § 226.52(b)(2)(i), the dollar amount associated with the extensions of credit in excess of the credit limit is the total amount of credit extended by the card issuer in excess of the credit limit during the March billing cycle ($15). Thus, consistent with § 226.52(b)(2)(i)(A), the card issuer may impose an over-the-limit fee of $15.

4. *Declined access check fees.* For purposes of § 226.52(b)(2)(i), the dollar amount associated with declining payment on a check that accesses a credit card account is the amount of the check. Thus, when a check that accesses a credit card account is declined, § 226.52(b)(2)(i)(A) prohibits a card issuer from imposing a fee that exceeds the amount of that check. For example, assume that a check that accesses a credit card account is used as payment for a $50 transaction, but payment on the check is declined by the card issuer because the transaction would have exceeded the credit limit for the account. For purposes of § 226.52(b)(2)(i), the dollar amount associated with the declined check is the amount of the check ($50). Thus, § 226.52(b)(2)(i)(A) prohibits the card issuer from imposing a fee that exceeds $50. However, the amount of this fee must also comply with § 226.52(b)(1)(i) or (b)(1)(ii).

5. *Inactivity fees.* Section 226.52(b)(2)(i)(B)(*2*) prohibits a card issuer from imposing a fee based on account inactivity (including the consumer's failure to use the account for a particular number or dollar amount of transactions or a particular type of transaction). For example, § 226.52(b)(2)(i)(B)(*2*) prohibits a card issuer from imposing a $50 fee when a consumer fails to use the account for $2,000 in purchases over the course of a year. Similarly, § 226.52(b)(2)(i)(B)(*2*) prohibits a card issuer from imposing a $50 annual fee on all accounts but waiving the fee if the consumer uses the account for $2,000 in purchases over the course of a year.

6. *Closed account fees.* Section 226.52(b)(2)(i)(B)(*3*) prohibits a card issuer from imposing a fee based on the closure or termination of an account. For example, 226.52(b)(2)(i)(B)(*3*) prohibits a card issuer from:

i. Imposing a one-time fee to consumers who close their accounts.

ii. Imposing a periodic fee (such as an annual fee, a monthly maintenance fee, or a closed account fee) after an account is closed or terminated if that fee was not imposed prior to closure or termination. This prohibition applies even if the fee was disclosed prior to closure or termination. *See also* comment 55(d)–1.

iii. Increasing a periodic fee (such as an annual fee or a monthly maintenance fee) after an account is closed or terminated. However, a card issuer is not prohibited from continuing to impose a periodic fee that was imposed before the account was closed or terminated.

52(b)(2)(ii) Multiple fees based on single event or transaction.

1. *Single event or transaction.* Section 226.52(b)(2)(ii) prohibits a card issuer from imposing more than one fee for violating the terms or other requirements of an account based on a single event or transaction. The following examples illustrate the application of § 226.52(b)(2)(ii). Assume for purposes of these examples that the billing cycles for a credit card account begin on the first day of the month and end on the last day of the month and that the payment due date for the account is the twenty-fifth day of the month.

i. Assume that the required minimum periodic payment due on March 25 is $20. On March 26, the card issuer has not received any payment and imposes a late payment fee. Section 226.52(b)(2)(ii) prohibits the card issuer from imposing an additional late payment fee if the $20 minimum payment has not been received by a subsequent date (such as March 31). However, § 226.52(b)(2)(ii) does not prohibit the card issuer from imposing an additional late payment fee if the required minimum periodic payment due on April 25 (which may include the $20 due on March 25) is not received on or before that date.

ii. Assume that the required minimum periodic payment due on March 25 is $30.

A. On March 25, the card issuer receives a check for $50, but the check is returned for insufficient funds on March 27. Consistent with §§ 226.52(b)(1)(ii)(A) and (b)(2)(i)(A), the card issuer may impose a late payment fee of $25 or a returned payment fee of $25. However, § 226.52(b)(2)(ii) prohibits the card issuer from imposing both fees because those fees would be based on a single event or transaction.

B. Same facts as paragraph ii.A. above except that that card issuer receives the $50 check on March 27 and the check is returned for insufficient funds on March 29. Consistent with §§ 226.52(b)(1)(ii)(A) and (b)(2)(i)(A), the card issuer may impose a late payment fee of $25 or a returned payment fee of $25. However, § 226.52(b)(2)(ii) prohibits the card issuer from imposing both fees because those fees would be based on a single event or transaction. If no payment is received on or before the next payment due date (April 25), § 226.52(b)(2)(ii) does not prohibit the card issuer from imposing a late payment fee.

iii. Assume that the required minimum periodic payment due on July 25 is $30. On July 10, the card issuer receives a $50 payment, which is not returned. On July 20, the card issuer receives a $100 payment, which is returned for insufficient funds on July 24. Consistent with § 226.52(b)(1)(ii)(A) and (b)(2)(i)(A), the card issuer may impose a returned payment fee of $25. Nothing in § 226.52(b)(2)(ii) prohibits the imposition of this fee.

iv. Assume that the credit limit for an account is $1,000 and that, consistent with § 226.56, the consumer has affirmatively consented to the payment of transactions that exceed the credit limit. On March 31, the balance on the account is $970 and the card issuer has not received the $35 required minimum periodic payment due on March 25. On that same date (March 31), a $70 transaction is charged to the account, which increases the balance to $1,040. Consistent with § 226.52(b)(1)(ii)(A) and (b)(2)(i)(A), the card issuer may impose a late payment fee of $25 and an over-the-limit fee of $25. Section 226.52(b)(2)(ii) does not prohibit the imposition of both fees because those fees are based on different events or transactions.

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Section 226.56—Requirements for over-the-limit transactions.

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56(e) Content.

1. *Amount of over-the-limit fee.* See Model Forms G–25(A) and G–25(B) for guidance on how to disclose the amount of the over-the-limit fee.

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56(j) Prohibited practices.

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6. *Additional restrictions on over-the-limit fees.* See § 226.52(b).

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Section 226.59–Reevaluation of Rate Increases.

59(a) General rule.

59(a)(1) Evaluation of increased rate.

1. *Types of rate increases covered.* Section 226.59(a) applies both to increases in annual percentage rates imposed on a consumer's account based on that consumer's credit risk or other circumstances specific to that

consumer and to increases in annual percentage rates imposed based on factors that are not specific to the consumer, such as changes in market conditions or the issuer's cost of funds.

2. *Rate increases actually imposed.* Under § 226.59(a), a card issuer must review changes in factors only if the increased rate is actually imposed on the consumer's account. For example, if a card issuer increases the penalty rate for a credit card account under an open-end (not home-secured) consumer credit plan and the consumer's account has no balances that are currently subject to the penalty rate, the card issuer is required to provide a notice pursuant to § 226.9(c) of the change in terms, but the requirements of § 226.59 do not apply. However, if the consumer's account later becomes subject to the penalty rate, the card issuer is required to provide a notice pursuant to § 226.9(g) and the requirements of § 226.59 begin to apply upon imposition of the penalty rate. Similarly, if a card issuer raises the cash advance rate applicable to a consumer's account but the consumer engages in no cash advance transactions to which that increased rate is applied, the card issuer is required to provide a notice pursuant to § 226.9(c) of the change in terms, but the requirements of § 226.59 do not apply. If the consumer subsequently engages in a cash advance transaction, the requirements of § 226.59 begin to apply at that time.

3. *Rate increases prior to effective date of rule.* For increases in annual percentage rates made on or after January 1, 2009 and prior to August 22, 2010, § 226.59(a) requires the card issuer to review the factors described in § 226.59(d) and reduce the rate, as appropriate, if the rate increase is of a type for which 45 days' advance notice would currently be required under § 226.9(c)(2) or (g). For example, 45 days' notice is not required under § 226.9(c)(2) if the rate increase results from the increase in the index by which a properly-disclosed variable rate is determined in accordance with § 226.9(c)(2)(v)(C) or if the increase occurs upon expiration of a specified period of time and disclosures complying with § 226.9(c)(2)(v)(B) have been provided. The requirements of § 226.59 do not apply to such rate increases.

4. *Amount of rate decrease.* Even in circumstances where a rate reduction is required, § 226.59 does not require that a card issuer decrease the rate that applies to a credit card account to the rate that was in effect prior to the rate increase subject to § 226.59(a). The amount of the rate decrease that is required must be determined based upon the card issuer's reasonable policies and procedures under § 226.59(b) for consideration of factors described in § 226.59(a) and (d). For example, assume a consumer's rate on new purchases is increased from a variable rate of 15.99% to a variable rate of 23.99% based on the consumer's making a required minimum periodic payment five days late. The consumer makes all of the payments required on the account on time for the six months following the rate increase. Assume that the card issuer evaluates the account by reviewing the factors on which the increase in an annual percentage rate was originally based, in accordance with § 226.59(d)(1)(i). The card issuer is not required to decrease the consumer's rate to the 15.99% that applied prior to the rate increase. However, the card issuer's policies and procedures for performing the review required by § 226.59(a) must be reasonable, as required by § 226.59(b), and must take into account any reduction in the consumer's credit risk based upon the consumer's timely payments.

59(a)(2) Rate reductions.

59(a)(2)(ii) Applicability of rate reduction.

1. *Applicability of reduced rate to new transactions.* Section 226.59(a)(2)(ii) requires, in part, that any reduction in rate required pursuant to § 226.59(a)(1) must apply to new transactions that occur after the effective date of the rate reduction, if those transactions would otherwise have been subject to the increased rate described in § 226.59(a)(1). A credit card account may have multiple types of balances, for example, purchases, cash advances, and balance transfers, to which different rates apply. For example, assume a new credit card account opened on January 1 of year one has a rate applicable to purchases of 15% and a rate applicable to cash advances and balance transfers of 20%. Effective March 1 of year two, consistent with the limitations in § 226.55 and upon giving notice required by § 226.9(c)(2), the card issuer raises the rate applicable to new purchases to 18% based on market conditions. The only transaction in which the consumer engages in year two is a $1,000 purchase made on July 1. The rate for cash advances and balance transfers remains at 20%. Based on a subsequent review required by § 226.59(a)(1), the card issuer determines that the rate on purchases must be reduced to 16%. Section 226.59(a)(2)(ii) requires that the 16% rate be applied to the $1,000 purchase made on July 1 and to all new purchases. The rate for new cash advances and balance transfers may remain at 20%, because there was no rate increase applicable to those types of transactions and, therefore, the requirements of § 226.59(a) do not apply.

59(c) Timing.

1. *In general.* The issuer may review all of its accounts subject to § 226.59(a) at the same time once every six months, may review each account once each six months on a rolling basis based on the date on which the rate was increased for that account, or may otherwise review each account not less frequently than once every six months.

2. *Example.* A card issuer increases the rates applicable to one half of its credit card accounts on June 1, 2011. The card issuer increases the rates applicable to the other half of its credit card accounts on September 1, 2011. The card issuer may review the rate increases for all of its credit card accounts on or before December 1, 2011, and at least every six months thereafter. In the alternative, the card issuer may first review the rate increases for the accounts that were repriced on June 1, 2011 on or before December 1, 2011, and may first review the rate increases for the accounts that were repriced on September 1, 2011 on or before March 1, 2012.

3. *Rate increases prior to effective date of rule.* For increases in annual percentage rates applicable to a credit card account under an open-end (not home-secured) consumer credit plan on or after January 1, 2009 and prior to August 22, 2010, § 226.59(c) requires that the first review for such rate increases be conducted prior to February 22, 2011.

59(d) Factors.

1. *Change in factors.* A creditor that complies with § 226.59(a) by reviewing the factors it currently considers in determining the annual percentage rates applicable to similar new credit card accounts may change those factors from time to time. When a creditor changes the factors it considers in determining the annual percentage rates applicable to similar new credit card accounts from time to time, it may comply with § 226.59(a) by reviewing the set of factors it considered immediately prior to the change in factors for a brief transition period, or may consider the new factors. For example, a creditor changes the factors it uses to determine the rates applicable to similar new credit card accounts on January 1, 2012. The creditor reviews the rates applicable to its existing accounts that have been subject to a rate increase pursuant to § 226.59(a) on January 25, 2012. The creditor complies with § 226.59(a) by reviewing, at its option, either the factors that it considered on December 31, 2011 when determining the rates applicable to similar new credit card accounts or the factors that it considers as of January 25, 2012. For purposes of compliance with § 226.59(d), a transition period of 60 days from the change of factors constitutes a brief transition period.

2. *Comparison of existing account to factors used for similar new accounts.* Under § 226.59(a), if a creditor evaluates an existing account using the same factors that it considers in determining the rates applicable to similar new accounts, the review of factors need not result in existing accounts being subject to exactly the same rates and rate structure as a creditor imposes on similar new accounts. For example, a creditor may offer variable rates on similar new accounts that are computed by adding a margin that depends on various factors to the value of the LIBOR index. The account that the creditor is required to review pursuant to § 226.59(a) may have variable rates that were determined by adding a different margin, depending on different factors, to a published prime rate. In performing the review required by § 226.59(a), the creditor may review the factors it uses to determine the rates applicable to similar new accounts. If a rate reduction is required, however, the creditor need not base the variable rate for the existing account on the LIBOR index but may continue to use the published prime rate. Section 226.59(a) requires, however, that the rate on the existing account after the reduction, as determined by adding the published prime rate and margin, be comparable to the rate, as determined by adding the margin and LIBOR, charged on a new account for which the factors are comparable.

3. *Similar new credit card accounts.* A card issuer complying with § 226.59(d)(1)(ii) is required to consider the factors that the card issuer currently considers when determining the annual percentage rates applicable to

similar new credit card accounts under an open-end (not home-secured) consumer credit plan. For example, a card issuer may review different factors in determining the annual percentage rate that applies to credit card plans for which the consumer pays an annual fee and receives rewards points than it reviews in determining the rates for credit card plans with no annual fee and no rewards points. Similarly, a card issuer may review different factors in determining the annual percentage rate that applies to private label credit cards than it reviews in determining the rates applicable to credit cards that can be used at a wider variety of merchants. In addition, a card issuer may review different factors in determining the annual percentage rate that applies to private label credit cards usable only at Merchant A than it may review for private label credit cards usable only at Merchant B. However, § 226.59(d)(1)(ii) requires a card issuer to review the factors it considers when determining the rates for new credit card accounts with similar features that are offered for similar purposes.

4. *No similar new credit card accounts.* In some circumstances, a card issuer that complies with § 226.59(a) by reviewing the factors that it currently considers in determining the annual percentage rates applicable to similar new accounts may not be able to identify a class of new accounts that are similar to the existing accounts on which a rate increase has been imposed. For example, consumers may have existing credit card accounts under an open-end (not home-secured) consumer credit plan but the card issuer may no longer offer a product to new consumers with similar characteristics, such as the availability of rewards, size of credit line, or other features. Similarly, some consumers' accounts may have been closed and therefore cannot be used for new transactions, while all new accounts can be used for new transactions. In those circumstances, § 226.59 requires that the card issuer nonetheless perform a review of the rate increase on the existing customers' accounts. A card issuer does not comply with § 226.59 by maintaining an increased rate without performing such an evaluation. In such circumstances, § 226.59(d)(1)(ii) requires that the card issuer compare the existing accounts to the most closely comparable new accounts that it offers.

5. *Consideration of consumer's conduct on existing account.* A card issuer that complies with § 226.59(a) by reviewing the factors that it currently considers in determining the annual percentage rates applicable to similar new accounts may consider the consumer's payment or other account behavior on the existing account only to the same extent and in the same manner that the issuer considers such information when one of its current cardholders applies for a new account with the card issuer. For example, a card issuer might obtain consumer reports for all of its applicants. The consumer reports contain certain information regarding the applicant's past performance on existing credit card accounts. However, the card issuer may have additional information about an existing cardholder's payment history or account usage that does not appear in the consumer report and that, accordingly, it would not generally have for all new applicants. For example, a consumer may have made a payment that is five days late on his or her account with the card issuer, but this information does not appear on the consumer report. The card issuer may consider this additional information in performing its review under § 226.59(a), but only to the extent and in the manner that it considers such information if a current cardholder applies for a new account with the issuer.

59(f) Termination of obligation to review factors.

1. *Revocation of temporary rates.* i. *In general.* If an annual percentage rate is increased due to revocation of a temporary rate, § 226.59(a) requires that the card issuer periodically review the increased rate. In contrast, if the rate increase results from the expiration of a temporary rate previously disclosed in accordance with § 226.9(c)(2)(v)(B), the review requirements in § 226.59(a) do not apply. If a temporary rate is revoked such that the requirements of § 226.59(a) apply, § 226.59(f) permits an issuer to terminate the review of the rate increase if and when the applicable rate is the same as the rate that would have applied if the increase had not occurred.

ii. *Examples.* Assume that on January 1, 2011, a consumer opens a new credit card account under an open-end (not home-secured) consumer credit plan. The annual percentage rate applicable to purchases is 15%. The card issuer offers the consumer a 10% rate on purchases made between February 1, 2012 and August 1, 2013 and discloses pursuant to § 226.9(c)(2)(v)(B) that on August 1, 2013 the rate on purchases will revert to the original 15% rate. The consumer makes a payment that is five days late in July 2012.

A. Upon providing 45 days' advance notice and to the extent permitted under § 226.55, the card issuer increases the rate applicable to new purchases to 15%, effective on September 1, 2012. The card issuer must review that rate increase under § 226.59(a) at least once each six months during the period from September 1, 2012 to August 1, 2013, unless and until the card issuer reduces the rate to 10%. The card issuer performs reviews of the rate increase on January 1, 2013 and July 1, 2013. Based on those reviews, the rate applicable to purchases remains at 15%. Beginning on August 1, 2013, the card issuer is not required to continue periodically reviewing the rate increase, because if the temporary rate had expired in accordance with its previously disclosed terms, the 15% rate would have applied to purchase balances as of August 1, 2013 even if the rate increase had not occurred on September 1, 2012.

B. Same facts as above except that the review conducted on July 1, 2013 indicates that a reduction to the original temporary rate of 10% is appropriate. Section 226.59(a)(2)(i) requires that the rate be reduced no later than 45 days after completion of the review, or no later than August 15, 2013. Because the temporary rate would have expired prior to the date on which the rate decrease is required to take effect, the card issuer may, at its option, reduce the rate to 10% for any portion of the period from July 1, 2013 to August 1, 2013, or may continue to impose the 15% rate for that entire period. The card issuer is not required to conduct further reviews of the 15% rate on purchases.

C. Same facts as above except that on September 1, 2012 the card issuer increases the rate applicable to new purchases to the penalty rate on the consumer's account, which is 25%. The card issuer conducts reviews of the increased rate in accordance with § 226.59 on January 1, 2013 and July 1, 2013. Based on those reviews, the rate applicable to purchases remains at 25%. The card issuer's obligation to review the rate increase continues to apply after August 1, 2013, because the 25% penalty rate exceeds the 15% rate that would have applied if the temporary rate expired in accordance with its previously disclosed terms. The card issuer's obligation to review the rate terminates if and when the annual percentage rate applicable to purchases is reduced to the 15% rate.

59(g) Acquired accounts.

59(g)(1) General.

1. *Relationship to § 226.59(d)(2) for rate increases imposed between January 1, 2009 and February 21, 2010.* Section 226.59(d)(2) applies to acquired accounts. Accordingly, if a card issuer acquires accounts on which a rate increase was imposed between January 1, 2009 and February 21, 2010 that was not based solely upon consumer-specific factors, that acquiring card issuer must consider the factors that it currently considers when determining the annual percentage rates applicable to similar new credit card accounts, if it conducts either or both of the first two reviews of such accounts that are required after August 22, 2010 under § 226.59(a).

59(g)(2) Review of acquired portfolio.

1. *Example—general.* A card issuer acquires a portfolio of accounts that currently are subject to annual percentage rates of 12%, 15%, and 18%. Not later than six months after the acquisition of such accounts, the card issuer reviews all of these accounts in accordance with the factors that it currently uses in determining the rates applicable to similar new credit card accounts. As a result of that review, the card issuer decreases the rate on the accounts that are currently subject to a 12% annual percentage rate to 10%, leaves the rate applicable to the accounts currently subject to a 15% annual percentage rate at 15%, and increases the rate applicable to the accounts currently subject to a rate of 18% to 20%. Section 226.59(g)(2) requires the card issuer to review, no less frequently than once every six months, the accounts for which the rate has been increased to 20%. The card issuer is not required to review the accounts subject to 10% and 15% rates pursuant to § 226.59(a), unless and until the card issuer makes a subsequent rate increase applicable to those accounts.

2. *Example—penalty rates.* A card issuer acquires a portfolio of accounts that currently are subject to standard annual percentage rates of 12% and 15%. In addition, several acquired accounts are subject to a penalty rate of 24%. Not later than six months after the acquisition of such accounts, the card issuer reviews all of these accounts in accordance with the factors that it currently

uses in determining the rates applicable to similar new credit card accounts. As a result of that review, the card issuer leaves the standard rates applicable to the accounts at 12% and 15%, respectively. The card issuer decreases the rate applicable to the accounts currently at 24% to its penalty rate of 23%. Section 226.59(g)(2) requires the card issuer to review, no less frequently than once every six months, the accounts that are subject to a penalty rate of 23%. The card issuer is not required to review the accounts subject to 12% and 15% rates pursuant to § 226.59(a), unless and until the card issuer makes a subsequent rate increase applicable to those accounts.

* * * * *

By order of the Board of Governors of the Federal Reserve System, June 14, 2010.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. 2010–14717 Filed 6–28–10; 8:45 am]

BILLING CODE 6210–01–P

Federal Register

Tuesday,
June 29, 2010

Part III

Department of Energy

10 CFR Part 430

Energy Conservation Program for Consumer Products: Test Procedures for Clothes Dryers and Room Air Conditioners; Proposed Rule

DEPARTMENT OF ENERGY

10 CFR Part 430

[Docket No. EERE–2008–BT–TP–0010]

RIN 1904–AC02

Energy Conservation Program for Consumer Products: Test Procedures for Clothes Dryers and Room Air Conditioners

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

ACTION: Supplemental notice of proposed rulemaking and public meeting.

SUMMARY: On December 9, 2008, the U.S. Department of Energy (DOE) published a notice of proposed rulemaking (NOPR) in which it proposed amendments to its test procedures for residential clothes dryers and room air conditioners to provide for measurement of standby mode and off mode power use by these products in order to implement recent amendments under the Energy Independence and Security Act of 2007 (EISA 2007) to the Energy Policy and Conservation Act (EPCA). In response to comments on the NOPR, DOE conducted additional investigations to address certain issues raised in these comments. In today's supplemental notice of proposed rulemaking (SNOPR), DOE is continuing to propose amendments to incorporate into its test procedures relevant provisions from the International Electrotechnical Commission (IEC) Standard 62301, "Household electrical appliances—Measurement of standby power," First Edition 2005–06, including language to clarify application of these provisions for measuring standby mode and off mode power consumption in clothes dryers and room air conditioners. In addition, DOE is proposing to adopt definitions of modes based on the relevant provisions from IEC Standard 62301 Second Edition Committee Draft for Vote. DOE is also proposing to amend its test procedures for clothes dryers and room air conditioners to address active mode energy use. Specifically, today's proposal addresses testing methods for clothes dryer automatic cycle termination, vent-less clothes dryers, test cloth preconditioning for clothes dryer energy tests, test conditions for gas clothes dryers, and current clothes dryer usage patterns and capabilities as well as the references in the current room air conditioner and clothes dryer test procedure. DOE will hold a public meeting to discuss and receive comments on the issues presented in this notice.

DATES: DOE will hold a public meeting on Wednesday, July 14, 2010 from 9 a.m. to 4 p.m., in Washington, DC. DOE must receive requests to speak at the public meeting before 4 p.m., Wednesday, July 7, 2010. DOE must receive a signed original and an electronic copy of statements to be given at the public meeting before 4 p.m., Wednesday, July 7, 2010.

DOE will accept comments, data, and information regarding the SNOPR before and after the public meeting, but no later than **August 30, 2010**. *See* section VI, "Public Participation," of this SNOPR for details.

ADDRESSES: The public meeting will be held at the U.S. Department of Energy, Forrestal Building, Room 1E–245, 1000 Independence Avenue, SW., Washington, DC 20585–0121. To attend the public meeting, please notify Ms. Brenda Edwards at (202) 586–2945. (Please note that foreign nationals visiting DOE Headquarters are subject to advance security screening procedures. Any foreign national wishing to participate in the public meeting should advise DOE as soon as possible by contacting Ms. Edwards to initiate the necessary procedures.)

Any comments submitted must identify the SNOPR on Test Procedures for Clothes Dryers and Room Air Conditioners, and provide the docket number EERE–2008–BT–TP–0010 and/or Regulatory Information Number (RIN) 1904–AC02. Comments may be submitted using any of the following methods:

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

2. *E-mail: AHAM2–2008–TP–0010@hq.doe.gov.* Include docket number EERE–2008–BT–TP–0010 and/or RIN 1904–AC02 in the subject line of the message.

3. *Mail:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J, 1000 Independence Avenue, SW., Washington, DC 20585–0121. Please submit one signed paper original.

4. *Hand Delivery/Courier:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, 950 L'Enfant Plaza, SW., Suite 600, Washington, DC 20024. *Telephone:* (202) 586–2945. Please submit one signed paper original.

For detailed instructions on submitting comments and additional information on the rulemaking process, *see* section VI, "Public Participation," of this document.

Docket: For access to the docket to read background documents or comments received, visit the U.S. Department of Energy, Resource Room of the Building Technologies Program, 950 L'Enfant Plaza, SW., Suite 600, Washington, DC 20024, (202) 586–2945, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. Please call Ms. Brenda Edwards at the above telephone number for additional information about visiting the Resource Room.

FOR FURTHER INFORMATION CONTACT: Ms. Margaret Sullivan, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Program, EE–2J, 1000 Independence Avenue, SW., Washington, DC 20585–0121. *Telephone:* (202) 287–1604. *E-mail: Margaret.Sullivan@ee.doe.gov.*

Mr. Francine Pinto, U.S. Department of Energy, Office of the General Counsel, GC–72, 1000 Independence Avenue, SW., Washington, DC 20585–0121. *Telephone:* (202) 586–7432. *E-mail: Francine.Pinto@hq.doe.gov.*

For information on how to submit or review public comments and on how to participate in the public meeting, contact Ms. Brenda Edwards, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Program, EE–2J, 1000 Independence Avenue, SW., Washington, DC 20585–0121. *Telephone:* (202) 586–2945. *E-mail: Brenda.Edwards@ee.doe.gov.*

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I. Background and Authority

Title III of the Energy Policy and Conservation Act (42 U.S.C. 6291, *et seq.;* "EPCA" or, in context, "the Act") sets forth a variety of provisions designed to improve energy efficiency. Part A of Title III (42 U.S.C. 6291–6309) establishes the "Energy Conservation Program for Consumer Products Other Than Automobiles," including clothes dryers and room air conditioners (all of which are referred to below as "covered products").[1] (42 U.S.C. 6291(1)–(2) and 6292(a)(2) and (8)).

Under the Act, this program consists essentially of three parts: (1) Testing; (2) labeling; and (3) Federal energy conservation standards. The testing requirements consist of test procedures that, pursuant to EPCA, manufacturers of covered products must use as the basis for certifying to DOE that their products comply with applicable energy conservation standards adopted under EPCA and for representations about the efficiency of those products. Similarly, DOE must use these test requirements to determine whether the products comply with EPCA standards. Under 42 U.S.C. 6293, EPCA sets forth criteria and procedures for DOE's adoption and amendment of such test procedures. EPCA provides that any test procedures prescribed or amended under this section shall be reasonably designed to produce test results which measure energy efficiency, energy use or estimated annual operating cost of a covered product during a representative average use cycle or period of use, as determined by the Secretary of Energy, and shall not be unduly burdensome to conduct. (42 U.S.C. 6293(b)(3)) In addition, if DOE determines that a test procedure amendment is warranted, it must publish proposed test procedures and offer the public an opportunity to present oral and written comments thereon, with a comment period no less than 60 days and not to exceed 270 days. (42 U.S.C. 6293(b)(2))

Finally, in any rulemaking to amend a test procedure, DOE must determine to what extent, if any, the proposed test procedure would alter the measured energy efficiency of any covered product as determined under the existing test procedure. (42 U.S.C. 6293(e)(1)) If DOE determines that the amended test procedure would alter the measured efficiency of a covered product, DOE must amend the applicable energy conservation standard accordingly. In determining the amended energy conservation standard, the Secretary shall measure, pursuant to the amended test procedure, the energy efficiency, energy use, or water use of a representative sample of covered products that minimally comply with the existing standard. The average of such energy efficiency, energy use, or water use levels determined under the amended test procedure shall constitute the amended energy conservation standard for the applicable covered products. (42 U.S.C. 6293(e)(2)) EPCA also states that models of covered products in use before the date on which the amended energy conservation standard becomes effective (or revisions of such models that come into use after such date and have the same energy efficiency, energy use, or water use characteristics) that comply with the energy conservation standard applicable to such covered products on the day before such date shall be deemed to comply with the amended energy conservation standard. (42 U.S.C. 6293(e)(3))

DOE's test procedures for clothes dryers are found at 10 CFR part 430, subpart B, appendix D. DOE established its test procedure for clothes dryers in a final rule published in the **Federal Register** on May 19, 1981. 46 FR 27324. The test procedure includes provisions

[1] All references to EPCA refer to the statute as amended including through the Energy Independence and Security Act of 2007, Public Law 110–140.

for determining the energy factor (EF) for clothes dryers, which is a measure of the total energy required to dry a standard test load of laundry to a "bone dry" [2] state.

DOE's test procedures for room air conditioners are found at 10 CFR part 430, subpart B, appendix F. DOE established its room air conditioner test procedure on June 1, 1977, and redesignated and amended it on June 29, 1979. 42 FR 27898; 44 FR 37938. The existing room air conditioner test procedure incorporates by reference two industry test standards: (1) American National Standard (ANS) (since renamed American National Standards Institute (ANSI)) Z234.1–1972, "Room Air Conditioners;" [3] and (2) American Society of Heating, Refrigerating, and Air-Conditioning Engineers (ASHRAE) Standard 16–69, "Method of Testing for Rating Room Air Conditioners." [4] The DOE test procedure includes provisions for determining the energy efficiency ratio (EER) of room air conditioners, which is the ratio of the cooling capacity in British thermal units (Btu) to the power input in watts (W).

As currently drafted, the test procedures for the products at issue in this rulemaking generally do not account for standby mode and off mode energy consumption, except in one narrow product class. Specifically, for gas dryers with continuously burning pilot lights, DOE's current test procedure for clothes dryers addresses the standby energy use of such pilot lights, but otherwise, neither this test procedure nor DOE's test procedure for room air conditioners addresses energy use in the standby or off modes.

The Energy Independence and Security Act of 2007 [5] (EISA 2007) amended EPCA, and in relevant part, directs DOE to amend its test procedures to include measures of standby mode and off mode energy consumption. The EISA 2007 amendments to EPCA further direct DOE to amend the test procedures to integrate such energy consumption into a single energy descriptor for that product. If that is technically infeasible, DOE must prescribe a separate standby mode and off mode energy-use test procedure, if technically feasible. (42 U.S.C. 6295(gg)(2)(A)) Any such amendment must consider the most current versions of the International Electrotechnical Commission (IEC) Standard 62301 ["Household electrical appliances–measurement of standby power," First Edition 2005–06 (IEC Standard 62301)] [6] [7] and IEC Standard 62087 ["Methods of measurement for the power consumption of audio, video, and related equipment," Second Edition 2008–09]. *Id.* For clothes dryers and room air conditioners, DOE must prescribe any such amendment to the test procedures by March 31, 2009. (42 U.S.C. 6295(gg)(2)(B)(ii))

The EISA 2007 amendments to EPCA also provide that amendments to the test procedures to include standby mode and off mode energy consumption will not determine compliance with previously established standards. (U.S.C. 6295(gg)(2)(C)) The test procedure amendments regarding provisions for standby mode and off mode would become effective, in terms of adoption into the CFR, 30 days after the date of publication in the **Federal Register** of the final rule in this test procedures rulemaking. However, DOE is proposing added language to the regulations codified in the CFR that would state that any added procedures and calculations for standby mode and off mode energy consumption resulting from EISA 2007 need not be performed at this time to determine compliance with the current energy conservation standards. Subsequently, manufacturers would be required to use the amended test procedures' standby mode and off mode provisions to demonstrate compliance with DOE's energy conservation standards on the effective date of a final rule establishing amended energy conservation standards for the products that address standby mode and off mode energy consumption, at which time the limiting statement in the DOE test procedure would be removed. Further clarification would also be provided that as of 180 days after publication of a test procedure final rule, any representations as to the standby mode and off mode energy consumption of the products that are the subject of this rulemaking would need to be based upon results generated under the applicable provisions of this test procedure. (42 U.S.C. 6293(c)(2))

On October 9, 2007, DOE published a notice in the **Federal Register** announcing the availability of a framework document to initiate a rulemaking to consider amended energy conservation standards for residential clothes dryers and room air conditioners (hereafter the October 2007 Framework Document). 72 FR 57254. The issuance of a framework document is the first step in conducting an appliance standards rulemaking. In the October 2007 Framework Document, DOE identified specific ways in which it could revise its test procedures for these two products and requested comment from interested parties on whether it should adopt such revisions. Specifically, DOE sought comment on potential amendments to the clothes dryer test procedure to: (1) Reflect lower remaining moisture content (RMC) [8] in clothes loads; (2) account for fewer annual use cycles; and (3) add the capability to test vent-less clothes dryers. (Framework Document, STD No. 1 at pp. 4–6) [9] DOE also received comments in response to the October 2007 Framework Document that it should consider changes to the dryer test load size. For room air conditioners, DOE requested input on potential amendments to the test procedure to: (1) Incorporate the most recent ANSI and ASHRAE test standards; (2) reduce the annual operating hours; and (3) measure part-load performance. (Framework Document, STD No. 1 at pp. 6–7) For room air conditioners, DOE also received comments in response to the October 2007 Framework Document that it should consider changes to the ambient test conditions. Because the October 2007 Framework Document was issued before the enactment of EISA 2007, possible amendments identified at that time for the clothes dryer and room air conditioner test procedures did not address standby mode or off mode energy use.

DOE published a notice of proposed rulemaking (NOPR) on December 9, 2008 (December 2008 TP NOPR), in which it proposed a number of revisions

[2] "Bone dry" is defined in the DOE clothes dryer test procedure as "a condition of a load of test clothes which has been dried in a dryer at maximum temperature for a minimum of 10 minutes, removed and weighed before cool down, and then dried again for 10-minute periods until the final weight change of the load is 1 percent or less." (10 CFR subpart B, appendix D, section 1.2)

[3] ANSI standards are available for purchase at *http://www.ansi.org.*

[4] ASHRAE standards are available for purchase at *http://www.ashrae.org.*

[5] Public Law 110–140 (enacted Dec. 19, 2007).

[6] IEC standards are available for purchase at: *http://www.iec.ch.*

[7] Multiple editions of this standard are referenced in this final rule. Unless otherwise indicated, the terms "IEC Standard 62301" or "IEC Standard 62301 First Edition" refer to "Household electrical appliances–measurement of standby power," First Edition 2005–06.

[8] RMC is the ratio of the weight of water contained by the test load to the bone-dry weight of the test load, expressed as a percent.

[9] A notation in this form provides a reference for information that is in the docket of DOE's rulemaking to develop energy conservation standards for clothes dryers and room air conditioners (Docket No. EERE–2007–BT–STD–0010), which is maintained in the Resource Room of the Building Technologies Program. This notation indicates that the statement preceding the reference was made in DOE's Framework Document, which is document number 1 in the docket for the clothes dryer and room air conditioner energy conservation standards rulemaking, and appears at pages 4–6 of that document.

and additions to its test procedures for clothes dryers and room air conditioners, consisting largely of provisions to address the new statutory requirement to expand test procedures to incorporate a measure of standby mode and off mode energy consumption. 73 FR 74639.

The NOPR was issued on December 2, 2008, although it was formally published on December 9, 2008 (*Id.*), and the proposals in the NOPR were addressed at a public meeting on December 17, 2008 (December 2008 Public Meeting). In addition, DOE invited written comments, data, and information on the December 2008 TP NOPR, and accepted such material through February 23, 2009.

DOE received oral comments from interested parties at the December 2008 Public Meeting and subsequently received four written comments. The principal test procedure issues on which interested parties commented were: (1) The establishment of multiple low power or standby modes for both clothes dryers and room air conditioners; (2) the number of annual hours associated with active, standby, and off modes for the calculation of energy use; (3) the consideration of an additional standby mode (a "network mode"); (4) the potential clarification of the definitions of standby and off mode; (5) the harmonization of mode definitions and testing procedures with the rest of the world, in particular the consideration of IEC Standard 62301 Second Edition, Committee Draft 2 (IEC Standard 62301 CD2); and (6) the potential integration of standby and off mode energy use and active mode energy use into a single energy-use metric.

DOE determined after the December 2008 TP NOPR was published that it would continue the clothes dryer and room air conditioner test procedure rulemaking to allow for consideration of a revised version of IEC Standard 62301, *i.e.,* IEC Standard 62301 Second Edition, which at that time was expected to be published in July 2009. DOE anticipated, based on review of drafts of the updated IEC Standard 62301, that the revisions could include different mode definitions. DOE expected to publish a supplemental notice of proposed rulemaking (SNOPR) for the test procedure rulemaking in which the new mode definitions from the revised IEC Standard 62301 would be considered. However, more recently, DOE received information that IEC Standard 62301 Second Edition would not be published until late 2010, which would not be in time for the consideration of standby and off mode power consumption in the concurrent energy conservation standards rulemaking. DOE, therefore, determined to publish today's SNOPR to consider the new mode definitions from the most recent draft version of IEC Standard 62301 Second Edition, designated as IEC Standard 62301 Second Edition, Committee Draft for Vote (IEC Standard 62301 CDV). DOE noted that the IEC first proposed revisions to IEC Standard 62301 to develop IEC Standard 62301 Second Edition by circulating IEC Standard 62301 Second Edition, Committee Draft 1 on November 16, 2007. IEC subsequently revised the proposed amendments to IEC Standard 62301 and circulated IEC Standard 62301 CD2 on October 17, 2008. Most recently, the IEC again revised the proposed amendments and circulated IEC Standard 62301 CDV on August 28, 2009. IEC Standard 62301 CDV contains the most recent proposed amendments to IEC Standard 62301, including new mode definitions. IEC Standard 62301 CDV revised the proposed mode definitions from those proposed in the previous draft version IEC Standard 62301 CD2 and addresses comments received by interested parties in response to IEC Standard 62301 CD2. DOE, therefore, believes that such new mode definitions represent the best definitions available for the analysis in support of today's SNOPR.

In the December 2008 TP NOPR, DOE's proposal was limited to amendments to its test procedures for clothes dryers and room air conditioners to include methods for measuring standby mode and off mode power consumption. DOE determined after the December 2008 TP NOPR to conduct a rulemaking to address the active mode test procedure issues for clothes dryers and room air conditioners, including those on which it requested comment in the October 2007 Framework Document. Because DOE decided to continue the test procedure rulemaking concerning standby mode and off mode power consumption, DOE intends to address in today's SNOPR the balance of the test procedure issues relating to active mode for clothes dryers and room air conditioners.

Any test procedure amendments regarding the active mode test provisions for clothes dryers and room air conditioners will become effective 30 days after the date of publication in the **Federal Register** of the final rule in this test procedures rulemaking. However, as of 180 days after publication of a test procedure final rule, any representations with respect to the energy use or efficiency or cost of energy consumed of the products that are the subject of this rulemaking would need to be based upon results generated under the applicable provisions of these amended test procedures. (42 U.S.C. 6293(c)(2))

This test procedure rulemaking is anticipated to support a concurrent energy conservation standards rulemaking for residential clothes dryers and room air conditioners. For clothes dryers, the National Appliance Energy Conservation Act of 1987 (NAECA), Public Law 100–12, amended EPCA to establish prescriptive standards for clothes dryers, requiring that gas dryers manufactured on or after January 1, 1988 not be equipped with a constant burning pilot and further requiring that DOE conduct two cycles of rulemakings to determine if more stringent standards are justified. (42 U.S.C. 6295(g)(3) and (4)) On May 14, 1991, DOE published a final rule in the **Federal Register** establishing the first set of performance standards for residential clothes dryers (56 FR 22250); the new standards became effective on May 14, 1994. 10 CFR 430.32(h). DOE initiated a second standards rulemaking for residential clothes dryers by publishing an advance notice of proposed rulemaking (ANOPR) in the **Federal Register** on November 14, 1994. 59 FR 56423. However, pursuant to the priority-setting process outlined in DOE's "Procedures for Consideration of New or Revised Energy Conservation Standards for Consumer Products" (the "Process Rule"),[10] DOE classified the clothes dryer standards rulemaking as a low priority for its fiscal year 1998 priority-setting process. As a result, DOE suspended the standards rulemaking activities for them. DOE has since resumed the rulemaking activities, and has recently initiated the second cycle of clothes dryer standards rulemakings. 72 FR 57254 (October 9, 2007).

NAECA established performance standards for room air conditioners that became effective on January 1, 1990, and directed DOE to conduct two cycles of rulemakings to determine if more stringent standards are justified. (42 U.S.C. 6295(c)(1) and (2)) On March 4, 1994, DOE published a NOPR for several products, including room air conditioners. 59 FR 10464. Because of the Process Rule, DOE suspended activities to finalize standards for room air conditioners. DOE subsequently resumed rulemaking activities related to room air conditioners, and, on September 24, 1997, DOE published a final rule establishing an updated set of performance standards, with an

[10] 61 FR 36974 (July 15, 1996) (*establishing* 10 CFR part 430, subpart C, appendix A).

effective date of October 1, 2000. 62 FR 50122; 10 CFR 40.32(b). Concurrent with the clothes dryer rulemaking, DOE has recently initiated the second cycle of room air conditioner standards rulemakings. 72 FR 57254.

EISA 2007 includes amendments to EPCA that direct DOE to incorporate standby and off mode energy use into any final rule establishing or revising a standard for a covered product adopted after July 1, 2010. (42 U.S.C. 6295(gg)(3)) DOE anticipates publishing the next final rule revising efficiency standards for clothes dryers and room air conditioners by June 30, 2011. Because publication of the final rule revising efficiency standards will fall after July 1, 2010 (the date after which any final rule establishing or revising a standard must incorporate standby and off mode energy use), this final rule must incorporate standby and off mode energy use, thereby necessitating the adoption of relevant standby and off mode provisions into the test procedures for these products.

This test procedure rulemaking will fulfill the seven-year review requirement prescribed by EISA 2007. At least once every 7 years, the Secretary shall review test procedures for all covered products and—amend test procedures with respect to any covered product or publish notice in the **Federal Register** of any determination not to amend a test procedure. (42 U.S.C. 6293(b)(1)(A))

II. Summary of the Proposal

In today's SNOPR, DOE proposes to amend the test procedures for clothes dryers and room air conditioners in order to: (1) Provide a foundation for DOE to develop and implement energy conservation standards that address the energy use of these products when in standby mode and off mode; (2) address the statutory requirement to expand test procedures to incorporate measures of standby mode and off mode power consumption; (3) adopt technical changes and procedures for more accurately measuring the effects of different automatic termination technologies in clothes dryers; (4) expand the clothes dryer test procedures to accommodate vent-less clothes dryers being considered for coverage under an amended energy conservation standard; (5) update detergent specifications for clothes dryer test cloth preconditioning; (6) adopt technical changes to better reflect current usage patterns and capabilities for the covered products; (7) update the references to external test procedures in the DOE room air conditioner and clothes dryer test procedure; and (8) clarify the test conditions for gas clothes dryers. The following paragraphs summarize these proposed changes.

In amending the current test procedures, DOE proposed in the December 2008 TP NOPR to incorporate by reference into both the clothes dryer and room air conditioner test procedures specific clauses from IEC Standard 62301 regarding test conditions and test procedures for measuring standby mode and off mode power consumption. This proposal is not affected by this SNOPR, in which DOE proposes to incorporate into each test procedure the definitions of "active mode," "standby mode," and "off mode" that are based on the definitions provided in the latest draft version of IEC Standard 62301 Second Edition, designated as IEC Standard 62301 CDV. As discussed in section III.B.1, DOE believes that the new mode definitions contained in IEC Standard 62301 CDV represent a substantial improvement over those in IEC Standard 62301 and demonstrate significant participation of interested parties in the development of the best possible definitions. Further, DOE proposes to include in each test procedure additional language that would clarify the application of clauses from IEC Standard 62301 and the mode definitions from IEC Standard 62301 CDV for measuring standby mode and off mode power consumption.[11]

For reasons discussed in section III.B.2 for clothes dryers, DOE is proposing in today's SNOPR a definition and testing procedures for a single standby mode, rather than the multiple standby modes—a general "inactive" mode, a "cycle finished" mode, and a "delay start" mode—that were proposed in the December 2008 TP NOPR. 73 FR 74639, 74645. DOE is also proposing to establish new methods to calculate clothes dryer standby mode and off mode energy use and to adopt a new measure of energy efficiency (Combined Energy Factor (CEF)) that includes energy use in the standby mode and off mode. The proposed amendments regarding standby mode and off mode would not change the method to calculate the existing clothes dryer energy efficiency metric for active mode only, which is the energy factor (EF).

Similarly, for reasons discussed in section III.B.2 for room air conditioners, DOE is proposing in today's SNOPR a definition and testing procedures for a single standby mode, rather than the multiple standby modes—a general "inactive" mode, a "delay start" mode, and an "off-cycle" mode—as was proposed in the December 2008 TP NOPR. 73 FR 74639, 74645. In the December 2008 TP NOPR, DOE also proposed that standby mode and off mode testing be conducted with room-side air temperature at 74 ± 2 degrees Fahrenheit (°F), with a temperature control setting of 79 °F. 73 FR 74639, 74646. However, upon further consideration, DOE determined that, because the proposed test procedure would be limited to the measurement of a single standby mode and an off mode, the proposed close tolerance on ambient temperature and the proposed temperature setting of 79 °F, which were relevant only for an off-cycle standby mode measurement, would not be required. Therefore, DOE is no longer proposing to include these requirements for testing conditions in today's SNOPR. DOE is also proposing in today's SNOPR new methods to calculate room air conditioner standby mode and off mode energy use and to adopt a new measure of energy efficiency (Combined Energy Efficiency Ratio (CEER)) that includes energy use in the standby mode and the off mode. The proposed amendments regarding standby mode and off mode would not change the method to calculate the existing room air conditioner energy efficiency metric for active mode only, which is the energy efficiency ratio (EER).

Based upon comments from interested parties in response to the October 2007 Framework Document and investigations of international test standards, DOE believes that the benefit of automatic cycle termination should be more accurately credited in its clothes dryer test procedure. Therefore, DOE proposes to revise this test procedure to include definitions of and provisions for testing both timer dryers and automatic termination control dryers using methodology provided in Australia/New Zealand (AS/NZS) Standard 2442.1: 1996, "Performance of household electrical appliances—Rotary clothes dryers, Part 1: Energy consumption and performance" (AS/NZS Standard 2442.1) and AS/NZS Standard 2442.2: 2000, "Performance of household electrical appliances—Rotary clothes dryers, Part 2: Energy labeling requirements" (AS/NZS Standard 2442.2). AS/NZS Standard 2442 is an internationally accepted testing

[11] EISA 2007 directs DOE to also consider IEC Standard 62087 when amending its test procedure to include standby mode and off mode energy consumption. *See* 42 U.S.C. 6295(gg)(2)(A). However, IEC Standard 62087 addresses the methods of measuring the power consumption of audio, video, and related equipment. As explained subsequently in this notice, the narrow scope of this particular IEC Standard reduces its relevance to today's proposal.

standard that provides testing methods to account for the over-drying energy consumption associated with both timer dryers and automatic termination control dryers. DOE has evaluated AS/NZS Standard 2442 and determined that it provides an accurate testing methodology for measuring the energy consumption for both timer and automatic termination control dryers while also accounting for over-drying energy consumption. Therefore, DOE is proposing to incorporate the testing methods from these international test standards, along with a number of added clarifications, to measure the energy consumption for both timer dryers and automatic termination control dryers, accounting for the amount of over-drying energy consumption, *i.e.,* the energy consumed by the clothes dryer after the load reaches an RMC of 5 percent. The proposed amendments would provide methods for timer dryers to measure the per-cycle energy consumption required to reach a final RMC of no more than 5 percent, and continuing to apply the effective energy efficiency penalty for timer dryer over-drying energy consumption provided by the fixed field use (FU) factor in the current test procedure. For automatic termination control dryers, the dryer would be tested using an automatic termination setting, allowing the dryer to run until the heater switches off for the final time at the end of the drying cycle, to achieve a final RMC of no more than 5 percent. Any energy consumed once the RMC is less than 5 percent would be considered over-drying. Based on the proposed test methods, an automatic termination control dryer that is able to dry the test load to close to 5-percent RMC, and thus minimize over-drying, will show a higher efficiency than if that same dryer were to over-dry the test load to an RMC less than 5 percent. The energy consumed by over-drying the test load would be included in the per-cycle energy consumption, and would result in a reduction in the measured EF.

As discussed in section III.C.3, DOE intends to analyze potential energy conservation standards for vent-less clothes dryers in a separate rulemaking. Therefore, provisions must be added to the DOE clothes dryer test procedure for measuring the energy efficiency performance in vent-less clothes dryers. DOE is proposing in today's SNOPR to amend the current clothes dryer test procedure to include provisions for testing vent-less clothes dryers based upon the alternate test procedure that DOE previously presented in "Energy Conservation Program for Consumer Products: Publication of the Petition for Waiver and Denial of the Application for Interim Waiver of LG Electronics from the Department of Energy Clothes Dryer Test Procedures." (LG Petition for Waiver) 71 FR 49437 (Aug. 23, 2006). Further, DOE proposes to include in the test procedure additional language based upon provisions from European Standard EN 61121, "Tumble dryers for household use—Methods for measuring the performance," Edition 3 2005 (EN Standard 61121) that would clarify the alternate test procedure presented in the LG Petition for Waiver. EN Standard 61121 is an internationally accepted test standard that provides methods for testing vent-less clothes dryers. The clarifications would require that if a vent-less clothes dryer is equipped with a condensation box (which would store condensed moisture removed from the air exiting the drum until later manual removal by the user), the dryer would be tested with such condensation box installed as specified by the manufacturer. In addition, the clarifications would provide that if the clothes dryer stops the test cycle for the reason that the condensation box is full, the test would not be valid. The clarifications would also require that the condenser heat exchanger not be taken out of the dryer between tests. Finally, the proposed clarifications would address clothes dryer preconditioning for vent-less dryers.

In addition, based upon comments from interested parties in response to the October 2007 Framework Document and data on consumer usage patterns, DOE is proposing to amend the DOE test procedure for clothes dryers to reflect current usage patterns and capabilities. DOE proposes to revise the number of annual use cycles from the 416 cycles per year currently specified by the DOE test procedure, to 283 cycles per year for all types (*i.e.,* product classes) of clothes dryers based on data from the Energy Information Administration (EIA)'s 2005 "Residential Energy Consumption Survey" (RECS) [12] [13] for the number of laundry loads (clothes washer cycles) washed per week and the frequency of clothes dryer use. DOE is also proposing to revise the 70-percent initial RMC required by the test procedure to 47 percent to accurately represent the current condition of laundry loads after a wash cycle, based on shipment-weighted RMC data for clothes washers submitted by the Association of Home Appliance Manufacturers (AHAM) and based on a distribution of RMC values for clothes washer models listed in the December 22, 2008, California Energy Commission (CEC) directory. In addition, DOE is proposing to change the 7-pound (lb) clothes dryer test load size specified by the current test procedure for standard-size clothes dryers to 8.45 lb, based on the historical trends of clothes washer tub volumes and the corresponding percentage increase in clothes washer test load sizes (as specified by the DOE clothes washer test procedure), which is assumed to proportionally impact dryer load sizes. DOE believes most compact clothes dryers are used in conjunction with compact-size clothes washers, and DOE does not have any information to suggest that the tub volume of such clothes washers has changed significantly. Therefore, DOE is not proposing to change the 3-lb test load size currently specified in its clothes dryer test procedure for compact clothes dryers.

For clothes dryers, DOE is also proposing to revise the detergent specifications for test cloth preconditioning due to obsolescence of the detergent specified in the test procedure, to eliminate an unnecessary reference to an obsolete industry clothes dryer test standard, and to amend the provisions in its test procedure which specify test conditions for gas clothes dryers to clarify the required gas supply pressure.

For room air conditioners, based upon comments received on the October 2007 Framework Document, DOE is proposing to update the references in its current room air conditioner test procedure to incorporate the most recent ANSI and ASHRAE test standards—ANSI/AHAM RAC–1–R2008, "Room Air Conditioners," (ANSI/AHAM RAC–1–R2008) and ANSI/ASHRAE Standard 16–1983 (RA 2009) "Method of Testing for Rating Room Air Conditioners and Packaged Terminal Air Conditioners" (ANSI/ASHRAE Standard 16–1983 (RA 2009)). DOE has also determined that the 750 annual operating hours specified by the current DOE test procedure is representative of current usage patterns, based upon its interpretation of data from the 2005 RECS and, therefore, is not proposing to amend the annual usage hours specified by the current DOE test procedure for room air conditioners.

As noted above in section I, EPCA requires that DOE must determine "to what extent, if any, the proposed test procedure would alter the measured

[12] U.S. Department of Energy—Energy Information Administration. "Residential Energy Consumption Survey," 2005 Public Use Data Files, 2005. Washington, DC. Available online at: *http://www.eia.doe.gov/emeu/recs/.*

[13] EIA's 2005 RECS is the latest available version of this survey.

energy efficiency * * * of any covered product as determined under the existing test procedure." (42 U.S.C. 6293(e)(1)) If DOE determines that the amended test procedure would alter the measured efficiency of a covered product, DOE must amend the applicable energy conservation standard during the rulemaking carried out with respect to such test procedure. In determining the amended energy conservation standard, the Secretary shall measure, pursuant to the amended test procedure, the energy efficiency, energy use, or water use of a representative sample of covered products that minimally comply with the existing standard. (42 U.S.C. 6293(e)(2)) Under 42 U.S.C. 6295(gg)(2)(C), EPCA provides that amendments to the test procedures to include standby mode and off mode energy consumption will not determine compliance with previously established standards. (U.S.C. 6295(gg)(2)(C))

These amended clothes dryer and room air conditioner test procedures would become effective, in terms of adoption into the CFR, 30 days after the date of publication in the **Federal Register** of the final rule in this test procedures rulemaking. Because the proposed amendments to the test procedures for measuring standby mode and off mode energy consumption would not alter the existing measures of energy consumption or efficiency for clothes dryers and room air conditioners, the proposed amendments would not affect a manufacturer's ability to comply with current energy conservation standards. Manufacturers would not be required to use the amended test procedures' standby mode and off mode provisions until the mandatory compliance date of amended clothes dryer and room air conditioner energy conservation standards. All representations related to standby mode and off mode energy consumption of both clothes dryers and room air conditioners made 180 days after the date of publication of the test procedures final rule in the **Federal Register** and before the compliance date of amended energy conservation standards must be based upon the standby and off mode requirements of the amended test procedures. (42 U.S.C. 6293(c)(2))

Furthermore, DOE has investigated how each of the proposed amendments to the active mode provisions in its clothes dryer and room air conditioner test procedures in today's SNOPR would affect the measured efficiency of products. DOE has addressed this requirement for each of the proposed amendments individually in section III.C.

III. Discussion

A. Products Covered by the Test Procedure Changes

Today's proposed amendments to DOE's clothes dryer test procedure cover both electric clothes dryers, which DOE's regulations define to mean a cabinet-like appliance designed to dry fabrics in a tumble-type drum with forced air circulation. The heat source is electricity and the drum and blower(s) are driven by an electric motor(s). The amendments also address gas clothes dryers, which DOE defines to mean a cabinet-like appliance designed to dry fabrics in a tumble-type drum with forced air circulation. The heat source is gas and the drum and blower(s) are driven by an electric motor(s).

These definitions and the proposed amendments discussed below cover both vented and vent-less clothes dryers, as well as combination washer/dryers.

Today's proposed amendments, to DOE's room air conditioner test procedure, cover a consumer product, other than a "packaged terminal air conditioner," which is powered by a single-phase electric current and which is an encased assembly designed as a unit for mounting in a window or through the wall for the purpose of providing delivery of conditioned air to an enclosed space. It includes a prime source of refrigeration and may include a means for ventilating and heating.

This definition and the proposed amendments discussed below cover room air conditioners designed for single- or double-hung windows with or without louvered sides and with or without reverse cycle, as well as casement-slider and casement-only window-type room air conditioners.

DOE is not proposing in today's SNOPR to change the definitions for clothes dryers and room air conditioners in DOE's regulations.

B. Clothes Dryer and Room Air Conditioner Standby Mode and Off Mode Test Procedures

1. Incorporating by Reference IEC Standard 62301 for Measuring Standby Mode and Off Mode Power in Clothes Dryers and Room Air Conditioners

As noted in the December 2008 TP NOPR, DOE considered, pursuant to EPCA, the most current versions of IEC Standard 62301 and IEC Standard 62087 for measuring power consumption in standby mode and off mode. (42 U.S.C. 6295(gg)(2)(A)) 73 FR 74639, 74643–44 (Dec. 9, 2008). DOE noted that IEC Standard 62087 specifies methods of measuring the power consumption of TV receivers, videocassette recorders (VCRs), set top boxes, audio equipment, and multi-function equipment for consumer use. IEC Standard 62087 does not include measurement for the power consumption of electrical appliances such as clothes dryers and room air conditioners. Therefore, DOE has tentatively determined that IEC Standard 62087 was unsuitable for potential amendments to the clothes dryer and room air conditioner test procedures. 73 FR 74639, 74643 (Dec. 9, 2008). DOE noted that IEC Standard 62301 provides for measuring standby power in electrical appliances, including clothes dryers and room air conditioners, and, thus, is applicable to the proposed amendments to the clothes dryer and room air conditioner test procedures. 73 FR 74643–44 (Dec. 9, 2008).

DOE proposed in the December 2008 TP NOPR to incorporate by reference into the DOE test procedures for clothes dryers and room air conditioners specific clauses from IEC Standard 62301 for measuring standby mode and off mode power: From section 4 ("General conditions for measurements"), paragraph 4.2, "Test room," paragraph 4.4, "Supply voltage waveform," and paragraph 4.5, "Power measurement accuracy," and section 5 ("Measurements"), paragraph 5.1, "General" and paragraph 5.3, "Procedure." DOE also proposed to reference these same provisions in the DOE test procedure for room air conditioners, as well as section 4, paragraph 4.3, "Power supply." 73 FR 74639, 74644 (Dec. 9, 2008).

DOE noted in the December 2008 TP NOPR that the EPCA requirement to consider IEC Standard 62301 in developing amended test procedures for clothes dryers and room air conditioners presented a potential conflict in defining "standby mode." 73 FR 74639, 74644 (Dec. 9, 2008). EPCA defines "standby mode" as the condition in which a product is connected to a main power source and offers one or more of the following user-oriented or protective functions: (1) To facilitate the activation or deactivation of other functions (including active mode) by remote switch (including remote control), internal sensor, or timer; and/or (2) to provide continuous functions, including information or status displays (including clocks) or sensor-based functions. (42 U.S.C. 6295(gg)(1)(A)(iii)). In contrast, paragraph 3.1 of IEC Standard 62301 defines "standby mode" as the "lowest power consumption mode which cannot be switched off

(influenced) by the user and that may persist for an indefinite time when an appliance is connected to the main electricity supply and used in accordance with the manufacturer's instructions." In addition, prior to EISA 2007, DOE adopted a definition for "standby mode" nearly identical to that of IEC Standard 62301 in the dishwasher test procedure, in which "standby mode" "means the lowest power consumption mode which cannot be switched off or influenced by the user and that may persist for an indefinite time when an appliance is connected to the main electricity supply and used in accordance with the manufacturer's instructions." (10 CFR part 430, subpart B, appendix C, section 1.14) While EPCA specifies that DOE may amend the definitions provided under 42 U.S.C. 6295(gg)(1)(A), taking into consideration the most current version of IEC Standard 62301 in updating its test procedure (42 U.S.C. 6295(gg)(1)(B)), DOE proposed in the December 2008 TP NOPR to adopt the broader, statutory definition of "standby mode" provided in EPCA for reasons of greater specificity and clarity among the considered definitions, and to include that definition in the test procedures for clothes dryers and room air conditioners. 73 FR 74639, 74644 (Dec. 9, 2008)

AHAM commented that the definition provided under EPCA, developed in part using IEC Standard 62301 Second Edition, Committee Draft 1, allowed the introduction and definition of "off mode" and it provided additional clarification on standby mode, which is not addressed in IEC Standard 62301. (AHAM, TP No. 10 at p. 2) [14] AHAM also submitted comments to DOE, which AHAM denoted as general application guidelines, to individual appliance committees on the use of IEC Standard 62301 definitions. AHAM stated that the energy mode definitions in its comment are consistent with IEC Standard 62301 and EISA 2007. (AHAM, TP No. 12 at p. 1) For standby mode, AHAM's submission states that this mode may persist for an indefinite period of time and may allow activation of other modes by local or remote switch. AHAM's description of standby mode further specifies that standby mode applies only to products that are not "continuous run" products, which it defines as a product which "is performing in active mode 100 [percent] of time that it is plugged into the main electricity supply." (AHAM, TP No. 12 at p. 2). DOE notes that neither clothes dryers nor room air conditioners would be classified as continuous run products, since both provide modes in which the unit would be plugged in but not operating in active mode. For the reasons discussed below, DOE is revising the test procedure amendments proposed in the December 2008 TP NOPR and is proposing in today's SNOPR mode definitions based on the definitions provided in IEC Standard 62301 CDV. As discussed further in section III.B.3 of this SNOPR, DOE also continues to propose the requirement it proposed in the December 2008 TP NOPR that for clothes dryers or room air conditioners that drop from a higher-power state to a lower-power state, as discussed in Section 5, Paragraph 5.1, note 1 of IEC Standard 62301, sufficient time would be allowed for the unit to reach the lower-power state before proceeding with the test measurement for standby mode and off mode power. 73 FR 74639, 74656, 74658 (Dec. 9, 2008).

In the December 2008 TP NOPR, DOE noted that, while section 325(gg)(2)(A) of EPCA (42 U.S.C. 6295(gg)(2)(A)) requires that the amended test procedures consider the most current version of IEC Standard 62301, the IEC is developing an updated version of this standard, IEC Standard 62301 Second Edition. 73 FR 74639, 74644 (Dec. 9, 2008). This updated version of IEC Standard 62301 is expected to include definitions of "off mode," "network mode," and "disconnected mode," and would revise the current IEC Standard 62301 definition of "standby mode." However, DOE stated in the December 2008 TP NOPR that, because the IEC anticipated that this new version of Standard 62301 would likely be published in July 2009, this later version of the standard would be unavailable in time for DOE to consider it and to still meet the EISA 2007 deadline for issuance of a final rule amending the relevant test procedure to include measures of standby mode and off mode energy consumption by March 31, 2009. *Id.* See 42 U.S.C. 6295(gg)(2)(B)(ii). For this reason, DOE stated in the December 2008 TP NOPR that IEC Standard 62301 would be the "current version" at the time of publication of the final rule, so consideration thereof would comply with EPCA. Accordingly, DOE incorporated sections from IEC Standard 62301 in the proposed amendments to the test procedure in the December 2008 TP NOPR. 73 FR 74639, 74644 (Dec. 9, 2008). DOE also stated in the December 2008 TP NOPR that after the final rule is published, amendments to the referenced standards would be adopted into the DOE test procedure only if DOE later publishes a final rule to incorporate them into its procedures. 73 FR 74644 (Dec. 9, 2008).

AHAM commented that a primary concern is the significant differences between IEC Standard 62301 and IEC Standard 62301 CD2. (AHAM, Public Meeting Transcript, TP No. 8 at p. 17) [15] AHAM supports the use of IEC Standard 62301; however, it also stated that there have been considerable issues and concerns with the current version, including confusion over how to interpret the standard. AHAM noted that IEC Standard 62301 CD2 provides clarifications to IEC Standard 62301, such as further defining standby and off mode to allow for the measurement of multiple standby power modes. However, AHAM also noted that the procedures for setup and testing remain very much the same. (AHAM, Public Meeting Transcript, TP No. 8 at pp. 29–31, 39–40) AHAM questioned whether the clarifications of IEC Standard 62301 CD2, particularly in terms of these mode definitions, could be incorporated into the language in the DOE test procedure if DOE is unable to incorporate the standard directly, and proposed that DOE consider harmonizing with the IEC Standard 62301 CD2 under the expectation that this language will be finalized in IEC Standard 62301 Second Edition. AHAM believes that EISA 2007 could be interpreted to allow IEC Standard 62301 CD2 to be incorporated before it is finalized. (AHAM, Public Meeting Transcript, TP No. 8 at pp. 31–35) Whirlpool Corporation (Whirlpool) and GE Consumer & Industrial (GE) supported AHAMs comments that DOE should harmonize with the rest of the world in considering IEC Standard 62301 CD2. (AHAM, Public Meeting Transcript, TP No. 8 at p. 17; Whirlpool, Public Meeting Transcript, TP No. 8 at p. 36; GE, Public Meeting Transcript, TP

[14] A notation in the form "AHAM, TP No. 10 at p. 2" identifies a written comment (1) made by AHAM; (2) recorded in document number 10 that is filed in the docket of this test procedures rulemaking (Docket No. EERE–2008–BT–TP–0010) and maintained in the Resource Room of the Building Technologies Program; and (3) which appears on page 2 of document number 10.

[15] A notation in the form "AHAM, Public Meeting Transcript, TP No. 8 at pp. 17, 29–35, 39–40" identifies an oral comment that DOE received during the December 17, 2008, NOPR public meeting, was recorded in the public meeting transcript in the docket for this test procedure rulemaking (Docket No. EERE–2008–BT–TP–0010), and is maintained in the Resource Room of the Building Technologies Program. This particular notation refers to a comment (1) made by AHAM during the public meeting; (2) recorded in document number 8, which is the public meeting transcript that is filed in the docket of this test procedure rulemaking; and (3) which appears on pages 17, 29–35, and 39–40 of document number 8.

No. 8 at pp. 35–36) Pacific Gas & Electric (PG&E) stated that it supports harmonization, but does not support any significant delays in this rulemaking. (PG&E, Public Meeting Transcript, TP No. 8 at p. 35)

In the December 2008 TP NOPR, DOE anticipated, based on review of draft versions of IEC Standard 62301 Second Edition, that the revisions to IEC Standard 62301 could include different mode definitions. As discussed in section I, DOE thus determined to publish an SNOPR for the test procedure rulemaking in which the new mode definitions from the IEC Standard 62301 Second Edition, expected in July 2009, would be considered. However, more recently, DOE received information that IEC Standard 62301 Second Edition would not be available until late 2010. Because the final version of IEC Standard 62301 Second Edition would not be published in time for the consideration of standby and off mode power consumption in the concurrent energy conservation standards rulemaking, DOE, therefore, determined to consider the new mode definitions from the draft version IEC Standard 62301 CDV. Based on DOE's review of IEC Standard 62301 CDV, DOE believes the definitions of standby mode, off mode, and active mode provided in IEC Standard 62301 CDV expand upon the EPCA mode definitions and provide additional guidance as to which functions are associated with each mode. DOE also believes that the comments received by IEC on IEC Standard 62301 CD2, and the resulting amended mode definitions proposed in IEC Standard 62301 CDV, demonstrate significant participation of interested parties in the development of the best possible definitions. For these reasons, DOE is proposing in today's SNOPR definitions of standby mode, off mode, and active mode based on the definitions provided in IEC Standard 62301 CDV. These definitions are discussed in detail in Section III.B.2. DOE is narrowly considering such language from IEC Standard 62301 CDV, even though this is not a finalized test standard, because of the consensus among comments received, and DOE's corroborating belief, that the mode definitions in the draft versions of IEC Standard 62301 Second Edition represent a substantial improvement over those in IEC Standard 62301.

DOE did not receive any comments in response to the December 2008 TP NOPR objecting to the proposed testing methods and procedures referenced in IEC Standard 62301. As noted above, IEC Standard 62301 will be the "current version" at the time of publication of the final rule, so consideration thereof will comply with EPCA. (42 U.S.C. 6295(gg)(2)(A)) For these reasons, this SNOPR does not affect DOE's proposal in the December 2008 TP NOPR to incorporate by reference the clauses presented above from IEC Standard 62301.

2. Determination of Modes To Be Incorporated

In the December 2008 TP NOPR, DOE proposed to incorporate into the clothes dryer and room air conditioner test procedure the definitions of "active mode," "standby mode," and "off mode" specified by EPCA. 73 FR 74639, 74644 (Dec. 9, 2008) EPCA defines "active mode" as "the condition in which an energy-using product—

(I) Is connected to a main power source;

(II) Has been activated; and

(III) Provides 1 or more main functions."

(42 U.S.C. 6295(gg)(1)(A)(i))

EPCA defines "standby mode" as "the condition in which an energy-using product—

(I) Is connected to a main power source; and

(II) Offers 1 or more of the following user-oriented or protective functions:

(aa) To facilitate the activation or deactivation of other functions (including active mode) by remote switch (including remote control), internal sensor, or timer.

(bb) Continuous functions, including information or status displays (including clocks) or sensor-based functions."

(42 U.S.C. 6295(gg)(1)(A)(iii)) This definition differs from the one provided in IEC Standard 62301 by permitting the inclusion of multiple standby modes.

EPCA defines "off mode" as "the condition in which an energy-using product—

(I) Is connected to a main power source; and

(II) Is not providing any standby mode or active mode function." [16]

(42 U.S.C. 6295(gg)(1)(A)(ii))

In the December 2008 TP NOPR, DOE recognized that these definitions for "active mode," "standby mode," and "off mode" were developed to be broadly applicable for many energy-using products. For specific products with multiple functions, these broad definitions could lead to unintended consequences if the meaning of "main functions" is narrowly interpreted. 73 FR 74639, 74644–45 (Dec. 9, 2008). To address this problem, DOE proposed in the December 2008 TP NOPR to amend the clothes dryer and room air conditioner test procedures to clarify the range of main functions that would be classified as active mode functions and establish standby and off mode definitions as follows. 73 FR 74639, 74645, 74645 (Dec. 9, 2008)

DOE proposed the following mode definitions for clothes dryers in the December 2008 TP NOPR:

"Active mode" means a mode in which the clothes dryer is performing the main function of tumbling the clothing with or without heated or unheated forced air circulation to remove moisture from the clothing and/or remove or prevent wrinkling of the clothing;

"Inactive mode" means a standby mode other than delay start mode or cycle finished mode that facilitates the activation of active mode by remote switch (including remote control), internal sensor, or timer, or provides continuous status display;

"Cycle finished mode" means a standby mode that provides continuous status display following operation in active mode;

"Delay start mode" means a standby mode that facilitates the activation of active mode by timer; and

"Off mode" means a mode in which the clothes dryer is not performing any active or standby function. 73 FR 74639, 74645 (Dec. 9, 2008).

For room air conditioners, DOE proposed the following mode definitions in the December 2008 TP NOPR:

"Active mode" means a mode in which the room air conditioner is performing the main function of cooling or heating the conditioned space, or circulating air through activation of its fan or blower, with or without energizing active air-cleaning components or devices such as ultraviolet (UV) radiation, electrostatic filters, ozone generators, or other air-cleaning devices;

"Inactive mode" means a standby mode other than delay start mode or off-cycle mode that facilitates the activation of active mode by remote switch (including remote control) or internal sensor or provides continuous status display;

"Delay start mode" means a standby mode in which activation of an active mode is facilitated by a timer;

[16] DOE notes that some features that provide consumer utility, such as displays and remote controls, are associated with standby mode and not off mode. A clothes dryer or room air conditioner is considered to be in "off mode" if it is plugged in to a main power source, is not being used for an active function such as drying clothing or providing cooling, and is consuming power for features other than a display, controls (including a remote control), or sensors required to reactivate it from a low power state. For example, a clothes dryer with mechanical controls and no display or continuously-energized moisture sensor, but that consumed power for components such as a power supply when the unit was not activated, would be considered to be in off mode when not providing an active function. For room air conditioners, a unit with mechanical controls and no display or remote control but with a power supply that is consuming energy, for example, could be considered to be in off mode while not providing an active function.

"Off-cycle mode" means a standby mode in which the room air conditioner: (1) Has cycled off its main function by thermostat or temperature sensor; (2) does not have its fan or blower operating; and (3) will reactivate the main function according to the thermostat or temperature sensor signal; and

"Off mode" means a mode in which a room air conditioner is not performing any active or standby function. 73 FR 74639, 74645 (Dec. 9, 2008).

DOE received numerous comments from interested parties on the standby and off mode definitions. DOE did not receive any comments objecting to the proposed definitions of active mode for clothes dryers and room air conditioners. As discussed in the following paragraphs regarding standby mode definitions, DOE did receive comments stating that certain modes that it had proposed as standby modes should be considered as part of active mode. In addition, AHAM's comments reiterated the definition of active mode in general as provided by EISA 2007 and stated that this definition is consistent with the energy mode definition in IEC Standard 62301. AHAM's comments also state, however, that when a product is not in off mode or standby mode, it is in active mode. (AHAM, TP No. 12 at p. 1) Such a definition is inconsistent with the EPCA, IEC Standard 62301 CD2, and IEC Standard 62301 CDV mode definitions, in which off mode is defined as providing no standby or active mode function. (42 U.S.C. 6295(gg)(1)(A)(ii))

As to the active mode, as discussed in section III.B.1, DOE is proposing in today's SNOPR to amend the DOE clothes dryer and room air conditioner test procedures to define active mode as a mode which "includes product modes where the energy using product is connected to a main power source, has been activated and provides one or more main functions." 10 CFR part 430, subpart B, appendix D1, proposed section 1.1 and appendix F, proposed section 1.1. The proposed definition of active mode is the same as the definition proposed for the December 2008 TP NOPR. 73 FR 74639, 74644 (Dec. 9, 2008). DOE notes that IEC Standard 62301 CD2 provided additional clarification that "delay start mode is a one off user initiated short duration function that is associated with an active mode." (IEC Standard 62301 CD2, section 3.8) IEC Standard 62301 CDV removed this clarification; however, in response to comments on IEC Standard 62301 CD2 that led to IEC Standard 62301 CDV, IEC states that delay start mode is a one off function of limited duration.[17] DOE infers this to mean that delay start mode would not be considered a standby mode, although no conclusion is made as to whether it would be considered part of active mode.

DOE is also proposing the additional clarifications discussed above for the range of main functions that would be classified as active mode functions, which were proposed in the December 2008 TP NOPR. For clothes dryers, DOE is proposing that the main function consist of tumbling the clothing with or without heated or unheated forced air circulation to remove moisture from the clothing and/or remove or prevent wrinkling of the clothing. 10 CFR part 430, subpart B, appendix D1, proposed section 1.1. For room air conditioners, DOE is proposing that the main function consist of cooling or heating the conditioned space, or circulating air through activation of its fan or blower, with or without energizing active air-cleaning components or devices such as ultraviolet (UV) radiation, electrostatic filters, ozone generators, or other air-cleaning devices. 10 CFR part 430, subpart B, appendix F, proposed section 1.1. DOE believes this proposed definition of active mode provides sufficient specificity for room air conditioners.

For clothes dryers, DOE additionally investigated whether certain operating cycles providing a steam function should be covered under active mode, and whether measurement of energy consumption for such cycles should be incorporated into the DOE clothes dryer test procedure. Based on its research and discussions with manufacturers, DOE believes that the general purpose of steam in a clothes dryer cycle is to soften the clothing load to ease wrinkles, sanitize clothes, eliminate static electrical charge, and/or help remove odors. As part of its reverse engineering analyses conducted for the energy conservation standards rulemaking for residential clothes dryers, DOE observed that the steam may be generated by spraying a fine mist of water into the heated drum, allowing the hot clothing load to evaporate the water, or the steam may be produced in a generator outside the drum before injecting it in with the clothes load. Most steam-equipped clothes dryers require a hookup to the cold water line that would supply water to an adjacent clothes washer. On certain models, however, the clothes dryer contains a user-fillable water reservoir. Steam functions typically are programmed as unique operating cycles, although manufacturers may provide the option to add steam during a conventional drying cycle or to periodically tumble and inject steam over a certain amount of time at the end of a conventional drying cycle to prevent wrinkling.

The current DOE test procedure does not contain any provisions that would account for the energy and water use of such steam cycles. Based on a preliminary market survey of products available on the market, DOE's estimates suggest that, at this time, steam cycles represent a very small fraction of overall product use on a nationwide basis. DOE is unaware of energy and water consumption or consumer usage data with respect to steam. For these reasons, DOE is not proposing amendments to include measurement of steam cycles for clothes dryers.

DOE received multiple comments regarding the proposed definition and clarifications for standby modes. AHAM opposed the establishment of multiple low power or standby modes for both clothes dryers and room air conditioners. AHAM stated that "delay start" and "cycle finished" modes for clothes dryers and "delay start" and "off-cycle" modes for room air conditioners should not be defined as standby modes, because in each case the product is not operating at its lowest power state. (AHAM, TP No. 10 at pp. 2–4) AHAM stated that the delay start function is associated with an active cycle, requires input by the consumer, and persists for a defined time. AHAM further stated that the cycle finished mode for clothes dryers and the off-cycle mode for room air conditioners are modes of limited duration that are associated with an active cycle, wherein the product is not operating at its lowest power state. According to AHAM, this condition is in conflict with the IEC Standard 62301 definition that standby mode "* * * may persist for an indefinite time * * *" (AHAM, TP No. 10 at pp. 2–3) For these reasons, AHAM commented that delay start mode for both products, cycle finished mode for clothes dryers, and off-cycle mode for room air conditioners should be incorporated into active mode, or that a standard empirical value should be added to all active energy measurements to represent the energy use of these low-power modes. *Id.* AHAM also noted that, for room air conditioners, delay start mode and off-cycle mode are energy-saving features which, in an integrated energy-use metric combining the energy use of these modes with

[17] "Compilation of comments on 59/523/CD: IEC 62301 Ed 2.0: Household electrical appliances—Measurement of standby power." August 7, 2009. p. 6. IEC Standards are available online at *http://www.iec.ch.*

energy use in active mode, result in lower-efficiency units that don't have such features appearing to be more efficient than units with these energy-saving features. (AHAM, TP No. 10 at p. 4)

GE adopted by reference AHAM's comments on the definitions of multiple standby modes. (GE, TP No. 11 at p. 1) Whirlpool also opposed defining multiple active and standby modes because doing so would add complexity to the test procedure without adding value to the measurements. Whirlpool agreed with AHAM and GE that delay start and cycle finished modes, which are user-initiated primary functions of the product, are part of active mode rather than separate standby modes. (Whirlpool, TP No. 9 at p. 2) PG&E added that it is confusing to consider as an off-cycle mode the state in which the thermostat has cycled off the fan and compressor. PG&E stated that this state should be considered part of the active mode. (PG&E, Public Meeting Transcript, TP No. 8 at pp. 84–85)

As discussed in section III.B.1, DOE is proposing in today's SNOPR to amend the DOE test procedure for clothes dryers and room air conditioners to define standby mode based on the definitions provided in IEC Standard 62301 CDV. DOE proposes to define standby mode as a mode which "includes any product modes where the energy using product is connected to a main power source and offers one or more of the following user oriented or protective functions which may persist for an indefinite time: [18]

- To facilitate the activation of other modes (including activation or deactivation of active mode) by remote switch (including remote control), internal sensor, timer;
- Continuous function: Information or status displays including clocks;
- Continuous function: Sensor-based functions." 10 CFR part 430, subpart B, appendix D1, proposed section 1.19 and appendix F, proposed section 1.5.

DOE is proposing an additional clarification that "a timer is a continuous clock function (which may or may not be associated with a display) that provides regular scheduled tasks (*e.g.,* switching) and that operates on a continuous basis." *Id.* This definition was developed based on the definitions provided in IEC Standard 62301 CDV, and expands upon the EPCA mode definitions to provide additional clarifications as to which functions are associated with each mode.

Based on these proposed definitions, delay start mode and cycle-finished mode for clothes dryers and delay start mode and off-cycle mode for room air conditioners are not modes that persist for an indefinite time, and would therefore not be considered as part of a standby mode. DOE's analysis of annual energy use in specific clothes dryer and room air conditioner modes—presented in the December 2008 TP NOPR—determined that delay start mode and cycle-finished mode for clothes dryers, and delay start mode and off-cycle mode for room air conditioners, each represent a negligible portion (0.1 percent or less) of the annual energy use for the particular product. 73 FR 74639, 74647, 74649 (Dec. 9, 2008). Therefore, an integrated energy efficiency metric for either clothes dryers or room air conditioners would not be measurably affected by either the inclusion or exclusion of the energy use in any of these modes. Further, DOE believes that the benefit of incorporating the energy use of these modes into the overall energy efficiency (*i.e.,* providing greater specificity in the evaluation of methods for reducing energy consumption and the potential for energy savings for the energy conservation standards rulemaking) is outweighed by the burden that would be placed on the manufacturers to measure power consumption in each of these modes. For these reasons, DOE is not proposing amendments to the test procedures to define delay start, cycle finished, and off-cycle modes or to measure power consumption in delay start mode for either product, cycle finished mode for clothes dryers, and off-cycle mode for room air conditioners in today's SNOPR. DOE is only including in the proposed clothes dryer and room air conditioner test procedures amendments in this SNOPR provisions for measuring energy consumption in the inactive mode and off mode.

AHAM commented that the term "inactive mode" should be changed to "standby mode" for simplicity and to remain consistent in the use of this term. In addition, AHAM stated that DOE should define standby mode as "the lowest power consumption mode which cannot be switched off or influenced by the user" (*i.e.,* not performing any function, but ready to perform a function) to be consistent with IEC Standard 62301. (AHAM, TP No. 10 at pp. 2–3) The comments which AHAM subsequently submitted to DOE clarified AHAM's suggested definition by stating that standby mode should be defined as "the lowest-power consumption mode when the appliance is connected to the main electricity supply and is used in accordance with the manufacturer's instructions. Standby mode power usage is the power (wattage) consumed by an appliance at the factory setting. Standby Mode may persist for an indefinite period of time." (AHAM, TP No. 12 at p. 2) AHAM stated that appliances to which its comments apply should be shipped in this mode. If the factory or "default" settings are indicated in manufacturer's instructions, AHAM stated that the appliance should be tested at those settings; otherwise, the appliance should be tested as shipped. *Id.* AHAM commented that any other feature accessible by the consumer should be considered as active mode, and, therefore, the definitions for off, standby and active modes should cover all clothes dryer and room air conditioner features. (AHAM, TP No. 10 at pp. 3–4)

Although at this time DOE is proposing to amend the test procedures for room air conditioners and clothes dryers to include only provisions for measuring energy use in inactive mode and that delay start, cycle finished, and off-cycle modes would not be considered part of standby mode, DOE remains open to consideration of additional standby modes. Therefore, DOE is not renaming "inactive mode" to "standby mode" in today's SNOPR. However, DOE agrees that, in measuring the single significant standby mode (inactive mode), power consumption would be measured in the lowest possible energy state, as discussed in section III.B.3.

In response to AHAM's comments, DOE believes that provisions for setting up the appliance for standby mode and off mode testing should be specified in the test procedure. However, DOE believes that setting up the appliance in accordance with manufacturer's instructions or in the as-shipped factory or "default" settings, as commented by AHAM, would allow manufacturers to ship appliances set in a low power mode that consumers may switch out of during typical standby or off mode use. In order to provide a clear and consistent testing method, DOE is proposing that the appliance be set up with the settings that produce the highest power consumption level, consistent with the particular mode

[18] The actual language for the standby mode definition in IEC Standard 62301 CDV describes "* * * user oriented or protective functions which usually persist" rather than "* * * user oriented or protective functions which may persist for an indefinite time." DOE notes, however, that section 5.1 of IEC Standard 62301 CDV states that "a mode is considered persistent where the power level is constant or where there are several power levels that occur in a regular sequence for an indefinite period of time." DOE believes that the proposed language, which was originally included in IEC Standard 62301 CD2, encompasses the possible scenarios foreseen by section 5.1 of IEC Standard 62301 CDV without unnecessary specificity.

definition under test, for standby and off mode testing. 10 CFR part 430, subpart B, appendix D1, proposed section 3.6 and appendix F, proposed section 4.2.

In the December 2008 TP NOPR, DOE requested comment on additional standby modes under the EPCA definition which had not been identified and which could represent significant energy use. 73 FR 74639, 74654 (Dec. 9, 2008) AHAM commented that, although there is the potential for networking in the future relating to functions such as peak load sharing, this feature would be considered part of active mode. According to AHAM, this mode might be selected by the consumer, thereby taking the product out of the default lowest power mode. (AHAM, TP No. 10 at p. 3) PG&E commented that it agrees with AHAM that network mode should be considered. PG&E added that if network mode is on all the time, then this mode should be considered a standby function, whereas if this mode is consumer-activated and on for limited periods of time, it should be considered part of active mode. (PG&E, Public Meeting Transcript, TP No. 8 at pp. 79, 86) GE raised concerns that some utilities require that a network function remain on continuously in order for consumers to get the peak-power rebates, implying that manufacturers may not have control over the way this part of the control works. (GE, Public Meeting Transcript, TP No. 8 at p. 87) PG&E responded by commenting that network modes might be designed for low power and intermittent activation. (PG&E, Public Meeting Transcript, TP No. 8 at pp. 87–88)

Section 3.7 of IEC Standard 62301 CDV defines network mode as a mode category which "includes any product modes where the energy-using product is connected to a main power source and at least one network function is activated (such as reactivation via network command or network integrity communication) but where the primary function is not active." Section 3.7 of IEC Standard 62301 CDV also provides a note stating, "Where a network function is provided but is not active and/or not connected to a network, then this mode is not applicable. A network function could become active intermittently according to a fixed schedule or in response to a network requirement. A 'network' in this context includes communication between two or more separate independently powered devices or pieces of equipment. A network does not include one or more controls, which are dedicated to a single piece of equipment. Network mode may include one or more standby functions." However, DOE is unaware of any clothes dryers or room air conditioners currently available on the market that incorporate a networking function. Further, DOE is unaware of any data regarding network mode in these products, which would allow it to determine appropriate testing procedures and mode definitions for incorporation into the test procedures for clothes dryers and room air conditioners. In particular, DOE is unaware of data and methods for the appropriate configuration of networks, whether network connection speed or the number and type of network connections affects power consumption, or whether wireless network devices may have different power consumptions when the device is looking for a connection and when the network connection is actually established. DOE is also unaware of how the energy consumption for clothes dryers and room air conditioners in a network environment may be affected by their product design and user interaction as well as network interaction, such as whether the network function could become active intermittently according to a fixed schedule or in response to a network requirement. For these reasons, the proposed amendments in today's SNOPR do not include network mode. However, DOE welcomes comment on whether clothes dryers and room air conditioners are available that incorporate a networking function, and whether definitions and testing procedures for a network mode should be incorporated into the DOE test procedure. DOE also requests comment on appropriate methodologies for measuring energy consumption in a network mode, and data on the results and repeatability of such testing methodology.

GE commented that standby mode should not apply to room air conditioners because they are considered continuously running products which operate in active mode 100 percent of the time that they are plugged into the main electricity supply and not in off mode. (GE, TP No. 11 at p. 2) DOE determined that room air conditioners with remote controls operate in a mode which facilitates the activation of other modes (including activation or deactivation of active mode) by remote switch (including remote control). This mode is covered by both the proposed definition in today's SNOPR and the EPCA definition for standby mode, and, hence, DOE believes that standby mode would apply to room air conditioners under the proposed definition.

DOE also requested comment on the definition and clarifications of off mode that were proposed in the December 2008 TP NOPR. AHAM stated it supports DOE's definition of off mode, but believes this definition must be clarified. (AHAM, TP No. 10 at pp. 2–4) AHAM provided clarifications in its comments, which state the following:

> "Off Mode describes the status of an appliance when it is connected to the main electricity supply and is providing no consumer-interactive function. Off Mode may persist for an indefinite period of time. Providing the product with an on/off switch satisfies this condition.
>
> Off Mode may include:
>
> 1. LED or some other indication of off mode condition;
> 2. Electric noise reduction capacitor, choke or filter;
> 3. The state where a one-way remote control device has turned the product off, but cannot be used to activate the product.
> 4. Leakage current will occur in some appliances, and may include current flow in 208/230 volt appliances where only one leg of the line is isolated by the switch.
> 5. May include electrical energy flow to a transformer of some electronics units."

(AHAM, TP No. 12 at p. 2)

As discussed in section III.B.1, DOE is proposing in today's SNOPR to amend the DOE test procedure for clothes dryers and room air conditioners to define off mode based upon the definition in IEC Standard 62301 CDV. DOE proposes to define off mode as a mode category which "includes any product modes where the energy using product is connected to a mains power source and is not providing any standby mode or active mode function and where the mode may persist for an indefinite time.[19] An indicator that only shows the user that the product is in the off position is included within the clasification of off mode." As noted in section III.B.1, this defintion was developed based on the definitions provided in IEC Standard 62301 CDV, and expands upon the EPCA mode definitions to provide additional clarifications as to which functions are associated with each mode.

In response to AHAM's comments regarding off mode, under the proposed mode definitions, a clothes dryer or room air conditioner equipped with a mechanical on/off switch which can disconnect power to the display and/or control components would be

[19] As with the definition for standby mode, IEC Standard 62301 CDV qualifies off mode as one that "* * * usually persists" rather than one that "* * * may persist for an indefinite time." For the same reasons as discussed for standby mode, DOE is proposing the latter definition.

considered as operating in the off mode when the switch is in the "off" position, provided that no other standby or active mode functions are energized. DOE agrees with AHAM that an energized LED or other indication that only shows the user that the product is in the off position would be considered part of off mode under the proposed definition, again if no other standby or active mode functions were energized. However, if any energy is consumed by the appliance in the presence of a one-way remote control, the unit would be operating in standby mode pursuant to EPCA (42 U.S.C. 6295(gg)(1)(A)(iii)), which includes a remote control which facilitates the activation or deactivation of other functions (including active mode) as a feature of standby mode. DOE agrees that the other three conditions, which AHAM outlines in its comments, would be indicative of off mode. Because DOE believes that a one-way remote control would be a function associated with standby mode, and not off mode as stated by AHAM, DOE is not proposing to adopt AHAM's definition for off mode.

DOE also notes that section 3.9 of IEC Standard 62301 CDV provides a definition of "disconnected mode," which is "the status in which all connections to mains power sources of the energy using product are removed or interrupted." IEC Standard 62301 CDV also adds a note that common terms such as "unplugged" or "cut off from mains" also describe this mode and that this mode is not part of the low power mode category. DOE believes that there would be no energy use in a "disconnected mode," and therefore, is not proposing a definition or testing methods for such a mode in the DOE test procedure for clothes dryers or room air conditioners.

3. Adding Specifications for the Test Methods and Measurements for Clothes Dryer and Room Air Conditioner Standby Mode and Off Mode Testing

DOE proposed in the December 2008 TP NOPR to establish test procedures for measuring all standby and off modes associated with clothes dryers and room air conditioners. 73 FR 74639, 74645 (Dec. 9, 2008). As discussed in section III.B.2, the mode identified as inactive mode in the December 2008 TP NOPR is believed to be the only significant standby mode for clothes dryers and room air conditioners at this time. This section discusses product-specific clarifications of the procedures of IEC Standard 62301 when used to measure standby and off mode energy use for clothes dryers and room air conditioners.

a. Clothes Dryers

DOE understands that displays on clothes dryers may reduce power consumption by automatically dimming or powering down after a certain period of user inactivity. For those clothes dryers for which the power input in inactive mode varies in this fashion during testing, DOE proposed in the December 2008 TP NOPR that that the test be conducted after the power level has dropped to its lower power state. 73 FR 74639, 74645 (Dec. 9, 2008).

PG&E commented that, while IEC Standard 62301 notes that some appliances wait in a higher-power state before dropping back to a lower-power state, the standard does not provide guidance on how long to wait for the appliance to drop to the lower-power state. (PG&E, Public Meeting Transcript, TP No. 8 at pp. 25–27) AHAM stated that section 5 of IEC Standard 62301 specifies a stabilization time of 30 minutes. (AHAM, Public Meeting Transcript, TP No. 8 at pp. 28–29) AHAM subsequently clarified in written comments that IEC Standard 62301 calls for a stabilization period of at least 30 minutes and a measurement period of at least 10 minutes, and that DOE's test procedure should be consistent with that of IEC Standard 62301 to reduce test burden. (AHAM, TP No. 10 at p. 4) Whirlpool commented that most test procedures involving electronics incorporate a 30-minute stabilization period and a 10-minute measurement period. Whirlpool believes that these requirements would be reasonable for DOE's test procedures. (Whirlpool, TP No. 9 at p. 3) PG&E supported the specification of a 30-minute stabilization period. (PG&E, Public Meeting Transcript, TP No. 8 at p. 50)

As part of the residential clothes dryer energy conservation standards rulemaking preliminary analyses, DOE conducted standby mode and off mode testing on 11 representative residential clothes dryers. Table 0.1 shows the measured duration of the higher-power state for clothes dryers in DOE's test sample. DOE observed during this testing that the higher-power state in inactive mode may persist for approximately 5–10 minutes of user inactivity after the user interface display has been energized for all products tested.

TABLE 0.1—CLOTHES DRYER STANDBY MODE TESTING: DURATION OF HIGHER-POWER STATE

Product class	Test unit	Control type	Automatic power-down?	Duration of higher-power state (min)
Vented Electric, Standard	1	Electromechanical	N	
	2	Electromechanical	N	
	3	Electronic	Y	5
	4	Electromechanical	N	
	5	Electromechanical	N	
Vented Electric, Compact (120 V)	6	Electromechanical	N	
Vented Gas	7	Electromechanical	N	
	8	Electronic	Y	5
	9	Electronic	Y	5
	10	Electronic	Y	7
	11	Electronic	Y	7

Paragraph 5.3.1 of section 5.3 of IEC Standard 62301 specifies, for products in which the power varies by not more than 5 percent from a maximum level during a period of 5 minutes, that the user waits at least 5 minutes for the product to stabilize and then measures the power at the end of an additional time period of not less than 5 minutes. Paragraph 5.3.2 of IEC Standard 62301 contains provisions for measuring average power in cases where the power is not stable. In such cases, it requires a measurement period of no less than 5 minutes, or one or more complete

operating cycles of several minutes or hours. IEC Standard 62301 contains no requirement that the stabilization period extends to 30 minutes, nor that the measurement is made over a period of at least 10 minutes. However, based on its testing results shown in Table 0.1, DOE also notes that some clothes dryers may remain in the higher-power state for the duration of a 5-minute stabilization period and 5-minute measurement period, and then drop to the lower-power state that is more representative of inactive mode. In contrast, IEC Standard 62301 CDV specifies for each testing method that the product be allowed to stabilize for at least 30 minutes prior to a measurement period of not less than 10 minutes. DOE believes this clarification would allow sufficient time for displays that automatically dim or power down after a period of user inactivity to reach the lower-power state prior to measurement. Based on the automatic power-down time periods observed in its own testing, DOE believes that the 30-minute stabilization and 10-minute measurement periods suggested by commenters provide a clearer and more consistent testing procedure than the corresponding times specified in IEC Standard 62301. This allows for representative measurements among products that may have varying times before the power drops to a low level.

DOE also notes that allowing a test period of "not less than" or "at least" a specified amount of time, as provided in both IEC Standard 62301 and IEC Standard 62301 CDV, may result in different test technicians testing the same product for different periods of time. In order to ensure that the testing procedures for standby and off mode are clear and consistent, such that different test technicians are testing the product using the same procedures, DOE is proposing to require that the stabilization period be 30 to 40 minutes, and the test period be 10 minutes. 10 CFR part 430, subpart B, appendix D1, proposed section 3.6.

The American Council for an Energy Efficient Economy (ACEEE) stated that the test procedure could be "gamed" by products for which the default setting would be for the display to power down after 5 minutes, but which would easily allow consumers to increase the duration of the higher-power state, or switch the product to permanently maintain the higher-power state. ACEEE commented that DOE should include additional guidance to level the playing field for all manufacturers. (ACEEE, Public Meeting Transcript, TP No. 8 at pp. 27–28) AHAM's comments for all covered products suggest that these products may have provision for the consumer to add or delete product functions that alter the as-shipped standby energy consumption, and that the power consumption in these user-selected states may exceed the power consumption in the lowest power consumption mode. AHAM stated that the consumer must be informed as to how to make the selections that would override the lowest power consumption mode. (AHAM, TP No. 12 at p. 2)

DOE's test procedures are developed to measure representative energy use for the typical consumer. DOE does not have data representing all possible consumer actions and appliance usage patterns that might increase energy use. As discussed above in section III.B.2, DOE is proposing that the appliance be set up with the settings that produce the highest power consumption level, consistent with the particular mode definition under test, for standby and off mode testing. DOE believes that this would prevent any "gaming" of default or as-shipped settings. For this reason, DOE has not proposed additional provisions in today's SNOPR to address the possibility of adjusting the as-shipped or default display settings or other features for higher energy use. However, DOE welcomes comment on methodologies to account for such consumer actions that might increase energy use and data on the corresponding consumer usage patterns.

DOE proposed in the December 2008 TP NOPR to adopt the test room ambient temperature of 73.4 ± 9 °F specified by IEC Standard 62301 for standby mode and off mode testing. 73 FR 74639, 74645–46 (Dec. 9, 2008). This test room ambient temperature is slightly different from the ambient temperature currently specified for DOE's drying performance tests of clothes dryers (75 ± 3 °F). However, the proposed test room ambient temperature conditions would permit manufacturers who opt to test active, standby, and off modes sequentially in the same test room to use the current ambient temperature requirements for drying tests, since the latter temperatures are within the limits specified by IEC Standard 62301. Alternatively, the proposed temperature specifications would allow a manufacturer that opts to conduct standby mode and off mode testing separately from drying tests more flexibility in ambient temperature. AHAM and Whirlpool supported DOE's test room ambient temperature specifications for standby mode and off mode testing of clothes dryers. (AHAM, TP No. 10 at p. 5; Whirlpool, TP No. 9 at p. 3) In the absence of comments objecting to the ambient temperature specifications, this SNOPR does not affect DOE's proposal in the December 2008 TP NOPR to use the test room ambient temperature specified by IEC Standard 62301 for clothes dryer standby mode and off mode testing.

b. Room Air Conditioners

A room air conditioner with a temperature display may use varying amounts of standby power depending on the digit(s) being displayed. DOE proposed in the December 2008 TP NOPR to require that test room temperature be maintained at 74 ± 2 °F, and that the temperature control setting is 79 °F. 73 FR 74639, 74646 (Dec. 9, 2008). These conditions differ from the cooling performance testing conditions in the DOE room air conditioner test procedure. The cooling performance test conditions are specified as 80 °F on the indoor side of the test chamber and 95 °F on the outdoor side. In addition, the cooling performance test conditions do not specify a temperature control setting. DOE proposed the different test room conditions in the December 2008 TP NOPR because such conditions would assure a consistent display configuration, and thus a representative power consumption, for all room air conditioners under test, particularly during off-cycle operation that was defined in the December 2008 TP NOPR as a standby mode. 73 FR 74639, 74646 (Dec. 9, 2008).

GE commented that the smaller tolerances specified by IEC Standard 62301, for ambient conditions that differ from the conditions for cooling performance testing, represent a testing burden. GE believes that the proposed conditions would be relevant only for off-cycle mode. (GE, Public Meeting Transcript, TP No. 8 at pp. 99–100) ACEEE commented that there would be no objection among interested parties to relax tolerance of the temperatures, if such close specification were not required. (ACEEE, Public Meeting Transcript, TP No. 8 at p. 101) AHAM commented that the proposed test room temperature is unrealistic and burdensome. (AHAM, TP No. 10 at p. 5) AHAM also stated that if off-cycle mode is considered part of active mode, then standby mode testing could be carried out in the same test chamber that is used for cooling performance testing because standby mode (other than off-cycle) is not affected by ambient temperature. (AHAM, Public Meeting Transcript, TP No. 8 at pp. 103–104)

As part of the room air conditioner energy conservation standards rulemaking preliminary analyses, DOE conducted standby mode and off mode testing on representative room air

conditioners. During its preliminary tests, DOE determined that room air conditioner displays among the units it tested do not provide any user information in inactive mode. In addition, DOE determined that the displays among the units it tested provide indication of time delay or time until start rather than temperature when the air conditioners are in delay start mode. These observations are supported by GE's comment, discussed above, that the proposed test chamber ambient conditions would be relevant only for off-cycle mode. (GE, Public Meeting Transcript, TP No. 8 at pp. 99–100) DOE concurs with GE's position that if the test procedure were limited to measurement of a single standby mode and an off mode as discussed in section III.B.2, the proposed close tolerance on ambient temperature would not be required. DOE is, therefore, proposing in today's SNOPR to provide flexibility in the room air conditioner test procedure amendments by allowing standby mode and off mode testing either in a test chamber used for measurement of cooling performance or in a separate test room that meets the specified standby mode and off mode test conditions. The proposed amendments to the room air conditioner test procedure in today's SNOPR specify maintaining the indoor test conditions, if tested in a cooling performance test chamber, or room ambient test conditions, if tested in a separate test room, at the temperature required by section 4.2 of IEC Standard 62301. Further, if the unit is tested in the cooling performance test chamber, the proposed amendments allow the manufacturer to maintain the outdoor test conditions either as specified for the DOE cooling test procedure or according to section 4.2 of IEC Standard 62301 for standby and off mode testing. DOE also notes that the indoor temperature conditions required by the DOE cooling performance test procedure fall within the temperature range allowed by section 4.2 of IEC Standard 62301.

DOE proposed a test procedure for the delay start mode in the December 2008 TP NOPR that required a 5-minute stabilization period followed by a 60-minute measurement period. 73 FR 74639, 74646 (Dec. 9, 2008) Because the proposed amendments to the test procedure in today's SNOPR are limited to the measurement of a single standby mode and an off mode as discussed in section III.B.2, DOE is not proposing any provisions in the room air conditioner test procedure for measuring delay start mode.

Similar to clothes dryers, DOE proposed in the December 2008 TP NOPR (73 FR 74639, 74646 (Dec. 9, 2008)) that standby and off modes for room air conditioners, other than delay start mode, be tested with a stabilization period no less than 5 minutes and a measurement period no less than 5 minutes for units with stable power, consistent with paragraph 5.3.1 of section 5.3 of IEC Standard 62301. In cases where the power was unstable, the provisions of paragraph 5.3.2 would apply, in which the measurement period would be no less than 5 minutes or one or more complete operating cycles. AHAM commented that IEC Standard 62301 requires a stabilization period at least 30 minutes long and a measurement period at least 10 minutes long and that DOE's test procedure should be consistent with that of IEC Standard 62301 to reduce test burden. (AHAM, TP No. 10 at p. 4) DOE does not have any information or data that would suggest that a 30-minute stabilization period followed by a 10-minute measurement period would produce more representative or consistent standby and off mode power measurements than the times proposed in the December 2008 TP NOPR.

However, DOE also notes that allowing a test period of "not less than" or "at least" a specified amount of time, as provided in IEC Standard 62301, may result in different test technicians testing the same product for different periods of time. In order to ensure that the testing procedures for standby and off mode are clear and consistent, such that different test technicians are testing the product using the same exact procedures, DOE is proposing to require that the stabilization period be 5 to 10 minutes, and the test period be 5 minutes. 10 CFR part 430, subpart B, appendix F, proposed section 4.2.

4. Calculation of Energy Use Associated With Standby Modes and Off Mode

Measurements of power consumption associated with each standby and off mode for clothes dryers and room air conditioners are expressed in W. The annual energy consumption in each of these modes for a clothes dryer or room air conditioner is the product of the power consumption in W and the time spent in that particular mode.

a. Clothes Dryers

Energy use for clothes dryers is expressed in terms of total energy use per drying cycle. As discussed in section III.D.3, DOE has determined that it is technically feasible to incorporate measures of standby and off mode energy use into the overall energy-use metric, a determination that is required by the EISA 2007 amendments to EPCA. (42 U.S.C. 6295(gg)(2)(A)) Therefore, DOE has examined standby and off mode energy consumption in terms of annual energy use apportioned on a per-cycle basis. Energy used during a drying cycle (active mode) is directly measured in the DOE test procedure, although adjustments are made to the directly measured energy to account for differences between test and field conditions. The energy use associated with continuously burning pilot lights of gas dryers is measured and is converted to an energy use per cycle by dividing calculated annual gas energy use by the representative average number of drying cycles per year (*i.e.,* 416). 10 CFR part 430, subpart B, appendix D, section 4.4. DOE proposes that this procedure for gas standing pilot lights provides an approach for calculating standby mode and off mode power consumption on a per-cycle energy-use basis.

Whirlpool commented that standing (*i.e.,* continuously burning) pilot lights are not allowed in gas dryers and that it was unclear why DOE was referring to them in this context. (Whirlpool, TP No. 9 at p. 2) The Federal standards prohibiting such pilot lights were established by the NAECA amendments to EPCA for gas clothes dryers manufactured after January 1, 1988. (42 U.S.C. 6295(g)(3)) However, the subsequent energy conservation standards rulemaking for clothes dryers amended those standards to require performance standards for all product classes of clothes dryers, including gas clothes dryers, based on EF, for clothes dryers manufactured on or after May 14, 1994. The amended energy conservation standards replaced the previous standards, and thus eliminated the prohibition of standing pilot lights. (56 FR 22250 (May 14, 1991)); 10 CFR 430.32(h)(1)). Although DOE is unaware of any current models of gas clothes dryers incorporating standing pilot lights, the methodology for measuring the energy consumption of such a feature is included in the current DOE clothes dryer test procedure because standing pilot lights are not precluded by the standards. For this reason, DOE continues to consider the methodology for incorporating standing pilot light annual energy use in the EF metric for gas dryers a viable approach for incorporating the annual energy use of modes other than active mode into the per-cycle energy-use metric.

In the existing test procedure, energy use per cycle for continuously burning pilot lights is calculated by multiplying the energy use measured for a period of one hour by an established number of hours per year that the dryer is not in drying mode, and dividing by the

representative average cycles per year. The existing test procedure established that a gas clothes dryer is in the drying mode 140 hours per year, and that the balance of the year (8,620 hours) is the established number of hours associated with the pilot light energy consumption.

DOE proposed in the December 2008 TP NOPR to adopt a similar approach for measuring energy consumption during standby and off modes for clothes dryers. Specifically, DOE proposed to adopt the current 140 hours associated with drying (*i.e.,* the active mode) and to associate the remaining 8,620 hours of the year with the standby and off modes. Table 0.2 presents the comparison of the approximate wattages and annual energy use associated with all modes that DOE proposed in the December 2008 TP NOPR. 73 FR 74639, 74647–48 (Dec. 9, 2008).

TABLE 0.2—DOE ESTIMATE OF ANNUAL ENERGY USE OF CLOTHES DRYER MODES

Mode	Hours	Typical Power *(W)*	Annual Energy Use *(kWh)*
Active	140	6,907	967.
Delay Start	* 34	3	0.1.
Cycle Finished	** 429	3	1.
Off and Inactive	† 8,157	0.5 to 3	4 to 24.

* 5 minutes per cycle × 416 cycles per year
** 5 percent of remaining time (0.05 × (8,760 − 140 − 34) = 429)
† 95 percent of remaining time (0.95 × (8,760 − 140 − 34) = 8,157)

GE and AHAM commented that the 0.5 to 3 W range provided for standby modes is typical for displays on appliances. (GE, Public Meeting Transcript, TP No. 8 at p. 113; AHAM, Public Meeting Transcript, TP No. 8 at pp. 113–114.)

At the December 17 Public Meeting, AHAM expressed general support of the DOE estimates of energy use. (AHAM, Public Meeting Transcript, TP No. 8 at p. 122.) Whirlpool commented that work carried out among AHAM members has included the development of a representative allocation of hours to the applicable clothes dryer operating modes. (Whirlpool, TP No. 9 at p. 3.) The data Whirlpool provided for this allocation are reproduced as Table 0.3 below.

TABLE 0.3—WHIRLPOOL-SUPPLIED ESTIMATE OF ANNUAL HOURS FOR CLOTHES DRYER MODES

DOE proposal	Whirlpool/AHAM definition	Whirlpool hours
Active	Active	140 (20 minutes per cycle).
Inactive	Standby	Assume equal to Delay Start.
Cycle Finished	Active	416 (1 hour/cycle).
Delay Start	Active	69 (10 minutes/cycle).
Off	Off	Balance [8,066].

The Whirlpool data confirm DOE's selection of 140 hours for active drying mode. The key difference between the hours proposed by DOE and Whirlpool is that Whirlpool allocates only 10 minutes per cycle to inactive mode (69 hours annually), resulting in 8,066 hours allocated to off mode. DOE believes that the proposed definition of off mode as applied to clothes dryers refers to dryers with mechanical rather than electronic controls or to dryers with electronic controls that have a mechanical switch with which the user can de-energize the electronic controls. Reactivation of the dryer with a pushbutton sensor, touch sensor, or other similar device that consumes power is considered to be a standby mode feature under the proposed definition, in which one possible standby mode "facilitate[s] the activation of other modes (including activation or deactivation of active mode) by remote switch (including remote control), internal sensor, timer." 10 CFR part 430, subpart B, appendix D1, proposed section 1.19 and appendix F, proposed section 1.5. Based on DOE's tests, it concluded that there are few clothes dryers with electronic controls that have this additional mechanical switch. Therefore, the combined inactive/off hours would most likely be allocated fully either to inactive or off mode, depending on the type of controls present on the clothes dryer. DOE does not have market share information to determine how many clothes dryers are currently shipped with electromechanical controls, but DOE believes that the relative proportion of inactive and off mode annual hours as contained in Whirlpool's data submission may not be wholly representative of the relative shipments of clothes dryers with electronic and electromechanical controls because it implies that virtually all clothes dryers would be equipped with electromechanical controls, and DOE's review of clothes dryer models currently available does not support such a conclusion. For this reason, DOE believes that, under the proposed definitions of standby and off modes, the allocation of annual hours to inactive and off modes are appropriate and this SNOPR does not affect DOE's proposal in the December 2008 TP NOPR for this allocation of hours.

In the December 2008 TP NOPR, DOE proposed an alternative simplified methodology for allocating annual hours. 73 FR 74639, 74648 (Dec. 9, 2008). The comparison of annual energy use of different clothes dryer modes shows that delay start and cycle finished modes represent a negligible percentage of total annual energy consumption. In addition, for clothes dryers currently on the market, power levels in these modes are similar to those for off/inactive modes. Therefore, DOE proposed that all of the non-active hours (which total 8,620) would be allocated to the inactive and off modes. 73 FR 74639, 74648 (Dec. 9, 2008). AHAM commented that it supports the alternative approach, but that the delay start and cycle finished mode hours more appropriately would be combined with the active mode hours than with the inactive and off mode hours.

(AHAM, Public Meeting Transcript, TP No. 8 at p. 123; AHAM, TP No. 10 at p. 6.) As discussed in section III.B.2, DOE has determined that delay start and cycle finished modes are not standby modes according to the definitions proposed in today's SNOPR. Therefore, DOE is not proposing to combine delay start and cycle finished mode hours with active mode hours as commented by AHAM. However, because the power consumption of clothes dryers operating in such modes approximates the power levels in off/inactive modes, it would be more appropriate under a simplified approach to allocate the hours associated with delay start and cycle finished modes to off/inactive modes. Therefore, in today's SNOPR, because DOE is not proposing amendments to the clothes dryer test procedure to measure delay start and cycle finished power consumption, DOE is proposing to maintain the estimate of 8,620 hours as the non-active hours that would be allocated to inactive and off modes for clothes dryers.

In the December 2008 TP NOPR, DOE proposed to allocate the number of hours for the combined off and inactive modes entirely to either off mode or standby mode, as appropriate, if only one of these modes is possible for the clothes dryer. DOE noted in the October 2008 TP NOPR that information to guide allocation of the hours for clothes dryers that have both inactive and off modes is currently unavailable. Two operational scenarios exist: (1) A clothes dryer reverts to an off mode after a specified time in inactive mode; or (2) a clothes dryer stays in inactive mode unless the user switches the appliance back to off mode. DOE does not have information regarding the percentage of clothes dryers being sold that fall into each of these categories. Because of this limitation, DOE proposed in the October 2008 TP NOPR to allocate half of the hours determined for off/inactive modes to each of the two modes. 73 FR 74639, 74648 (Dec. 9, 2008). Because of DOE's interpretation of the inactive and off mode data supplied by Whirlpool as not being representative of typical inactive and off mode hours under the EPCA mode definitions, and in the absence of additional data regarding allocation of hours, this SNOPR does not affect DOE's proposal in the December 2008 TP NOPR for the allocation of hours between inactive mode and off mode.

DOE recognizes that the analysis of the number of annual hours allocated to each clothes dryer mode are based, in part, on the number of annual use cycles. Although, as discussed in section III.C.5.a, DOE believes that the average number of annual cycles is currently 283 rather than the 416 cycles specified in the current DOE clothes dryer test procedure, DOE does not have any information on whether active mode cycle times may have changed accordingly. It is possible that the smaller number of use cycles may correspond to larger load sizes and thus, potentially, longer drying times. Therefore, in consideration of Whirlpool's data submittal which supported DOE's estimate of 140 hours in active mode, DOE is proposing in today's SNOPR the same allocation of hours for inactive mode and off mode that were proposed in the December 2008 TP NOPR even though it is proposing fewer annual use cycles.

In summary, DOE is proposing to amend the clothes dryer test procedure to calculate clothes dryer energy use per cycle associated with inactive and off modes by: (1) Calculating the product of wattage and allocated hours for inactive and off modes, depending on which of these modes are possible; (2) summing the results; (3) dividing the sum by 1,000 to convert from Wh to kWh; and (4) dividing by 283 cycles per year. The 8,620 hours for off/inactive modes would be allocated entirely to either off mode or inactive mode, as appropriate, if only one of these modes is possible for the clothes dryer. If both modes were possible, the hours would be allocated to each mode equally as discussed above in this section, and each would be allocated 4,310 hours.

b. Room Air Conditioners

In the December 2008 TP NOPR, DOE stated it was not aware of reliable data for hours spent in different standby and off modes in room air conditioners. Therefore, DOE estimated the annual hours for standby and off modes and the relative magnitude of annual energy use in standby and off modes in an example for a representative 8,000 Btu/hour (Btu/h), 9 EER unit that has delay start, off-cycle, and inactive modes. 73 FR 7439, 74648–49 (Dec. 9, 2008). DOE's estimates of annual energy use in each mode are shown in Table 0.4.

TABLE 0.4—DOE ESTIMATE OF ANNUAL ENERGY USE OF ROOM AIR CONDITIONER MODES FOR A REPRESENTATIVE UNIT WITH 8,000 BTU/H CAPACITY AND 9 EER

Mode	Hours	Typical Power *(W)*	Annual Energy Use *(kWh)*
Active Cooling	750	889	667
Delay Start	90	2	0.2
Off-Cycle	440	2	0.9
Off and Standby	4,850	0.5 to 2	2.5 to 10

In the December 2008 TP NOPR, DOE presented an alternative simplified methodology. Similar to the analysis for clothes dryers, the comparison of annual energy use of different room air conditioner modes shows that delay start and off-cycle modes represent a small percentage of annual energy use in the active mode, and that the power consumption in those standby modes are distinct from but comparable to those for off/inactive modes. Thus, DOE proposed adopting an alternative approach focusing only on off and inactive modes. In that case, the non-active hours are allocated as if the room air conditioner has only the inactive standby mode. A total of 5,115 hours would be allocated to the standby and off modes ($8{,}760 \times 0.75 - 750 - 705 = 5{,}115$).[20] 73 FR 74639, 74649 (Dec. 9, 2008). AHAM and GE support this alternative proposal, with the clarification that the off-cycle and delay start hours should be considered part of the active mode hours rather than part of the standby or off mode hours. (AHAM, Public Meeting Transcript, TP No. 8 at p. 130; AHAM, TP No. 10 at p. 6; GE, Public Meeting Transcript, TP No. 8 at p. 131.) In today's SNOPR, because DOE is not proposing amendments to the room air conditioner test procedure to measure delay start and off-cycle power consumption, DOE is proposing the estimate of 5,115 hours as the non-active hours that would be allocated to inactive and off modes for

[20] Multiplying by 0.75 eliminates hours associated with unplugged hours, assumed for half of the hours of the year for half of room air conditioners as described in the December 2008 TP NOPR (73 FR 74639, 74648 (Dec. 9, 2008)); 750 = Cooling (active mode) hours; 705 = Fan-only (active mode) hours.

room air conditioners. For the same reasons as discussed for delay start and cycle finished modes for clothes dryers, DOE believes that the delay start and off-cycle hours for room air conditioners should be allocated to inactive and off modes even though it has determined that delay start and off-cycle modes are not standby modes.

Typically, room air conditioners with remote control can be controlled whenever they are plugged in; hence, these units do not have provision for an off mode in addition to inactive mode. However, if a room air conditioner allows the user to switch off remote control operation, such a product would be capable of both off and inactive modes. DOE notes that information to guide allocation of the hours for room air conditioners that have both inactive and off modes is currently unavailable. For these units, DOE proposed in the December 2008 TP NOPR that the off/inactive hours are allocated equally to the off and inactive modes for such a product. Otherwise, for units that are capable of operation in only off or inactive mode, DOE proposed that all of the hours be allocated to the appropriate mode. 73 FR 74639, 74649 (Dec. 9, 2008). In the absence of comments on or additional data regarding allocation of hours, this SNOPR does not affect DOE's proposal in the December 2008 TP NOPR for the allocation of hours between inactive mode and off mode.

In summary, DOE is proposing to amend the room air conditioner test procedure to calculate room air conditioner annual energy use associated with inactive and off modes by: (1) Calculating the products of wattage and allocated hours for inactive and off modes, depending on which of these modes is possible; (2) summing the results; and (3) dividing the sum by 1,000 to convert from Wh to kWh. The 5,115 hours for off/inactive modes would be allocated entirely to either off mode or inactive mode, as appropriate, if only one of these modes is possible for the room air conditioner. If both modes were possible, the hours would be allocated to each mode equally as discussed above in this section, and each would be allocated 2,557.5 hours.

5. Measures of Energy Consumption

The DOE test procedures for clothes dryers and room air conditioners currently provide for the calculation of several measures of energy consumption. For clothes dryers, the test procedure incorporates the following: Various measures of per-cycle energy consumption; including total per-cycle electric dryer energy consumption; per-cycle gas dryer electrical energy consumption; per-cycle gas dryer gas energy consumption; per-cycle gas dryer continuously burning pilot light gas energy consumption; total per-cycle gas dryer gas energy consumption expressed in Btu; and total per-cycle gas dryer gas energy consumption expressed in kWh. 10 CFR part 430, subpart B, appendix D, sections 4.1–4.5. The test procedure also provides an EF, which is equal to the clothes load in pounds divided either by the total per-cycle electric dryer energy consumption or by the total per-cycle gas dryer energy consumption expressed in kWh. 10 CFR 430.23(d). For room air conditioners, the test procedure calculates annual energy consumption in kWh and an EER. 10 CFR 430.23(f).

Under 42 U.S.C. 6295(gg)(2)(A), EPCA directs that the "[t]est procedures for all covered products shall be amended pursuant to section 323 to include standby mode and off mode energy consumption * * * with such energy consumption integrated into the overall energy efficiency, energy consumption, or other energy descriptor for each covered product, unless the Secretary determines that—(i) the current test procedures for a covered product already fully account for and incorporate the standby mode and off mode energy consumption of the covered product; or (ii) such an integrated test procedure is technically infeasible for a particular covered product, in which case the Secretary shall prescribe a separate standby mode and off mode energy-use test procedure for the covered product, if technically feasible."

As part of the December 2008 TP NOPR DOE explored whether the existing measures of energy consumption for clothes dryers and room air conditioners can be combined with standby mode and off mode energy use to form a single metric. For the reasons presented in the December 2008 TP NOPR, DOE proposed combined metrics addressing active, standby, and off modes for clothes dryers and room air conditioners, as discussed below.

a. Clothes Dryers

In the December 2008 TP NOPR, DOE proposed to establish the following measures of energy consumption for clothes dryers that integrate energy use of standby and off modes with energy use of main functions of the products. "Per-cycle integrated total energy consumption expressed in kWh" will be defined as the sum of per-cycle standby and off mode energy consumption and either total per-cycle electric dryer energy consumption or total per-cycle gas dryer energy consumption expressed in kWh, depending on which type of clothes dryer is involved. "Integrated energy factor" (IEF) will be defined as the (clothes dryer test load weight in lb)/(per-cycle integrated total energy in kWh). 73 FR 74639, 74650 (Dec. 9, 2008).

b. Room Air Conditioners

In the December 2008 TP NOPR, DOE proposed to establish the following measures of energy consumption for room air conditioners that integrate energy use of standby and off modes with energy use of main functions of the products. "Integrated annual energy consumption" will be defined as the sum of annual energy consumption and standby and off mode energy consumption. "Integrated energy efficiency ratio" (IEER) will be defined as (cooling capacity in Btu/hr × 750 hours average time in cooling mode)/(integrated annual energy consumption × 1,000 Wh per kWh). 73 FR 74639, 74650 (Dec. 9, 2008).

AHAM, Whirlpool, and GE all supported the proposed integrated measures of energy consumption and energy efficiency for clothes dryers and room air conditioners combining standby mode and off mode energy consumption with active mode energy consumption. (AHAM, TP No. 10 at p. 6; Whirlpool, TP No. 9 at p. 3; GE, TP No. 11 at p. 1) PG&E and ACEEE both commented that an integrated metric for these products is largely irrelevant. (PG&E, Public Meeting Transcript, TP No. 8 at p. 147, ACEEE, Public Meeting Transcript, TP No. 8 at pp. 146–147) PG&E recognizes the legal requirements and limitations, but it does not support an integrated metric. It stated that many of the covered appliances use a large amount of energy in active mode and only a small amount in standby mode. PG&E also commented that the measurements of energy use in active and standby mode can be combined, but the cost of reducing standby mode energy use, which is small but could be made smaller very inexpensively, is low. PG&E suggested a prescriptive limit on standby power or a voluntary agreement for a standby power limit. (PG&E, Public Meeting Transcript, TP No. 8 at pp. 143–144) ACEEE stated that the public policy objective in EISA 2007 was to encourage limitations of the amount of energy wasted when a covered product is not in active mode, regardless of the type of product. ACEEE believes that it would be more straightforward to simply place a limitation on the wattage at each of these non-operating cycle conditions, which would encourage manufacturers to incorporate low-standby-power

components such as improved power supplies. ACEEE also commented that it is not sure why DOE is mixing in source use of gas with site use of electricity to present integrated measures that do not help minimize the relatively small contributions of non-duty cycle energy use. ACEEE believes such an approach is not technically feasible unless all energy is site use because of the many disagreements about the appropriate site-to-source conversions and because these conversions vary so much among regions and times of day. (ACEEE, Public Meeting Transcript, TP No. 8 at pp. 140–142)

EPCA directs that standby mode and off mode energy consumption be integrated into the overall energy efficiency, energy consumption, or other energy descriptor for each product unless the Secretary determines—(i) The current test procedure already fully accounts for and incorporates the standby mode and off mode energy consumption; or (ii) such an integrated test procedure is technically infeasible (42 U.S.C. 6295(gg)(2)(A)). DOE tentatively determined in the December 2008 TP NOPR that it is technically feasible to integrate standby mode and off mode energy consumption into the overall energy consumption metrics for clothes dryers and room air conditioners. 73 FR 74639, 74650 (Dec. 9, 2008). In the case of clothes dryers, the DOE test procedure already allows for a measure of standby power (*i.e.,* pilot gas consumption) to be incorporated into EF. For both clothes dryers and room air conditioners, the difference in energy use in active and standby modes is so large that standby power has little impact on the overall measure of energy efficiency. Therefore, it is technically feasible for both products to integrate standby and off mode power into the energy-use metric. While DOE recognizes that a prescriptive standard for standby and off mode power could have certain advantages for products such as clothes dryers and room air conditioners in which energy use in such modes represents such a small percentage of annual energy use in the active mode, EISA 2007 provides a clear requirement for an integrated metric where technical feasibility for such incorporation is determined. In response to ACEEE's comment regarding the technical feasibility of mixing source use of gas with site use of electricity to present integrated measures of energy use, DOE notes that the current DOE clothes dryer test procedure only considers gas use at the appliance site, precluding the need for a site-to-source conversion factor. Since the test procedure already incorporates both electrical energy consumption and gas energy consumption for gas clothes dryers, converting the gas energy consumption metric, Btu/h, to kWh to obtain total energy consumption, DOE concludes that considering additional electricity or gas usage during standby mode or off mode would also be technically feasible.

DOE was also made aware that the Air-Conditioning, Heating and Refrigeration Institute (AHRI) Standard 340/360–2007, "Performance Rating of Commercial and Industrial Unitary Air-Conditioning and Heat Pump Equipment," (AHRI Standard 340/360) and the ASHRAE Standard 90.1–2007, "Energy Standard for Buildings Except Low-Rise Residential Buildings," (ASHRAE 90.1) both published in 2007, included an IEER metric, also named "Integrated Energy Efficiency Ratio," which is meant to rate the part-load performance of the air-conditioning equipment under test. Manufacturers of the equipment covered by these standards currently list IEER ratings in their product literature and in the AHRI certified product directory. This IEER metric does not integrate standby mode and off mode energy use, as is being proposed in today's SNOPR. Because the IEER metric used in AHRI Standard 340/360 and ASHRAE 90.1 was established prior to the IEER proposed in this rulemaking, DOE is proposing for today's SNOPR to revise the name of the integrated metrics incorporating standby mode and off mode energy use to "combined" metrics for both clothes dryers and room air conditioners.

For these reasons, today's SNOPR proposes to incorporate into the DOE test procedures the "per-cycle combined total energy consumption expressed in kWh" and "combined energy factor" (CEF) for clothes dryers and "combined annual energy consumption" and "combined energy efficiency ratio" (CEER) for room air conditioners as were proposed in the December 2008 TP NOPR. 73 FR 74639, 74650 (Dec. 9, 2008).

AHAM and GE noted that DOE did not propose in the December 2008 TP NOPR to amend the annual energy cost calculations for room air conditioners in 10 CFR 430.23 to include the cost of standby mode and off mode energy use. (AHAM, Public Meeting Transcript, TP No. 8 at pp. 164–165; GE, Public Meeting Transcript, TP No. 8 at p. 164) AHAM stated that such an annual energy cost should be obtained by multiplying the integrated annual energy consumption from the new method by the representative average unit cost of electrical energy in dollars per kWh. (AHAM, TP No. 10 at p. 6) DOE is not proposing to amend the annual energy cost calculations in 10 CFR 430.23 for clothes dryers and room air conditioners to include the cost of energy consumed in standby and off modes because:

- EPCA as amended by EISA does not require DOE to include standby and off mode energy costs in the annual energy cost calculation; and
- The Federal Trade Commission's (FTC's) EnergyGuide Label for room air conditioners includes as an indicator of product energy efficiency the annual energy cost, compared to a range of annual energy costs of similar products. Appendix E to 16 CFR part 305. An annual energy cost incorporating standby and off mode energy would no longer be directly comparable to the minimum and maximum energy costs prescribed for the EnergyGuide Label. Clothes dryers are not covered products for the EnergyGuide Label.

C. Clothes Dryer and Room Air Conditioner Active Mode Test Procedures

1. Correction of Text Describing Energy Factor Calculation for Clothes Dryers

DOE proposed in the December 2008 TP NOPR to correct certain errors contained in specific references used in the current DOE test procedure regulation. 73 FR 74639, 74650 (Dec. 9, 2008). In particular, the reference to sections 2.6.1 and 2.6.2 of 10 CFR part 430, subpart B, appendix D in the calculation of EF for clothes dryers found at section 430.23(d)(2) was determined to be incorrect and should refer instead to sections 2.7.1 and 2.7.2. Section 2.6 provides instructions for the test clothes to be used in energy testing of clothes dryers, whereas section 2.7 provides instructions on test loads. The EF of clothes dryers is measured in lbs of clothes per kWh. Since the EF calculation requires the weight of the test load, DOE proposed in the December 2008 TP NOPR to correct these references in 10 CFR 430.23(d)(2). DOE did not receive any comments opposing this correction. Therefore, this SNOPR does not affect DOE's proposal in the December 2008 TP NOPR for this same correction.

2. Automatic Cycle Termination for Clothes Dryers

In the October 2007 Framework Document, DOE stated that it believes that the clothes dryer test procedure may not adequately measure the benefits of automatic cycle termination, in which a sensor monitors either the exhaust air temperature or moisture in

the drum to determine the length of the drying cycle. (Framework Document, STD No. 1 at p. 5.) Currently, the test procedure provides a single credit for the enhanced performance of clothes dryers equipped with automatic termination but does not distinguish between the type of sensing control system (*e.g.,* temperature-sensing or moisture-sensing controls) and the sophistication and accuracy of the control system. The current clothes dryer test procedure provides a credit in the calculation of EF for clothes dryers equipped with an automatic cycle termination feature, defined in terms of an FU scaling factor applied to the per-cycle drying energy consumption. Gas or electric clothes dryers with time termination control (*i.e.,* those dryers equipped only with a timer to determine the end of a drying cycle) are assigned an FU of 1.18, while dryers with automatic termination are assigned an FU of 1.04. Therefore, clothes dryers with automatic cycle termination control receive a 12-percent credit as compared to a comparable dryer with time termination control, which is assumed to consume more energy due to over- or under-drying, which in the latter case can result in consumers running an additional drying cycle. DOE sought comment in the October 2007 Framework Document on such a test procedure revision.

In response to the October 2007 Framework Document, AHAM, Edison Electric Institute (EEI), Alliance Laundry Systems (ALS), and the Consortium for Energy Efficiency (CEE) commented that the clothes dryer test procedure should be changed to account for the use of automatic cycle termination. (AHAM, STD No. 8 at p. 2; EEI, STD No. 5 at p. 2; ALS, STD No. 6 at p. 1; CEE, STD No. 10 at p. 2.)[21] Whirlpool commented that automatic cycle termination reduces over- or under-drying. According to Whirlpool, over-drying wastes energy directly, and under-drying leads to consumer use of a second clothes-drying cycle. Whirlpool believes that the test procedure should credit both temperature sensing and moisture sensing automatic termination and, because moisture sensing is less subject to over- or under-drying, this approach should receive greater credit. Whirlpool added that it would need additional time to evaluate a specific recommendation on the nature of the credit. (Whirlpool, STD No. 7 at p. 2.)

The ACEEE, Appliance Standards Awareness Project (ASAP), Natural Resources Defense Council (NRDC), and the Northwest Power and Conservation Council (NPCC) (hereafter "Joint Comment") stated in jointly filed comments that DOE should verify the benefits of automatic cycle termination for clothes dryers and that testing should be conducted on new and accelerated-use models to verify long-term effectiveness. The Joint Comment added that the test procedure should not provide any "default" efficiency credit for reduced cycle time unless such benefits have been verified through actual testing. (Joint Comment, STD No. 9 at p. 13.) At the October 24, 2007 framework document public meeting, ACEEE questioned whether the current DOE clothes dryer test procedure allows for ambiguity or less-than-optimum results in terms of cycle termination when the clothes are defined to be dry. (ACEEE, Public Meeting Transcript, STD No. 4.6 at p. 36.)[22]

Based on comments received in response to the October 2007 Framework Document, DOE agrees that the benefit of automatic cycle termination should be more accurately credited, and that this credit should account for any over- or under-drying. Therefore, DOE considered potential amendments to the DOE test procedure to account for automatic cycle termination. DOE investigated other clothes dryer test procedures for measuring the effectiveness of automatic cycle termination and conducted limited testing to analyze over-drying energy consumption and the applicability of the proposed amendments to the DOE clothes dryer test procedure.

DOE reviewed industry and international clothes dryer test standards for testing methods and procedures for evaluating clothes dryers that use automatic cycle termination. DOE noted that AHAM recently published an update to its industry test standard, AHAM HLD–1–2009, "Household Tumble Type Clothes Dryers" (AHAM Standard HLD–1–2009), which contains provisions for measuring the over-drying energy consumption for dryers that use automatic cycle termination. DOE also noted that the international test standards EN Standard 61121 and AS/NZS Standard 2442.1 both address methods for testing dryers with automatic termination sensor technologies. EN Standard 61121 is used in European Union (EU) member countries. DOE notes that this test standard appears to be identical to the IEC Standard 61121, which is used in other countries such as China.

As noted above, DOE reviewed the recently issued AHAM Standard HLD–1–2009, which provides separate testing procedures for automatic termination sensing dryers and timer dryers. For timer dryers, AHAM Standard HLD–1–2009 requires that the test cycle (with the temperature set to maximum) is run until the load is dried to 5-percent ± 1-percent RMC, which can be determined from experience or continuous weighing. The test procedure in AHAM Standard HLD–1–2009 for automatic termination sensing dryers requires that the dryer be operated at the maximum temperature setting and the test cycle is stopped when it just reaches cool down. If the RMC is less than 6 percent, then the test is valid and is repeated two more times. AHAM Standard HLD–1–2009 allows automatic termination sensing dryers to dry the test load to any value below 6-percent RMC, and the total energy consumption and final RMC are recorded. DOE notes that the procedures for timer dryers and automatic termination sensing dryers both require that the initial RMC of the test load be 70 percent ± 5 percent.

Annex H of AHAM Standard HLD–1–2009 contains moisture removal datasheet tables that can be used to record testing data. As noted above, the test requires that the total energy input and the final RMC be recorded at the end of the test cycle for both timer dryers and automatic termination sensing dryers. Table H.2 of annex H, which includes test values to record for automatic termination sensing dryers, requires that the time to dry to 5-percent RMC and total energy to reach 5-percent RMC be recorded. This table indicates that the time to dry the test load to 5-percent RMC can be estimated using dynamic scale recording and that the total energy to reach 5-percent RMC can be estimated using dynamic energy

[21] A notation in the form "AHAM, STD No. 8 at p.2" identifies a written comment that DOE has received and has included in the docket of the energy conservation standards rulemaking for clothes dryers and room air conditioners (Docket No. EE–2007–STD–0010). This particular notation refers to a comment (1) submitted by the Association of Home Appliance Manufacturers (AHAM), (2) in document number 8 in the docket of that rulemaking, and (3) appearing on page 2 of document number 8.

[22] A notation in the form "ACEEE, Public Meeting Transcript, STD No. 4.6, p. 36" identifies an oral comment that DOE received during the October 24, 2007, framework public meeting and that was recorded in the public meeting transcript in the docket for the energy conservation standards rulemaking for clothes dryers and room air conditioners (Docket No. EE–2007–STD–0010), maintained in the Resource Room of the Building Technologies Program. This particular notation refers to a comment (1) made by the American Council for an Energy Efficient Economy (ACEEE) during the public meeting, (2) recorded in document number 4.6, which is the public meeting transcript that is filed in the docket of that rulemaking, and (3) which appears on page 36 of document number 4.6.

recording and the time determined above. From this, the over-drying energy loss is calculated by subtracting the total energy to reach 5-percent RMC from the total measured energy input. Therefore, an automatic termination-sensing dryer that dries the test load to between 5- and 6-percent final RMC would have no over-drying energy consumption. DOE believes that AHAM Standard HLD–1–2009 provides a clear methodology for measuring the over-drying energy consumption for automatic termination sensing dryers and provides a means for comparing the accuracy of different automatic termination sensor technologies used in different clothes dryer models. However, DOE believes that AHAM Standard HLD–1–2009 does not provide an appropriate method for comparing the amount of over-drying for a timer dryer to that of an automatic termination-sensing dryer. According to the methods in AHAM Standard HLD–1–2009, a timer dryer could appear to consume less energy, and thus appear more efficient, than an automatic termination-sensing dryer since the timer dryer test only allows for drying the test load to as low as 4-percent RMC, whereas the automatic cycle termination test would allow for drying the test load to any value below 6-percent RMC, including lower than 4-percent RMC.

DOE reviewed EN Standard 61121, which defines "automatic tumble dryer," as a dryer "which switches off the drying process when a certain RMC of the load is reached," and "non-automatic tumble dryer," as a dryer "which does not switch off the drying process when a certain RMC of the load is reached, usually controlled by a timer, but may also be manually controlled." The testing procedures in section 9 of EN Standard 61121 require that, for automatic termination control dryers, a program is selected which achieves the final RMC value given in Table 3 in the test standard.[23] The test standard adds additional clarification, stating that the test cycle be repeated using a different program if the program selected does not dry the test load to the specified RMC, and that if no program is available to dry the test load to the specified RMC, this fact is reported and the test is stopped. Section 9 of EN Standard 61121 also states that for non-automatic (timer) dryers, the dryer is operated for as long as required to achieve the final RMC specified in Table 3 in the test standard. The test standard adds that if the dryer does not reach the RMC after its maximum programmed time, this fact is reported and the test is stopped. DOE notes that although EN Standard 61121 provides descriptions of the test methods to use for each type of dryer, it does not provide any methodology to account for the energy consumed over- or under-drying the test load beyond a certain RMC for each type of dryer. According to the test procedures in EN Standard 61121, if the test load is dried to the same RMC, and therefore consumed the same amount of energy during the test cycle, a timer dryer and automatic termination control dryer would appear to consume the same amount of energy in real world use.

DOE also reviewed AS/NZS Standard 2442.1 for potential amendments to the DOE test procedure to more properly account for automatic cycle termination. DOE noted that AS/NZS Standard 2442.1 provides similar definitions of types of dryers as provided by EN Standard 61121, including "manual dryer," "timer dryer," and "autosensing dryer." In particular, AS/NZS Standard 2442.1 defines "autosensing dryer" as a dryer that can be preset to carry out at least one sequence of operations to be terminated by means of a system assessing, directly or indirectly, the RMC of the load. AS/NZS Standard 2442.1 also provides that when the drying temperature can be chosen independently of the program of an autosensing dryer, it shall be set to the maximum. DOE also notes that the combined definitions of manual and timer dryer in AS/NZS Standard 2442.1 are equivalent to the definition of "non-automatic tumble dryer" in EN Standard 61121.

AS/NZS Standard 2442.1 provides separate testing methods for manual/timer dryers and automatic termination control dryers, for which DOE noted the following differences. The manual/timer dryer test procedure requires that two test cycles be conducted. For the first test cycle, the dryer is operated until the RMC is greater than 6 percent and less than 7 percent. The test procedure is then repeated to obtain an RMC greater than 5 percent and less than 6 percent. In both cases, the test cycle is not allowed to advance into the cool-down period. From these results, the energy consumption required to obtain a final RMC of exactly 6 percent is linearly interpolated. The automatic termination control dryer test procedure requires that a drying program be selected to achieve a final RMC below 6 percent. The test cycle is run until immediately before the cool-down period begins. AS/NZS Standard 2442.1 allows for any final RMC value below 6 percent for automatic termination control dryers. If the RMC of the test load is above 6 percent for such a dryer, the test is invalid and a new test is run with a different drying program setting. For the automatic termination control dryer test, the moisture removed from the load and the energy consumed to reach the measured final RMC are recorded. DOE notes that the automatic termination control dryer test procedure does not provide a calculation for determining the energy consumption to obtain a final RMC of exactly 6 percent, as is done in the timer dryer test procedure.

AS/NZS Standard 2442.2 sets out the equations and procedures for calculating the values of the comparative energy consumption. The comparative energy consumption, which is determined through the projected annual energy consumption, includes an FU factor which accounts for the over-drying of clothes by manual/timer dryers. According to AS/NZS Standard 2442.2, the FU factor is equal to 1.1 for manual/timer controlled dryers and 1.0 for automatic termination control dryers; these values were estimated from research obtained in the United States. DOE notes that the AS/NZS Standard 2442.2 also provides a calculation for the "tested energy performance," which is the tested energy consumption divided by the mass of moisture removed. However, DOE notes that AS/NZS Standard 2442.2 only uses this value as a check, requiring only that the tested energy performance be less than 1.36 kilowatt hour (kWh) per kilogram (kg) of moisture removed. Therefore, DOE believes that for autosensing dryers the calculation for the comparative energy consumption, which is independent of the tested energy performance, takes into consideration the amount of energy consumed over-drying the test load below 6-percent RMC during the test cycle by simply adding this energy consumption to the overall annual energy consumption.

DOE was made aware in discussions with an Australian clothes dryer manufacturer that the 1.1 FU factor for timer dryers in the calculation of comparative energy consumption in AS/NZS Standard 2442.2 was questioned in the past by interested parties involved in the development of Australia/New Zealand testing standards as possibly being too low. However, DOE was informed that limited studies were conducted by interested parties that showed that this value was still appropriate, and, therefore, DOE is not proposing a different FU factor for timer dryers. As discussed later in this

[23] Table 3 of EN Standard 61121 specifies the final moisture content of the test load after drying for "dry cotton" programme as 0 percent with an allowable range of ±3 percent.

section, DOE is requesting comment on the FU factor for timer dryers.

DOE notes that appendix E of AS/NZS Standard 2442.1 provides specifications for the preparation of the standard damp test load, in which the load is soaked in a clothes washer for 10 minutes and then the water is extracted by a normal spin operation to reduce the RMC of the test load to between 85 and 90 percent. This process is similar to the test load preparation outlined in the DOE test procedure (with different RMC values and soaking times). However, AS/NZS Standard 2442.1 then requires that a final mass adjustment be made, such that the initial RMC of the test load is 90 percent (190 percent ± 0.02 kg of the bone dry weight) by adding water uniformly to the load in a very fine spray. Although AS/NZS Standard 2442.1 requires a much higher RMC than is representative of actual clothes washer loads, DOE still believes that the final mass adjustments to achieve a more exact initial RMC in AS/NZS Standard 2442.1 would improve the repeatability and help to reduce variation from test to test. DOE believes this would also allow for a more representative comparison (without the use of RMC correction factors for automatic termination control dryers based on limited test data) between timer dryers and automatic termination control dryers.

DOE believes that AS/NZS Standard 2442 provides testing methods and procedures which accounts for the amount of over-drying associated with automatic termination control dryers beyond a specified RMC, and effectively takes into consideration the accuracy of different automatic termination sensor technologies. DOE also believes that the testing methods provide an accurate and representative method for comparing the energy consumption between timer dryers and automatic termination control dryers. For these reasons DOE proposes to amend the DOE test procedure for clothes dryers to incorporate the individual test procedures for timer dryers and automatic termination control dryers in AS/NZS Standard 2442 with modifications as appropriate for the DOE test procedure. The following discussion describes the proposed amendments.

Based on the definitions in EN Standard 61121 and AS/NZS Standard 2442, DOE proposes to define "timer dryer" as "a dryer which can be preset to carry out at least one sequence of operations to be terminated by a timer, but may also be manually controlled," and "automatic termination control dryer" as "a dryer which can be preset to carry out at least one sequence of operations to be terminated by means of a system assessing, directly or indirectly, the moisture content of the load. An automatic termination control dryer with supplementary timer shall be tested as an automatic termination control dryer."

For the reasons discussed above, DOE proposes to amend sections 2.7.1, "Compact size dryer load," and 2.7.2, "Standard size dryer load," of the DOE test procedure for clothes dryers, which contain provisions for test load preparation, to add at the end of both sections the following requirement: "Make a final mass adjustment, such that the moisture content is 47 percent ± 0.33 percent by adding water uniformly to the load in a very fine spray." The ± 0.33 percent allowable RMC range was determined based upon the allowable range specified in AS/NZS Standard 2442.1 (190 percent ± 0.02 kg of the bone dry weight) for a 7-lb test load. DOE is also proposing that the procedure for dampening and extracting water from the test load specified in the current test procedure be changed to require that the moisture content of the test load be between 42 and 47 percent of the bone-dry weight of the test load, and would serve as an initial preparation step prior to the final mass adjustments to obtain a test load with an RMC of 47 percent proposed above. DOE notes that it is proposing to use a nominal initial RMC of 47 percent based on the proposed amendment to change the initial RMC from 70 percent to 47 percent, as discussed in section III.C.5.b. If DOE does not adopt this proposed amendment to change the nominal initial RMC, it would propose for the above mentioned amendment to first prepare the test load to 65- to 70-percent RMC and make adjustments to the moisture content to get 70-percent ± 0.33-percent initial RMC.

DOE also notes that section 2.7 of the existing clothes dryer test procedure regarding test load preparation requires that the test load be agitated in water whose temperature is 100° ± 5 °F. DOE recognizes that some residential clothes washers may use a default cold rinse cycle at the end of the wash cycle, which sections 2.6.1.2.1 and 2.6.3.1 of the current DOE clothes washer test procedure specifies to be 60° ± 5 °F. However, DOE does not have any data indicating whether a different water temperature for clothes dryer test load preparation would be more representative of current consumer usage habits. For this reason, DOE is not proposing any changes to the water temperature for clothes dryer test load preparation at this time. If consumer usage data is made available that indicates a 60° ± 5 °F water temperature is more representative of consumer usage, DOE may adopt an alternate approach specifying a 60° ± 5 °F water temperature for test load preparation in section 2.7 of the DOE clothes dryer test procedure. DOE invites comment on whether the existing water temperature of 100° ± 5 °F for test load preparation in the existing test procedure is representative of consumer usage habits, and, if not, what would be a representative value. In addition, DOE is unaware of how changes to the water temperature for clothes dryer test load preparation would affect the measured efficiency as compared to the existing test procedure. For this reason, DOE also requests data quantifying how changes to the water temperature for clothes dryer test load preparation would affect the measured efficiency as compared to the existing DOE test procedure, in particular for those units that are minimally compliant with current energy conservation standards.

DOE also proposes to amend section 3.3, "Test cycle," in the DOE test procedure for clothes dryers to include testing procedures specific to each type of dryer. For timer dryers, the clothes dryer shall be operated at the maximum temperature setting and, if equipped with a timer, at the maximum time setting. The load shall be dried to 5–6 percent RMC without the dryer advancing into cool down, resetting the timer if necessary. The procedure would then be repeated until the RMC of the test load is 4–5 percent. DOE requests comment on whether using the maximum temperature setting is representative of current consumer usage habits. DOE also requests comment on whether multiple temperature settings should be evaluated and averaged, and if so, how testing multiple temperature settings would affect the measured efficiency as compared to the existing DOE clothes dryer test procedure, which only measures the clothes dryer at the maximum temperature setting.

As part of the energy conservation standards rulemaking preliminary analyses, DOE conducted testing on a representative gas clothes dryer. To support the evaluation of the testing methods for automatic termination control dryers, DOE conducted additional testing on this gas clothes dryer to evaluate the effects of program settings that provide the maximum drying temperature and maximum dryness level (*i.e.,* lowest final RMC). DOE selected these settings to remain consistent with the current DOE clothes dryer test procedure, which specifies

that the maximum temperature setting be selected for the test cycle. The tests consisted of running the clothes dryer on the cycle settings discussed above with test load initial RMCs of 70 percent ± 0.33 percent, 56 percent ± 0.33 percent, and 47 percent ± 0.33 percent, and allowing the clothes dryer to run until the heater cycles off for the the final time (*i.e.,* immediately before the cool-down period begins). For each initial RMC, three identical tests were conducted to determine the repeatability of the test results. Table 0.5 below shows the results from this testing compared to the results of testing the same gas dryer according to the current DOE test prcocedure.

TABLE 0.5—DOE AUTOMATIC CYCLE TERMINATION TEST RESULTS

Initial RMC (%)	Test	Final RMC (%)	Per-cycle energy consumption (kWh)
70	Automatic Cycle Termination	0.6	3.018
	Current DOE	*3.3	*2.462
56	Automatic Cycle Termination	0.6	2.559
	Current DOE	*3.7	*2.001
47	Automatic Cycle Termination	0.5	2.252
	Current DOE	*3.4	*1.754

*Current DOE test procedure normalizes the per-cycle energy consumption equation to represent the energy consumption required to dry the test load to 4-percent RMC. In addition, the current DOE test procedure multiplies the per-cycle energy consumption by a fixed field use factor of 1.04 to account for over-drying energy consumption.

DOE noted that for all of the test runs, using the maximum temperature and dryness level settings resulted in the test load being dried to near bone dry (0.4-percent to 0.7-percent RMC). Using the data of the estimated RMC of the test load measured continuously during the test cycle, as discussed below, DOE also observed that for all of the test runs, the estimated RMC of the test load was below 1-percent RMC by the time the heater began cycling on/off. The increased amount of over-drying resulted in higher energy consumption, greater than the per-cycle energy consumption resulting from the same dryer being tested according to the DOE test procedure, which uses a fixed FU factor to account for over-drying energy consumption. DOE believes that different manufacturers may target different final RMCs for their highest dryness level setting. Based on the test results for this gas clothes dryer unit, DOE believes that the highest dryness level setting may be intended to dry the clothes load to near bone dry, beyond the target RMC of the DOE test procedure, and would not be appropriate for the proposed test cycle. For this reason, DOE does not intend to propose that the highest dryness level be specified for the test cycle. DOE believes that a "normal" drying program would be more representative of consumer usage habits and would more likely dry the clothes load to the target range specified in the DOE clothes dryer test procedure.

Based on additional testing, DOE is proposing an alternative approach in which, for automatic termination control dryers, a "normal" program shall be selected for the test cycle to be most representative of consumer usage. Where the drying temperature can be chosen independently of the program, it shall be set to the maximum. When the heater switches off for the final time at the end of the drying cycle, *i.e.,* immediately before the cool-down period begins, the dryer shall be stopped. If the final RMC is greater than 5 percent, the tests shall be invalid and a new run shall be conducted using the highest dryness level setting. Any test cycle in which the final RMC is 5 percent or less shall be considered valid. DOE is also proposing that for automatic termination control dryers, the cycle setting selected for the test be recorded. This would include settings such as the drying mode, dryness level, and temperature level. DOE requests comment on whether proposed cycle and settings are representative of current consumer usage habits. DOE also requests comment on whether multiple cycles and settings should be tested and how the results from those multiple tests should be evaluated, and if so, how testing multiple cycles and settings would affect the measured efficiency as compared to the existing DOE clothes dryer test procedure, which only requires that the clothes dryer be tested at the maximum temperature setting.

DOE notes that AS/NZS Standard 2442 specifies the maximum allowable final RMC for automatic termination control dryers as 6 percent. DOE, however, is unaware of any data indicating that a final RMC of 6 percent would be representative of current consumer usage habits. DOE also notes that using 5-percent RMC, as proposed in today's SNOPR, would remain within the range specified by the current DOE test procedure, which specifies 2.5- to 5-percent final RMC. DOE seeks comment and consumer usage data on whether a 6-percent final RMC target value would be more representative of current consumer usage habits. DOE also notes that AS/NZS Standard 2442 requires an initial RMC of 90 percent. As noted in section III.C.5.b, DOE researched appropriate initial RMC values based on clothes washer shipment-weighted average RMC, and believes that a value of 47-percent RMC would be most representative of clothes loads being dried after completion of a residential clothes washer cycle.

DOE notes that there are at least two ways to terminate the drying cycle during the test: (1) Termination before cool-down, or (2) termination at the end of the selected test cycle, including cool-down. As discussed above, section 4.2 of AS/NZS Standard 2442.1 requires that for automatic termination control dryers, the programmed test cycle be run until immediately before the cool-down period begins. Similarly, section 4.5.1 of AHAM–HLD–1–2009 requires that the automatic termination control dryer test cycle not be permitted to advance into the cool-down period. Alternatively, section 9.2.1 of EN Standard 61121 requires that the selected test cycle program be allowed to run until completion, including the cool-down period. Today's SNOPR proposes automatic cycle termination based on the provisions in AS/NZS Standard 2442 because it provides a more representative comparison of the energy consumption between automatic termination control dryers and timer dryers than EN Standard 61121. In addition, the proposed amendments to stop the test cycle immediately before the cool-down period will harmonize DOE test methods with industry and international test standards. However, DOE is considering the alternative

method of section 9.2.1 of EN Standard 61121 because it may provide incentives for energy-saving improvements in dryer controls. DOE recognizes that manufacturers may design products to use the residual heat during the cool-down period (*i.e.,* immediately after the heater has switched off for the final time) to continue to dry the clothes load while slowly spinning the drum to achieve a desired RMC.[24] DOE recognizes that inclusion of the cool-down period may make it possible for some manufacturers to design dryers that attain the desired RMC with lower total energy consumption. This potential for energy efficiency improvement would not be captured by the test methods proposed in today's SNOPR. In order to capture this real-world energy savings potential associated with the additional drying using residual heat during the cool-down period, DOE could adopt an alternate approach to include the measurement of the cool-down period as part of the proposed automatic cycle termination test methodology. Under an alternate approach, section 3.3.2 of the test procedure for automatic termination control dryers, instead of specifying that "when the heater switches off for the final time, immediately before the cool-down period begins, stop the dryer," would specify to "run the clothes dryer until the programmed cycle has terminated." DOE also notes that the inclusion or exclusion of the cool-down period under the proposed test method would not affect the ability to compare energy consumption test results between automatic termination control dryers and timer dryers in DOE's clothes dryer test procedure. DOE welcomes comment on whether the cool-down period should be included as part of the active mode test cycle for automatic termination control dryers. DOE is unaware of data showing the effects of including the cool-down period on the measured efficiency as compared to the existing test procedure. For this reason, DOE also welcomes data quantifying how including the cool-down period in the test cycle would affect the measured efficiency of clothes dryers as compared to the existing DOE test procedure, in particular for those units that are minimally compliant with current energy conservation standards.

Finally, DOE proposes to revise section 4, "Calculation of Derived Results from Test Measurements," of the DOE test procedure. DOE proposes to revise the FU factor credits in the current DOE test procedure to more appropriately account for automatic termination control dryers' over-drying energy consumption. Automatic termination control clothes dryers would receive an FU factor of 1.0 (instead of the 1.04 currently provided), with any over-drying energy consumption being added to the drying energy consumption to decrement EF. Based on the proposed test methods, an automatic termination control dryer that is able to dry the test load to close to 5-percent RMC, and thus minimize over-drying, would result in a higher measured efficiency than if it over-dried the test load to an RMC less than 5 percent. The energy consumed over-drying the test load would be included in the per-cycle energy consumption, and would result in a reduction in the measured EF. For timer dryers, DOE is proposing to use the results from the proposed test cycles (5–6 and 4–5 percent final RMCs) to interpolate the value of the per-cycle energy consumption required to dry the test load to exactly 5-percent RMC. DOE invites comment on whether such methodology appropriately credits both automatic termination control and timer clothes dryers.

DOE is unaware of any data or studies that would indicate that the 1.18 FU factor credit for timer dryers (to account for over- or under-drying test loads in real-world use) is inaccurate and not currently representative of consumer usage habits. For this reason, DOE does not intend to revise the 1.18 FU factor credit for timer dryers at this time. However, DOE recognizes that this field use factor for timer dryers was established at the same time the DOE clothes dryer test procedure was established, in 1981, and may not be representative of current consumer usage patterns. DOE is open to revising this value and welcomes data and comment on whether this value is appropriate.

In support of the residential clothes dryer energy conservation standards rulemaking, DOE conducted testing of ten vented clothes dryers and two vent-less clothes dryers (one of which was not an automatic termination control dryer) at an independent testing laboratory.[25] As part of this testing, DOE conducted a limited number of preliminary automatic cycle termination tests in order to analyze the various automatic termination technologies found in DOE's sample of selected dryers. DOE selected the AHAM 8-lb test load[26] instead of the 7-lb load specified in the DOE test procedure for standard-size clothes dryers in order to lengthen the test cycle times and better evaluate the function of the dryer controls as the test load approached low RMCs. The independent test lab conducting the clothes dryer tests used a data acquisition system to monitor estimated RMC of the test load continuously during the test cycle. The system used a platform weighing scale, along with an algorithm to account for buoyancy effects of hot air in the dryer, drum rotational effects, and other proprietary factors. With this data, DOE was able to estimate when the test load reached a certain RMC and how much energy was associated with over-drying for RMCs beyond that point. However, for the vent-less clothes dryer, the test lab was unable to accurately monitor the estimated RMC of the test load continuously to analyze over-drying because the moisture removed from the clothes load remained inside the dryer cabinet until a drain pump removed it, in contrast to vented dryers in which the moisture-laden air exits the dryer cabinet through the exhaust pipe. Therefore, the scale weight measurement used to calculate the estimated RMC was not meaningful for the vent-less units.

The automatic termination tests conducted by DOE consisted of running the test cycle in a user-programmable automatic termination mode and allowing the dryer to self-terminate the drying cycle using the various automatic termination sensor technologies. DOE monitored the energy consumption and estimated RMC of the test load during the test cycle from the starting time at 70-percent initial RMC to the time when the heater last cycled off (*i.e.,* immediately before the cool-down period). The specific focus was on analyzing the amount of over-drying energy consumed drying the test load to less than 5-percent RMC. DOE also applied a correction factor to the test data to account for the fact that the automatic cycle termination tests used the AHAM 8-lb test load instead of the DOE 7-lb test load. For a test reducing the nominal RMC of the test load from an initial 70 percent to a final 5 percent, an 8-lb test load would require 5.2 lb of

[24] The clothes dryer would also consume energy to spin the drum during the cool-down period that is currently not accounted for by the DOE test procedure.

[25] A summary of this testing is available in the preliminary technical support document for the residential clothes dryer energy conservation standards rulemaking and can be found online at *http://www1.eere.energy.gov/buildings/appliance_standards/residential/clothes_dryers.html.*

[26] The AHAM 8-lb test load is made up of the following mixed cotton items, which are intended to represent clothes items regularly laundered: 2 sheets, 1 table cloth, 2 shirts, 3 bath towels, 2 "T" shirts, 2 pillow cases, 3 shorts, 1 wash cloth, 2 handkerchiefs.

water to be removed during the test cycle, whereas a 7-lb test load would only require 4.6 lb of water to be removed. Because the automatic cycle termination tests with the AHAM 8-lb test load would consume more energy to dry the greater amount of water in the test load, DOE developed a correction factor by comparing the rates of energy consumption per nominal percent RMC reduced between the automatic cycle termination test, and the tests conducted according to the current DOE test procedure.

Figure 0.1 shows the over-drying energy consumption versus the final RMC for a number of different units tested, and, in some cases, different cycle settings. DOE noted that some of the tested units stopped the test cycle at or higher than 5-percent RMC, thereby not producing over-drying. For the remaining tests, the data show that over-drying the test load to lower final RMCs requires higher energy consumption, with a slightly exponential trend likely because it becomes more difficult to remove the final small amounts of moisture remaining in the test load. DOE did not observe any apparent relationship between the type of automatic cycle termination sensor technology used and the amount of over-drying. However, these tests were conducted using different testing methods than the methods proposed in today's SNOPR (*e.g.,* various automatic cycle termination settings). Therefore, DOE was unable to determine whether one type of sensor technology is more accurate, and thus more effective at preventing over-drying.

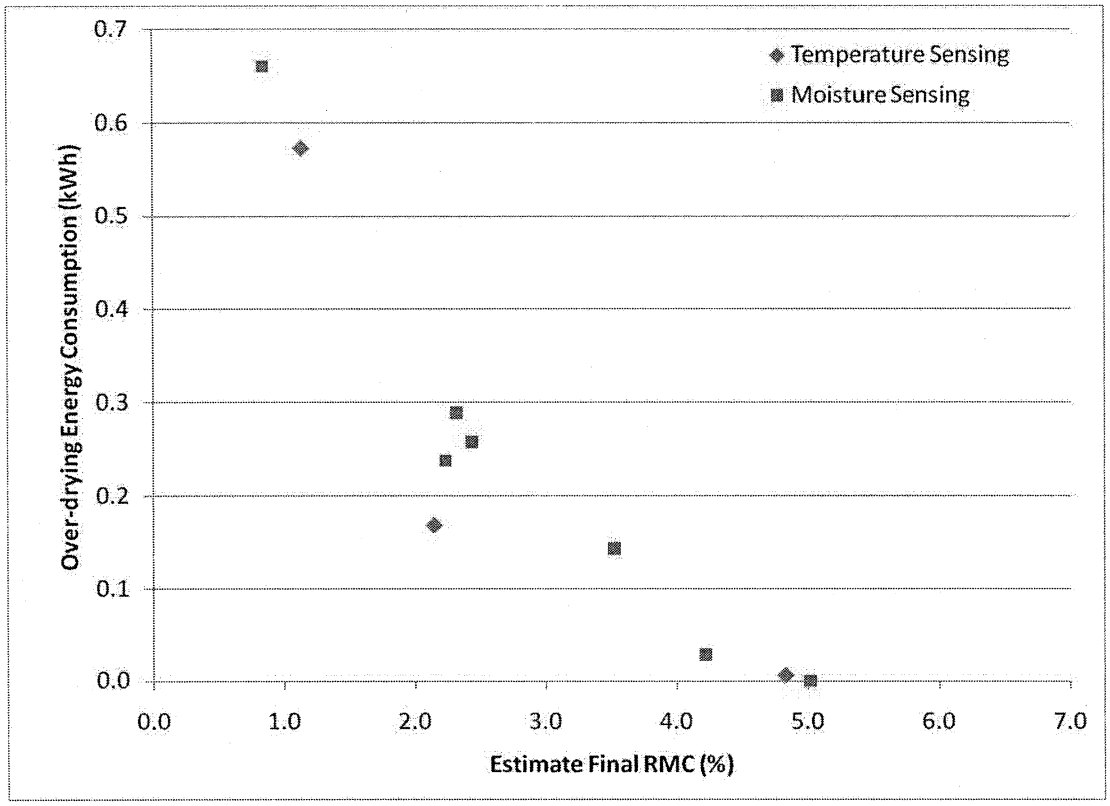

Figure 0.1 Automatic Cycle Termination Test Over-Drying Energy Consumption versus Estimated Final RMC

Figure 0.2 presents the data from one of the test runs for a vented baseline electric standard dryer, showing the cumulative energy consumption as the test load is dried. DOE observed that for this clothes dryer, the energy consumption versus the estimated RMC in the range of 70 percent to 10 percent shows a linear relationship. However, there appears to be an exponential trend when comparing the RMC below 5 percent to the over-drying energy consumption, with a significant increase in over-drying energy consumption when the RMC of the test load reaches approximately 3 percent or less. DOE observed these same trends in most of the other clothes dryers tested. As discussed above, this non-linearity at low RMC likely occurs because it becomes more difficult to remove the lesser amounts of moisture remaining in the test load.

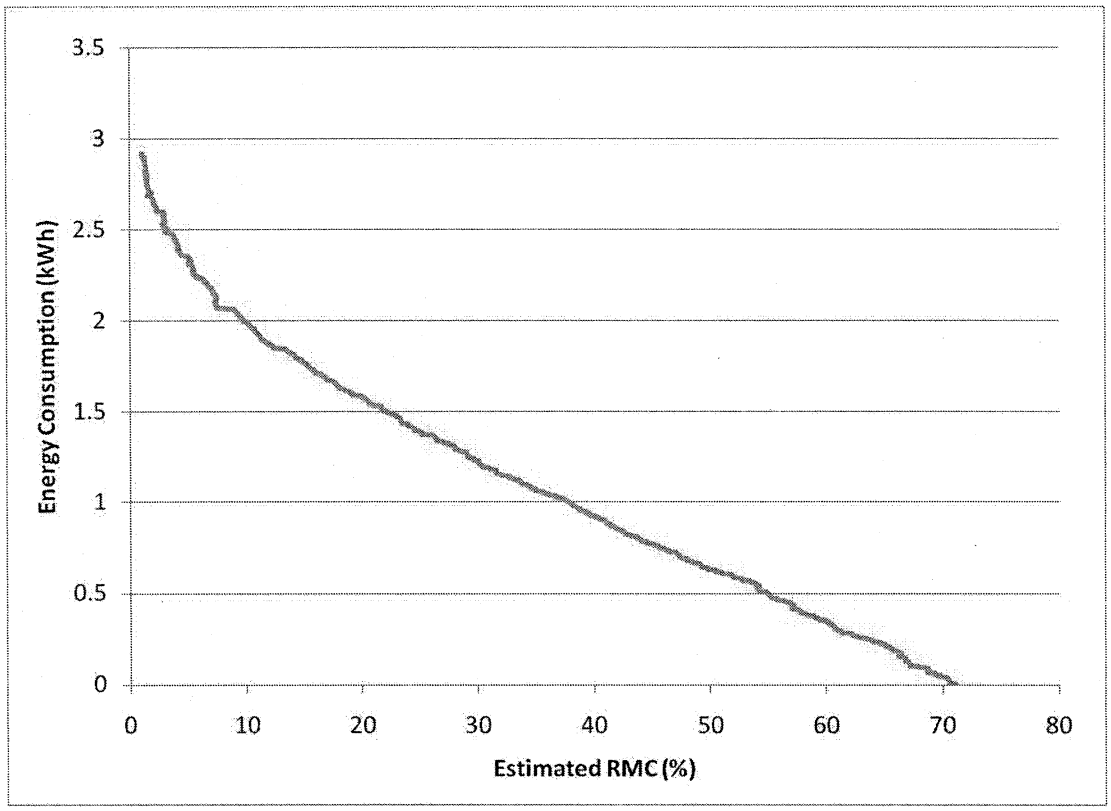

Figure 0.2 Automatic Cycle Termination Test Energy Consumption versus Estimated RMC during the Test Cycle

Because DOE had not yet developed the proposed test procedure for automatic cycle termination at the time that this testing was conducted, test conditions different than those proposed in the test procedure amendments were used; *i.e.,* various automatic cycle termination settings were applied to achieve the low RMCs, and an 8-lb AHAM test load comprising different materials and articles of clothing was used. Therefore, the testing results may not be representative of the results obtained when using the proposed automatic cycle termination testing methods.

DOE also analyzed how the proposed changes to the DOE clothes dryer test procedure, discussed above, would affect the measured EF of residential clothes dryers, as required by EPCA. EPCA also requires that DOE must determine how the EF of clothes dryers which are minimally compliant would be affected by the amendments to the test procedure, and based on this, amend the energy conservation standards as appropriate. (42 U.S.C. 6293(e)) As part of DOE's preliminary analyses for the energy conservation standards rulemaking for clothes dryers, DOE concluded that all clothes dryers currently available on the U.S. market that are covered under the current energy conservation standards are equipped with some form of automatic cycle termination sensing. Therefore, DOE analyzed, as discussed in the paragraphs below, how the proposed changes to the clothes dryer test procedure would affect the measured EF of residential clothes dryers according to the test procedure for automatic termination control dryers.

Because DOE is changing the FU credit from 1.04 to 1.0 for automatic termination control dryers, a dryer which has an automatic cycle termination setting that is capable of drying the test load to very close to 5-percent RMC, and therefore had little over-drying energy consumption, would receive a 4-percent credit in EF compared to the current DOE test procedure. DOE also notes that because the proposed test procedure requires the test load to be dried to a target final RMC of 5 percent (or lower), the measured energy consumption would decrease and EF increase if the target RMC of 5 percent is achieved (no over-drying), as compared to the current DOE test procedure which uses a correction factor in order to determine the energy consumption required to dry the test load to a final RMC of 4 percent. As discussed below for timer dryers, based on the differences in the calculations of per-cycle energy consumption using a starting RMC of 47 percent, if the target final RMC of 5 percent is achieved, DOE believes that the EF would increase by about 2.4 percent using the proposed test procedure as compared to the current DOE test procedure.

DOE believes that a clothes dryer which is minimally compliant with current energy conservation standards would likely use a less accurate automatic termination control system, and that such a dryer would possibly over-dry the test load below 5-percent RMC, such that the energy consumption and measured EF would be equivalent to that measured by the existing DOE clothes dryer test procedure. For this reason, DOE does not believe that any changes to the current energy conservation standards as a result of the proposed amendments to the test procedure to account for automatic cycle termination would be warranted. However, DOE welcomes comment on this tentative conclusion, as well as test data of minimally compliant clothes dryers tested according to the proposed automatic termination control dryer test procedure to determine whether changes to the current energy

conservation standards for dryers would be warranted.

The proposed test procedure for timer dryers would provide the energy consumption required to dry the test load from 47-percent RMC to 5-percent RMC. DOE notes that the 5-percent final RMC falls within the range of RMC specified by the current test procedure (2.5–5 percent final RMC). However, in the current DOE clothes dryer test procedure, the per-cycle energy consumption calculation contains a correction factor which is intended to normalize the measured energy consumption to represent the energy consumption required to dry the test load to 4-percent RMC.[27] Because the proposed test procedure for timer dryers would measure the energy consumption to reach a final RMC of only 5 percent, the energy consumption would be lower, and EF higher, as compared to the current DOE test procedure, which measures the energy consumption to reach a final RMC of 4 percent. Based on the differences in the calculations of per-cycle energy consumption, DOE believes that the EF would increase by about 2.4 percent using the proposed test procedure as compared to the current DOE test procedure, assuming that an initial RMC of 47 percent would be used in both cases. However, because DOE is unaware of any clothes dryers controlled only by a timer currently on the U.S. market, as noted above, DOE does not intend to revise the current energy conservation standards based on the proposed amendments to the test procedure.

3. Test Procedure for Vent-Less Clothes Dryers

DOE noted in the October 2007 Framework Document that a potential limitation of the clothes dryer test procedure had been identified for vent-less dryers, which includes condensing clothes dryers and combination washer/dryers. (Framework Document, STD No. 1 at p. 5) Manufacturers of vent-less clothes dryers commented that the current clothes dryer test procedure is unable to test this type of clothes dryer. Vent-less clothes dryers do not vent exhaust air to the outside as a conventional dryer does. Instead, they typically use ambient air in a heat exchanger to cool the hot, humid air inside the appliance, thereby condensing out the moisture. Alternatively, cold water can be used in the heat exchanger to condense the moisture from the air in the drum.[28] In either case, the dry air exiting the drum is reheated and recirculated in a closed loop. Thus, there is no moisture-laden exhaust air to vent outside, only a wastewater stream that either can be collected in an included water container or discharged down the household drain. However, the process of condensing out the moisture in the recirculated air results in higher energy consumption than a conventional dryer, and it can significantly increase the ambient room temperature.

Manufacturers of condensing clothes dryers have, in the past, applied for waivers from the DOE test procedure for these products on the basis that the test procedure did not contain provisions for vent-less clothes dryers. On November 15, 2005, LG filed an Application for Interim Waiver and Petition for Waiver from the clothes dryer test procedure for its condensing dryer model because it asserted that the current clothes dryer test procedure applies only to vented clothes dryers. The current test procedure requires the use of an exhaust restrictor to simulate the backpressure effects of a vent tube in an installed condition. Condenser dryers do not have exhaust vents as they recirculate rather than exhaust the process air. LG further stated that DOE's test procedure for clothes dryers provides no definition or mention of condensing clothes dryers. LG also noted that it knew of no other test procedure that would rate its condensing dryer products.

On August 23, 2006, DOE published the LG Petition for Waiver. 71 FR 49437. In that notice, DOE presented an alternate test procedure for vent-less dryers to address the potential limitation of the clothes dryer test procedure. 71 FR 49437, 49439.[29] The alternate test procedure consisted of adding separate definitions for a "conventional clothes dryer" (which is vented) and a "condensing clothes dryer" (which is a vent-less design). Further, the alternate test procedure presented in the LG Petition for Waiver qualified the requirement for an exhaust simulator so that it would only apply to conventional clothes dryers. In that notice, DOE stated that it is seeking comment on the proposed modification to the test procedure. In response, Whirlpool submitted a comment agreeing with the alternate test procedure, although it recommended clarifications to DOE's proposed definitions. 73 FR 66641, 66642 (Nov. 10, 2008). On November 10, 2008, DOE approved the LG Petition for Waiver and determined that LG should not be required to rate or test the subject clothes dryer model according to the existing test procedure. The notice did not include further rulemaking actions on the presented alternate test procedure. 73 FR 66641.

Under DOE's regulations for petitions for waiver from the energy conservation program, codified in 10 CFR 430.27(m), DOE is required to publish a NOPR within 1 year of the granting of any waiver. The NOPR would propose amending its regulations to eliminate any need for continuation of the waiver. DOE is required to subsequently publish a final rule as soon thereafter as practicable. The waiver would then terminate on the effective date of the final rule. Publication of this SNOPR addressing, in part, test procedures for vent-less clothes dryers, would satisfy these regulatory requirements for the LG waiver.

DOE notes that there are currently no existing Federal energy conservation standards for vent-less clothes dryers. In the October 2007 Framework Document, DOE stated that it intended to analyze potential energy conservation standards for vent-less clothes dryers. In particular, DOE proposed to analyze vent-less clothes dryers as a separate product class, recognizing the unique utility that vent-less clothes dryers offers to consumers (the ability to be installed in conditions in which vented clothes dryers would be precluded due to venting restrictions). DOE proposed to analyze two product classes for vent-less clothes dryers: (1) Vent-less electric compact (240V) clothes dryers, and (2) electric combination washer/dryers. DOE also requested comment in the October 2007 Framework Document on the alternate test procedure for vent-less clothes dryers proposed in the LG Petition for Waiver.

ALS and CEE both commented in response to the October 2007 Framework Document in support of revising the clothes dryer test procedure to test vent-less clothes dryers. (ALS, STD No. 6 at p. 1; CEE, STD No. 10 at pp. 1–2) AHAM also supported including a provision to test vent-less clothes dryers, but added that a single procedure for vented and vent-less clothes dryers may not be applicable. (AHAM, STD No. 8 at p. 1) At the October 2007 public meeting, AHAM commented that adding ventless dryers

[27] The correction factor in the current test procedure normalizes the measured energy consumption to represent the energy consumption required to dry the test load from 70-percent initial RMC to 4-percent final RMC. As discussed in section III.C.5.b, DOE is proposing to change the initial RMC from 70 to 47 percent. DOE has considered the effects of changing the initial RMC from 70 to 47 percent on the measured EF in section III.C.5.b.

[28] This is a typical approach for combination washer/dryers, which wash and dry a load in the same drum.

[29] DOE's alternate test procedure for vent-less dryers was described in the LG Petition for Waiver.

to the test procedure is not as simple as closing a vent off, but may require a more significant change to appropriately measure energy use. AHAM added that it would work on developing such a test procedure for DOE to measure energy use. (AHAM, Public Meeting Transcript, STD No. 4.6 at pp. 18–19) AHAM commented that the energy calculation for vent-less clothes dryers should take a more "holistic" approach than those for vented clothes dryers because vent-less clothes dryers can have an effect on energy use outside of their system (*i.e.,* impacts on HVAC loads). (AHAM, Public Meeting Transcript, STD No. 4.6 at p. 51; AHAM, STD No. 8 at p. 3) Whirlpool commented that in light of increasing interest by manufacturers in offering vent-less clothes dryers in North America, it would work through AHAM to propose an appropriate test procedure. (Whirlpool, STD No. 7 at p. 2) Whirlpool also noted that combination washer/dryers would require a unique test procedure, and that DOE should weigh the effort to create such a test procedure against the potential for energy savings from a product with very modest annual unit sales. (Whirlpool, STD No. 7 at p. 3)

DOE notes that accounting for ambient space conditioning impacts would require significant changes to the current test procedure. According to EPCA, any test procedures prescribed or amended under this section shall be reasonably designed to produce test results which measure energy efficiency, energy use, water use, or estimated annual operating cost of a covered product during a representative average use cycle or period of use. (42 U.S.C. 6293(b)(3)) DOE believes that accounting for impacts on HVAC loads on energy use of a household would be beyond the scope of a test procedure to measure the energy use of a product, as prescribed by EPCA. DOE also notes that other DOE test procedures for products such as refrigerators, ovens, and water heaters which could impact HVAC loads, do not take into account these impacts on ambient space conditioning in the test procedure. DOE also notes that for the energy conservation standards rulemaking for water heaters, DOE considered the effects of heat pump water heaters on house heating loads as part of the energy-use characterization, and did not propose to amend the test procedure to account for such energy use. For these reasons, DOE is not proposing to amend the DOE clothes dryer test procedure to account for the ambient space conditioning impacts, but will consider such impacts as part of the concurrent energy conservation standards rulemaking.

In order to analyze potential energy conservation standards for vent-less clothes dryers, provisions must be added to the DOE clothes dryer test procedure for measuring the energy efficiency performance in vent-less clothes dryers. Therefore, DOE determined to consider such amendments to its clothes dryer test procedure. DOE first examined the test procedure proposed as part of the LG Petition for Waiver. DOE conducted limited tests of vent-less clothes dryers at an independent testing laboratory according to those amendments. DOE tested one vent-less electric compact (240V) clothes dryer and one vent-less combination washer/dryer, conducting three test runs per unit. Table 0.6 shows the results from DOE's tests. DOE observed no variation in EF from test to test within the precision of the proposed test procedure for the vent-less electric compact (240V) dryer, and less than 2-percent variation in EF from test to test for the vent-less combination washer/dryer. Based on this limited testing, the proposed testing procedures appear to produce repeatable results. DOE welcomes additional test data for vent-less clothes dryers tested according to the alternate test procedure presented in the LG Petition for Waiver, in particular to analyze the test-to-test variation for individual units tested multiple times.

TABLE 0.6—DATA FROM DOE TESTING OF VENT-LESS CLOTHES DRYERS

Test run	Energy factor *(lb/kWh)*	
	Vent-less electric compact (240 V)	Vent-less combination washer/dryer
1	2.37	1.95
2	2.37	1.96
3	2.37	1.93

In reviewing alternate test procedures for vent-less clothes dryers for potential amendments to the DOE test procedure, DOE also investigated testing conditions and methods specified in test standards used internationally. DOE is aware of international test standards for clothes dryers used in Europe, China, Australia, and New Zealand which include provisions for vent-less or condensing clothes dryers.

DOE evaluated EN Standard 61121, and identified as relevant the test procedures for condensing (vent-less) clothes dryers, as well as certain test conditions which affect all clothes dryers. These test procedures provide greater specificity than the alternate test procedure presented in the LG Petition for Waiver, and details of the relevant sections of EN Standard 61121 are presented below.

Section 3 of EN Standard 61121, "Definitions and symbols," provides definitions for various types of dryers, including:

"*3.1*
tumble dryer
appliance in which textile material is dried by tumbling in a rotating drum, in which heated air is passed"

"*3.2*
air vented tumble dryer
tumble dryer with a fresh-air intake which is heated and passed over the textile material and where the resulting moist air is exhausted into the room or vented outside,"

"*3.3*
condenser tumble dryer
tumble dryer in which the air used for the drying process is dehumidified by cooling."

Section 6.1 of EN Standard 61121, "General," which addresses general conditions for measurements, provides in part the following conditions for dryer installation and, in particular, installation without an exhaust duct:

"The measurements shall be carried out on a tumble dryer installed and used in accordance with manufacturer's instructions, except as required by this standard."

* * * * *

"Where the tumble dryer is intended for use without a duct (i.e., the tumble dryer is intended to be vented into the room), the tumble dryer shall be tested as supplied without a duct."

* * * * *

"Where a manufacturer gives the option to use the tumble dryer both with and without a duct, the tumble dryer shall be tested without a duct."

Section 6.2.3 of EN Standard 61121, "Ambient temperature," requires that the ambient temperature of the room in the vicinity of the dryer shall be maintained at 23 ± 2 degrees Celsius (°C) throughout the test.

Section 9 of EN Standard 61121, "Performance tests," provides the test procedures for performance tests of the main tumble dryer functions. In particular, section 9.1, "General," states:

* * * * *

"Tumble dryers shall be configured with or without a duct as specified in 6.1."

"All tests shall be started with the tumble dryer at ambient temperature conditions according to 6.2.3."

Note: This can be done by leaving the machine at ambient conditions for at least 12 h [hours].

Section 9.2.1 of EN Standard 61121, "Drying tests general," which details the procedures for the drying test, provides in part the following:

"For automatic tumble dryers those programmes are selected which aim to achieve the final moisture values given in table 3."[30]

* * * * *

"The minimum number of valid cycles shall be five * * * If the dryer is automatically stopped during a cycle and the reason is that the condensation box is full of water, the fact is reported and the test is stopped."

"**Note:** If the manufacturer gives the option to use a condenser tumble dryer both with or without condensation box, the dryer should be tested with the condensation box."

Section 9.2.1 also provides that water and energy consumption for the cycle shall be reported. The water consumption would be applicable to condensing clothes dryers which use water to condense moisture in the drum exhaust air.

Section 10.3 of EN Standard 61121, "Water consumption," provides for the calculation of the corrected test cycle water consumption corresponding to the nominal final RMC (specified in Table 3 of EN Standard 61121).

EN Standard 61121 also provides a method for measuring the efficiency of condensing moisture from the test load. Section 9.2.2 of EN Standard 61121, "Condensation efficiency," states the following:

"The condensation efficiency for a condenser tumble dryer, shall be measured using the dry cotton programme and setting selected to achieve the "dry cotton" result (this means the equivalent timer setting for a timer dryer) in the drying test."

"The mass of the test load is measured immediately before and after the cycle. The mass of the moisture condensed during the cycle and collected in the container is determined. The first cycle after a period of non-operation longer than 36 h shall not be used for evaluation."

"During the time between two cycles the door of the tumble dryer shall be closed except for loading."

Section 10.5 of EN Standard 61121, "Condensation efficiency," subsequently provides the following methods and calculations for the condensation efficiency:

"Efficiency of condensation, C, is determined according to 9.2.2 as the ratio between the water produced during the cycle W_w, relative to the total mass of water evaporated from the load."

* * * * *

"Efficiency of condensation is the mean value of a minimum of four valid cycles."

"**Note:** Due [to] this requirement the first run of a condensation efficiency test has normally to be discarded."

DOE notes that AS/NZS Standard 2442.1 also includes provisions for condensing clothes dryers. AS/NZS Standard 2442.1 states that the scope of the standard specifically includes condenser dryers and the dryer function of combination washer/dryers. Section 1.4.4 of AS/NZS Standard 2442.1, "Dryer types," provides the following definitions for vented and condenser clothes dryers:

"*Vented electric rotary clothes dryer*—a clothes dryer in which air (usually heated) is passed through the load while it is being tumbled. The air and accumulated moisture is then discharged to the atmosphere."

"*Condenser electric rotary clothes dryer*—a clothes dryer in which air (usually heated) is passed through the load while it is being tumbled. The moisture thus accumulated is then separated from the air within the dryer, converted to a liquid, and either drained or stored for later removal."

DOE notes that these definitions are essentially the same as those provided in EN Standard 61121. Both definitions state that the moisture in the air from the drying process is dehumidified, but AS/NZS Standard 2442.1 adds more detail providing that the liquid can either be drained or stored for later removal. Section 3.4 of AS/NZS Standard 2442.1, "Exhaust," also provides the following exhaust conditions for installation, which DOE notes are very similar to those provided in EN Standard 61121, and provides conditions to cover all possible dryer configurations:

"3.4.3 Dryers with optional exhaust duct—Where a dryer is designed to operate with an optional exhaust duct, the dryer shall be tested without the duct fitted, in accordance with the manufacturer's instructions for operating without a duct."

"3.4.4 Dryers without exhaust duct—Where a dryer is designed solely to operate without an exhaust duct, the test shall be carried out in accordance with the recommendations of the manufacturer."

Similar to EN Standard 61121, AS/NZS Standard 2442.1 provides that for condensing clothes dryers, as applicable, the volume of supply water consumed be recorded at the end of the test cycle. The test procedure also provides a calculation of the water consumption per test cycle (used to reach the specified final RMC).

DOE also considered comments that Whirlpool submitted as part of the residential clothes dryer and room air conditioner energy conservation standards rulemaking, providing amendments to the DOE test procedure for clothes dryers to include methods for the testing of condensing dryers.[31] These suggested amendments were largely based upon EN Standard 61121. Whirlpool stated that section 1 of the DOE test procedure for clothes dryers must incorporate definitions of an "exhausted dryer," "non-exhausted dryer," and a "condensing dryer." Whirlpool suggested the following definitions:

"An exhausted Dryer has a blower system which is intended to deliver the heated, moist air from the Drum cavity into a duct system external to the Dryer and this duct system is exhausted into the outdoors."

"A non-exhausted Dryer is intended to be used without an external duct system and has no provision to connect to such a duct system."

"A condensing Dryer is a non-exhausted tumble Dryer in which the air used for the drying process is dehumidified by using room ambient air for cooling. The blower system used for circulating room ambient air is independent of the heated moist air from the Drum cavity."

(Whirlpool, STD No. 13 at p. 20).

Whirlpool also stated that section 2.1 of the DOE test procedure for clothes dryers must be updated to include non-exhausted dryers. Whirlpool proposed that "[w]here the tumble Dryer is defined as a non-exhausted Dryer and is intended for use without a duct [t]he tumble Dryer shall be tested as supplied without a duct," and that "[w]here the tumble Dryer is defined as an exhausted Dryer and is intended for use with a duct [t]he Dryer exhaust shall be

[30] Table 3 of EN Standard 61121 specifies the final moisture content of the test load after drying for "dry cotton" programme as 0 percent with an allowable range of −3 to +3 percent.

[31] Whirlpool, 2007. "U.S Department of Energy Test Procedure Change for Condensing Clothes Dryers." September 4, 2007. Docket No. EE–2007–BT–STD–0010, Comment Number 13.

restricted by adding the AHAM exhaust simulator described in 3.3.5 of [AHAM Standard HLD–1–2009].” *Id.*

With regard to the pre-conditioning cycle in section 2.8 of the DOE test procedure for clothes dryers, Whirlpool proposed that, in order to align with the European energy procedure, the DOE test procedure should incorporate the following condensing dryer pre-conditioning cycle: “For condensing Dryers, the Dryer steady state temperature must be equal to ambient room temperature according to 2.2 before the start of all test runs. Note: this can be done by leaving the machine at ambient room conditions for at least (12) hours between tests but not more than (36) hours between tests.” *Id.* at 21. In addition, Whirlpool stated that in order to align with the European energy procedure and for consistency in results, the DOE test procedure should incorporate the following condenser dryer test procedure steps:

“If the manufacturer gives the option to use a condensing tumble Dryer both with or without condensation box, the Dryer shall be tested with the condensation box.”

“If the Dryer is automatically stopped during a cycle and the reason is that the condensation box is full of water, the test is stopped, and the run is invalid.”

“During the time between two cycles, the door of the tumble Dryer shall be closed except for loading.”

“The first cycle after a period of non-operation longer than (36) hours shall not be used for evaluation.”

“Results from the first test run on an unused (dry) condensing Dryer are invalid and cannot be used for the energy efficiency calculations.”

“The Condenser unit of the Dryer must remain in place and not be taken out of the Dryer for any reason between tests.”

Id. at 22.

After review of the definitions detailed in EN Standard 61121 (section 3), AS/NZS Standard 2442.1 (section 1.4), and Whirlpool’s proposed amendments to the DOE test procedure, DOE concludes that the definitions of “conventional clothes dryer” and “condensing clothes dryer” proposed in the LG Petition for Waiver are essentially the same as the definitions discussed above from the international test standards. Therefore, DOE proposes to define “conventional clothes dryer” as “a clothes dryer that exhausts the evaporated moisture from the cabinet,” and “vent-less clothes dryer” as “a clothes dryer that uses a closed-loop system with an internal condenser to remove the evaporated moisture from the heated air. The moist air is not discharged from the cabinet.” DOE is proposing to use the term “vent-less” to reflect the actual consumer utility (*i.e.* no external vent required) instead of “condensing” because of the possibilty of market availability of vented dryers that also condense. DOE invites comment on these proposed definitions.

After evaluating the installation conditions detailed in EN Standard 61121 (section 6.1), AS/NZS Standard 2442.1 (section 3.4), and Whirlpool’s proposed amendments to the DOE test procedure, DOE believes that the proposed amendments regarding the exhaust duct installation requirements in DOE’s publication of the LG Petition for Waiver are appropriate for testing vent-less dryers, along with additional clarifications. DOE notes that the exhaust duct installation conditions proposed in the LG Petition for Waiver simply remove the requirement of installing an exhaust simulator for a clothes dryer without an exhaust duct (vent-less dryer). The international test standards, detailed above, similarly require that a clothes dryer without an exhaust duct be tested as such, but also provide additional conditions for a clothes dryer with an optional exhaust duct, stating that such a dryer should be tested without the duct installed. DOE believes these installation conditions provide additional clarity and cover all possible clothes dryer configurations as well as provide harmonization with international test standards. Therefore, DOE proposes in today’s notice to amend section 2.1 of the DOE test procedure for clothes dryers, which covers installation conditions, to qualify the requirement for an exhaust simulator so that it would only apply to conventional clothes dryers, with additional clarification that vent-less clothes dryers be tested without the exhaust simulator installed and, if a dryer is designed to operate with an optional exhaust duct, the dryer shall be tested without the duct installed.

DOE also believes that the provisions in EN Standard 61121 regarding a condensation box provides additional clarity in an effort to cover all possible vent-less dryer configurations. For this reason, DOE is proposing to revise section 2.1, “Installation,” of the DOE test procedure for clothes dryers to add the requirement in the installation conditions that “if a manufacturer gives the option to use a vent-less dryer with or without a condensation box, the dryer shall be tested with the condensation box installed.” In addition, DOE proposes to amend the testing cycle measurement in section 3.3 of the DOE test procedure for clothes dryers to add that “if the dryer automatically stops during a cycle and the reason is that the condensation box is full of water, the test is stopped, and the test run is invalid.” This requirement would ensure consistency of the measured efficiency.

Also regarding installation conditions, DOE believes that Whirlpool’s proposal to add a requirement that the condenser unit of the dryer must remain in place and not be taken out of the dryer for any reason between tests would provide additional clarification to the test procedure and ensure that all manufacturers are testing products under the same conditions. For this reason, DOE proposes in today’s SNOPR to add in section 2.1 of the DOE clothes dryer test procedure regarding installation the provision that “the condenser unit of the dryer must remain in place and not be taken out of the dryer for any reason between tests.” DOE invites comment on the proposed amendments regarding installation conditions, including exhaust configuration, condensation box, and condenser unit requirements.

DOE believes that the methodology in the current DOE test procedure for conventional (vented) dryers can be applied to vent-less dryers, with a number of added clarifications. Based upon starting test conditions detailed in EN Standard 61121 (section 9.1) and Whirlpool’s proposed amendments, DOE agrees that section 2.8 of 10 CFR 430 subpart B appendix D will likely need to be revised to provide a consistent and repeatable approach for vent-less clothes dryers. Currently, this section, which addresses clothes dryer preconditioning, requires that before any test cycle is initiated, the clothes dryer must be operated without a test load in the non-heat mode for 15 minutes or until the discharge air temperature varies less than 1 °F during a period of 10 minutes, whichever is longer. Because a vent-less clothes dryer does not have discharge air for which the temperature can be measured, DOE proposes to revise this section to require that, for vent-less clothes dryers, the steady-state temperature must be equal to ambient room temperature according to section 2.2 of appendix D before the start of all test runs, with a note that this can be done by leaving the machine at ambient room conditions for at least 12 hours but not more than 36 hours between tests. DOE also proposes to revise section 2.8, “Test loads,” of the DOE clothes dryer test procedure to add a qualification to the procedure for pre-conditioning that it applies only to vented clothes dryers.

DOE agrees with the provisions in section 9.2.2 of EN Standard 61121 and Whirlpool’s proposed amendments that specify that the first cycle after a period of non-operation longer than 36 hours

shall not be used for evaluation, and that, between test cycles, the door of the tumble dryer shall be closed except for loading (and unloading). DOE notes that this would make the first test run on an unused (dry) condensing dryer invalid and could not be used for the energy efficiency calculations. DOE believes these provisions will maintain a clear and repeatable testing procedure and produce accurate and representative results. Therefore, DOE proposes in today's notice to incorporate these provisions into section 3.3 of the DOE clothes dryer test procedure. DOE welcomes comment on these provisions as well as data comparing test results allowing longer or shorter than 36 hours of non-operation to evaluate the repeatability of test results.

DOE notes that section 9.2.1 of EN Standard 61121 requires that at least five valid test cycles be performed and the results averaged. DOE's clothes dryer test procedure does not specify multiple test cycles to obtain the representative EF, and DOE is not aware of data suggesting that test-to-test variation is sufficient to warrant a requirement for more than one test cycle. Therefore, DOE is not proposing amendments addressing the number of valid test cycles. DOE welcomes input and data on this issue.

DOE also investigated the water consumption of vent-less clothes dryers. Based upon its review of products on the U.S. market, DOE is unaware of any vent-less electric compact (240V) condensing dryers which use water in a heat exchanger to condense moisture in the air exiting the drum; instead, available units use an air-to-air heat exchanger. DOE's review also showed that only vent-less combination washer/dryers use water to condense moisture in the air exiting the drum for products on the market in the United States. As part of its energy testing of clothes dryers conducted at an independent laboratory, DOE measured the water consumed by a vent-less combination washer/dryer according to the DOE clothes dryer test procedure (without the use of the exhaust simulator). The test procedure was conducted three times, and the combination washer/dryer consumed on average 3.25 gallons (27.1 lb) of cold water, with a range of 2.83 gallons to 3.95 gallons. Although this water consumption is not insignificant, combination washer/dryers represent a very small niche of the U.S. clothes dryer market and, therefore, DOE believes that the benefit of measuring water use for vent-less dryers is outweighed by the burden that would be placed on manufacturers to measure water consumption. For this reason, DOE is not proposing amend the DOE test procedure to include a requirement to measure the water consumption for vent-less condensing clothes dryers. DOE welcomes comment and data on the water consumption of vent-less clothes dryers and whether measurement of water consumption should be included in the DOE clothes dryer test procedure.

DOE believes the results from DOE's tests at an independent laboratory are representative of the repeatability of results that would be observed using the testing procedures proposed in today's SNOPR. Although DOE's tests were conducted using the alternate test procedure in the LG Petition for Waiver, DOE believes that the additional clarifications proposed in today's SNOPR would not significantly affect these testing results. Therefore, DOE believes that the amendments to the test procedure to for vent-less clothes dryers proposed in today's notice would produce accurate and repeatable measurements of CEF.

The proposed amendments for vent-less clothes dryers would cover products which are not covered under the current DOE test procedure. For this reason, the proposed amendments in today's SNOPR for vent-less clothes dryers would not affect the existing EF ratings of residential clothes dryers. Therefore, no change to the current clothes dryer energy conservation standards would be required. (42 U.S.C. 6293(e))

4. Detergent Specifications for Clothes Dryer Test Procedure Preconditioning

Section 2.6.3 of the current DOE clothes dryer test procedure specifies that the test cloth be preconditioned by performing a 10-minute wash cycle in a standard clothes washer using AHAM Standard Test Detergent IIA. 10 CFR part 430, subpart B, appendix D, section 2.6.3. This detergent is obsolete and no longer supplied by AHAM or other suppliers. The current AHAM standard detergent is identified as AHAM standard test detergent Formula 3. Because AHAM Standard detergent IIA is no longer available to manufacturers, DOE proposes to amend section 2.6.3 of the clothes dryer test procedure to specify the use of AHAM standard test detergent Formula 3 in test cloth preconditioning.

Clothes washer tests that DOE conducted with AHAM standard test detergent Formula 3 suggest that the dosage that is specified in section 2.6.3(2) of the DOE clothes dryer test procedure for AHAM Standard detergent IIA—6.0 grams (g) per gallon of water—may no longer be appropriate, because at the end of clothes washer test cloth preconditioning, which specifies the same dosage, undissolved clumps of detergent were observed in the cloth load. Further, DOE conducted extractor tests that indicate that detergent dosage impacts RMC measurements by as much as several percent.

AHAM's clothes dryer test standard, AHAM HLD–1–2009, specifies a standard test detergent Formula 3 dosage of 27 g + 4.0 g/lb of base test load for test cloth pre-treatment. For DOE's clothes dryer test cloth preconditioning, the current test procedure specifies that clothes washer water fill level be set to the maximum level, regardless of test load size. In today's notice, DOE is proposing to amend the test load size for standard-size clothes dryers to 8.45 lb ±.085 lb (see section III.C.5.c.), which would result in a detergent dosage for AHAM standard test detergent Formula 3 of 60.8 g. DOE believes that the detergent concentration should be set by the pounds of test cloth in this standard-size test load because this load is more closely matched to the maximum water fill level than is the compact-size test load (3.0 lb ±.03 lb.) For preconditioning a compact-size test load, DOE proposes that the same detergent dosage would be specified because the water fill level would remain the same as for the larger load, resulting in the same concentration of the water/detergent mixture. 10 CFR part 430, subpart B, appendix D, revised section 2.6.3.

Due to the observed problems associated with the current dosage specification in the DOE clothes dryer test procedure, DOE is tentatively proposing in today's notice to amend section 2.6.3 of the clothes dryer test procedure to require 60.8 g of AHAM standard test detergent Formula 3 for test cloth preconditioning, but is also seeking further information on the appropriate detergent concentration.

DOE is unaware of any data indicating that changes to the detergent specifications for test cloth preconditioning would affect the measured efficiency. DOE believes that the proposed amendments in today's SNOPR changing the detergent specifications for test cloth preconditioning would not affect the EF rating of residential clothes dryers and would not require revision of the existing energy conservation standards for these products. However, DOE welcomes data showing the effects of changing the detergent specifications for test cloth preconditioning on the measured EF for clothes dryers.

5. Changes To Reflect Current Usage Patterns and Capabilities

a. Clothes Dryer Number of Annual Cycles

As noted above, DOE established its test procedure for residential clothes dryers in a final rule published in the **Federal Register** on May 19, 1981. 46 FR 27324. Although DOE has updated its test procedure for residential clothes washers since that time,[32] it has not updated its residential clothes dryer test procedure since it was first established in 1981. In the revised residential clothes washer test procedure, the average number of annual use cycles was revised to reflect current (at the time) consumer use patterns. DOE noted in the October 2007 Framework Document that the average number of dryer use cycles assumed in the revised clothes washer test procedure is inconsistent with the use cycles in the clothes dryer test procedure. (Framework Document, STD No. 1 at p. 4)

In the case of the average residential clothes washer annual use cycles, DOE published a final rule on August 27, 1997, amending the DOE clothes washer test procedure to lower the annual clothes washer use cycles from 416 to 392 cycles per year, a value that DOE determined to be more representative of current usage patterns. 62 FR 45484. Further, the revised DOE clothes washer test procedure assumes that 84 percent of all clothes washer loads are dried in clothes dryers. Thus, based upon the parameters in the current residential clothes washer test procedure, the annual usage pattern for clothes dryers is calculated to be 329 cycles per year. In contrast, the current DOE residential clothes dryer test procedure assumes an average annual clothes dryer use of 416 cycles per year, which is 21 percent higher than the number of cycles per year derived from the current clothes washer test procedure. DOE notes that the number of annual cycles does not factor into the EF calculation except in the case of gas clothes dryers with standing pilots (which DOE determined are no longer available on the market), nor is the number of annual cycles used in the life-cycle cost (LCC), national energy savings (NES), or national impact analysis (NIA) calculations, which instead use consumer survey data. DOE sought comment on this issue in the October 2007 Framework Document. (Framework Document, STD No. 1 at p. 5)

In response to the October 2007 Framework Document, AHAM stated that it supports changing the clothes dryer test procedure to decrease the use cycles from 416 to 329 cycles per year, as proposed by DOE, based on usage patterns for residential washers. (AHAM, STD No. 8 at p.1) CEE also supported decreasing the number of use cycles to be more consistent with the clothes washer test procedure. CEE noted that in the amendments to the DOE test procedure for clothes washers in 1997, the clothes dryer utilization factor (*i.e.,* percentage of clothes washer loads dried in clothes dryers) was set to 84 percent. However, CEE was unsure whether 392 (the number of annual clothes washer cycles) or 329 (84 percent of 392) is the correct number of clothes dryer cycles, and recommended that DOE re-examine the clothes dryer utilization factor. (CEE, STD No. 10 at p. 1) EEI stated that the test procedure should have fewer use cycles based on the EIA's RECS data and demographic projections. (EEI, STD No. 5 at p. 2)

Whirlpool commented that 392 annual clothes washer cycles are generally accepted as valid. However, Whirlpool stated that the value of 84 percent of washer loads being machined dried is high. Whirlpool cited data from Procter & Gamble indicating that consumers average 5.72 loads per week, or 297 annually, and that line drying and blocking are a common alternative to machine drying. Whirlpool also stated that other surveys suggest that annual laundry loads are closer to 343 than 392, which, if the 84 percent were applied, would result in 288 dryer loads annually. However, Whirlpool concluded that the annual number of cycles should be 298 (equaling 76 percent of the 392 clothes washer loads). (Whirlpool, STD No. 7 at p. 2)

The Joint Comment stated that DOE should request manufacturers to verify that the ratio of dryer cycles to washer cycles is 84 percent. The Joint Comment commented that DOE should establish the number of clothes dryer cycles independent of washer cycles because some laundry is washed but not dried in a dryer, while some clothes dryer loads have not been washed. The Joint Comment also noted that many recently manufactured clothes dryers have software that logs the number of cycles, and manufacturers could provide cycle count data for clothes dryers with at least 1 full year of operation (to account for month-to-month variations). The Joint Comment stated that another potential data source DOE should check is the California Measurement Advisory Council (CALMAC), which documents appliance energy use in California. (Joint Comment, STD No. 9 at pp. 10–11)

For these reasons, DOE determined to review available data and investigate the number of annual clothes dryer use cycles in order to amend its test procedure to accurately reflect current consumer usage habits. DOE reviewed the 2004 California Statewide Residential Appliance Saturation Study (RASS), which surveyed appliance product usage patterns, including clothes dryers.[33] The study surveyed 7,686 households between 2002 and 2003, asking the question "how many loads of clothes do you dry in your clothes dryer during a typical week?" For the 6,790 of these households that said they owned a clothes dryer, average usage was 4.69 loads per week, or approximately 244 loads per year. However, because this study provides only a limited dataset, DOE does not intend to rely only on this data to determine an appropriate number of annual use cycles for the clothes dryer test procedure.

DOE also reviewed data from the 2005 RECS to determine the annual usage of clothes dryers. RECS is a national sample survey of housing units that collects statistical information on the consumption of and expenditures for energy in housing units along with data on energy-related characteristics of the housing units and occupants. RECS provides enough information to establish the type (*i.e.,* product class) of clothes dryer used in each household, the age of the product, and an estimate of the household's annual energy consumption attributable to clothes dryers. DOE estimated the number of clothes dryer cycles per year for each sample home using data given by RECS on the number of laundry loads (clothes washer cycles) washed per week and the frequency of clothes dryer use. Based on its analysis of RECS data, DOE estimated the dryer usage factor (the percentage of washer loads dried in a clothes dryer) to be 91 percent and the calculated average usage to be 283 cycles per year for all product classes of clothes dryers. DOE also notes that the RECS data shows a historical decreasing trend for the number of clothes washer and clothes dryer cycles. Because this dataset is more extensive than that of the RASS, DOE believes these numbers are more representative of annual usage patterns. Therefore, DOE is proposing to amend the number of annual use cycles in its test procedure to 283 cycles for all product classes of clothes dryers.

[32] *See* 62 FR 45484 (Aug. 27, 1997); 68 FR 62198 (Oct. 31, 2003).

[33] For more information visit: *http://www.energy.ca.gov/appliances/rass/.*

The proposed amendments for the number of annual use cycles only affect the equations for the per-cycle gas energy consumption of a continuously burning pilot light in gas dryers, which factors into EF, and the estimated annual operating cost for all clothes dryers. DOE is not aware of any gas dryers currently available on the market that incorporate a continuously burning pilot light. For this reason, DOE believes the proposed amendments in today's SNOPR to change the number of clothes dryer annual use cycles would not affect the EF rating of residential clothes dryers and would not require revision of the existing energy conservation standards for these products.

b. Clothes Dryer Initial Remaining Moisture Content

In the revised residential clothes washer test procedure, a new parameter, the RMC of the test cloth, was introduced. The RMC is the ratio of the weight of water contained by the test load at the completion of the clothes washer energy test cycle to the bone-dry weight of the test load, expressed as a percent. Correspondingly, the initial RMC of a clothes load being dried is a function of RMC at the end of a clothes washer cycle. The current DOE clothes dryer test procedure specifies an initial RMC of 70 ± 3.5 percent. As was explained above for the average number of use cycles per year, the RMC of typical clothes loads in the residential clothes washer test procedure should be consistent with values defined in the clothes dryer test procedure. However, DOE believes that the initial RMC in the clothes dryer test procedure may not reflect typical RMCs of actual clothes dryer loads.

DOE notes that the revision to the clothes washer test procedure changed the clothes washer energy conservation standards metric to a modified energy factor (MEF), which established a method for crediting the performance of clothes washers that lower the RMC and, thereby, reduce clothes drying energy use. Since the clothes dryer test procedure was established in 1981 (46 FR 27324, May 19, 1981), average clothes washer RMC has decreased due to the introduction of higher efficiency models with higher final spin speeds. Therefore, while clothes dryer energy use has decreased with the lower RMC, clothes washer energy use has increased somewhat to achieve the higher spin speeds. This energy use is accounted for in the residential clothes washer energy conservation standards rulemaking, and the net national annual energy use for clothes washers and clothes dryers combined is expected to decrease as average RMC is reduced. During the course of the standards rulemaking for clothes washers that culminated in a final rule published in the **Federal Register** on January 12, 2001, DOE estimated RMCs at specific efficiency levels. 66 FR 3314. For the residential clothes washer standard which became effective January 1, 2007 (1.26 MEF), DOE estimated a weighted-average RMC of 56 percent.

As discussed in section I, the EF for clothes dryers is determined by measuring the total energy required to dry a standard test load of laundry to a "bone dry" state. If today's clothes dryer loads have initial RMCs that are lower than the nominal 70 percent specified in the existing DOE clothes dryer test procedure, revisions to the test procedure to reflect more realistic (*i.e.,* lower) RMCs would result in the current EF rating increasing for a given clothes dryer, since the clothes dryer would have less water to remove.

AHAM commented in response to the October 2007 Framework Document that an RMC of 56 percent is realistic, and added that it will collect additional information to validate this estimate. (AHAM, STD No. 8 at p. 1.) Whirlpool stated that the weighted-average RMC from clothes washers that it sells in North America is approximately 56 percent and that a revised test procedure should use this value. (Whirlpool, STD No. 7 at pp. 1–2.) CEE, EEI, and ALS also support revising the clothes dryer test procedure to account for lower RMC. (CEE, STD No. 10 at p. 1; EEI, STD No. 5 at p. 2; ALS, STD No. 6 at p. 1) CEE added that the lower average RMC is likely due to recent improvements in clothes washers, particularly the entrance of horizontal-axis washers with high spin speeds and significantly reduced RMC. (CEE, STD No. 10 at p. 1.)

The Joint Comment also commented that a lower RMC for the clothes dryer test procedure is justified. The Joint Comment referenced CEC data for the relationship between residential clothes washer MEF and RMC, which shows that models just meeting current energy conservation standards have an average RMC of 55 percent. The Joint Comment also noted that a regression fit through the entire CEC data set shows a residential clothes washer with an MEF of 0.817 (which approximates pre-2001 standards) would have an estimated RMC of 72 percent, which is comparable to the value in the existing test procedure. (Joint Comment, STD No. 9 at pp. 12–13.)

DOE agrees that a review of the residential clothes washer models in the CEC database suggests that the average RMC is less than the nominal 70 percent which is currently provided in the DOE clothes dryer test procedure. Therefore, DOE considered amendments to the clothes dryer test procedure to address RMC.

As part of the preliminary analyses for the residential clothes dryers energy conservation standards rulemaking, DOE estimated the RMC of clothes washers using a distribution of values for models listed in the December 12, 2008, CEC product database. For products for which the RMC was listed, the RMC values ranged from 30 percent to 61 percent, with an average of 46 percent.

As part of the October 2007 Framework Document, DOE requested data from AHAM showing the shipments of residential clothes washers for which RMC was reported, along with shipment-weighted RMC (*See* Table 0.7). These data sets, each including disaggregated data for front-loading and top-loading clothes washers, as well as reported overall values for all units, provide insight into what initial clothes dryer RMC would be most representative of current residential clothes washers. However, as noted above, AHAM indicated that the data contains only shipments for which the RMC was reported and thus the total will not be equal to actual shipments reported for 2000–2008. The data indicate that RMC has been decreasing consistently, from about 54 percent in 2000 to 47 percent in 2008, and suggest that the initial RMC of nominally 70 percent in the DOE clothes dryer test procedure is greater than the current shipment-weighted residential clothes washer average RMC.

TABLE 0.7—AHAM SHIPMENT-WEIGHTED CLOTHES WASHER RMC DATA SUBMITTAL [34]

Year	Clothes washer shipments for which RMC was reported			Shipment-weighted RMC (%)		
	Front-loading	Top-loading	Total	Front-loading	Top-loading	Total
2000	232,714	686,440	919,154	43.6	57.4	53.9
2001	235,989	473,629	709,618	41.3	57.7	52.2
2002	280,667	529,265	809,932	41.5	58.1	52.3
2003	351,411	1,676,877	2,028,288	43.1	54.5	52.5
2004	1,179,813	5,270,285	6,450,098	42.2	52.8	50.9
2005	1,563,108	5,394,511	6,957,619	40.8	52.7	50.1
2006	1,851,218	5,628,279	7,479,497	39.3	51.4	48.4
2007	1,973,825	5,371,142	7,344,967	38.3	51.4	47.8
2008	2,043,024	4,492,059	6,535,083	38.1	51.0	47.0

Based on the shipment-weighted RMC data submitted by AHAM and DOE's own review of the CEC residential clothes washer database, DOE believes that an initial RMC of 47 percent is representative of current residential clothes dryer initial test load characteristics. Therefore, DOE is proposing in today's notice to amend section 2.7, "Test loads," of the clothes dryer test procedure to require that the initial RMC be changed from 70 ± 3.5 percent to 47 percent. DOE is not proposing to allow the ± 3.5 percent range in RMC because the proposed amendments to the DOE clothes dryer test procedure for automatic cycle termination, detailed in section III.C.2, would require that the test load be initially prepared to between 42- and 47-percent RMC, and that final adjustments be made to the RMC to achieve 47-percent ± 0.33-percent RMC, in order to account for over-drying energy consumption.

Alternatively, if DOE, in the final rule, does not adopt the proposed amendments in today's SNOPR for testing automatic cycle termination, presented in section III.C.2, but adopts only these aforementioned proposed amendments to change the initial RMC, DOE proposes to specify an initial RMC of 47 ± 3.5 percent. In that case, the tolerance of ± 3.5 percent on the nominal initial RMC, as currently specified in DOE's test procedure, would allow the same flexibility in test cloth preparation as is currently allowed. If DOE, in the final rule, does adopt the proposed amendments to account for automatic cycle termination, then the tolerance of ± 3.5 percent for the initial RMC would not be necessary. DOE welcomes comment on and additional data regarding the representative initial RMC for current dryer test loads.

DOE also notes that the current test procedure contains a provision in the calculation of per-cycle energy consumption that is intended to normalize EF by the reduction in RMC over the course of the drying cycle. A scaling factor of 66 is applied, which is representative of the percentage change from the nominal initial RMC of 70 percent to the nominal ending RMC of 4 percent. However, DOE notes that the proposed changes to account for automatic cycle termination, as presented above in section III.C.2, would require amending the calculations for the per-cycle energy consumption to remove the need for this scaling factor. Therefore, DOE is not proposing to amend the scaling factor in today's SNOPR. Alternatively, if DOE, in the final rule, does not adopt the proposed amendments in today's SNOPR for testing automatic cycle termination, presented in section III.C.2, but adopts only these aforementioned proposed amendments to change the initial RMC, DOE proposes to change the scaling factor to 43 to reflect a starting RMC of 47 percent. If DOE, in the final rule, does adopt the proposed amendments to account for automatic cycle termination, then changes to the scaling factor would not be necessary.

As noted above in section I, if DOE determines that the amended test procedure would alter the measured efficiency of a covered product, DOE must amend the applicable energy conservation standard. In determining the amended energy conservation standard, the Secretary shall measure, pursuant to the amended test procedure, the energy efficiency, energy use, or water use of a representative sample of covered products that minimally comply with the existing standard. The average of such energy efficiency, energy use, or water use levels determined under the amended test procedure shall constitute the amended energy conservation standard for the applicable covered products. (42 U.S.C. 6293(e)(2))

As part of the October 2007 Framework Document, DOE requested data from AHAM to help evaluate the effect of a lower initial RMC on measured EF for clothes dryers which minimally comply with existing energy conservation standards. Table 0.8 lists and Figure 0.3 illustrates the data AHAM provided for the change in measured EF that was observed when initial RMC was reduced from nominally 70 percent to nominally 56 percent. When the scaling factor in the calculation of per-cycle energy consumption, described above, was changed to 52—reflecting a change in RMC during the test cycle from an initial 56 percent to a final 4 percent—measured EF increased by an average of 22 percent in AHAM's test sample of 11 baseline clothes dryers. Under these conditions, the average EF increased from 3.09 to 3.77 lb per kWh. When this scaling factor was left as 66 as currently provided for in the DOE test procedure, measured EF decreased by an average of 4 percent when initial RMC was reduced as described. In this case, average EF decreased from 3.09 to 2.97 lb per kWh.

[34] AHAM, 2009. *AHAM Weighted RMC for Front Load and Top Load Units, 2000–2008—DOE Clothes Dryer Rulemaking, Secondary Data Request.* July 7, 2009. Docket No. EE–2007–BT–STD–0010, Comment Number 18

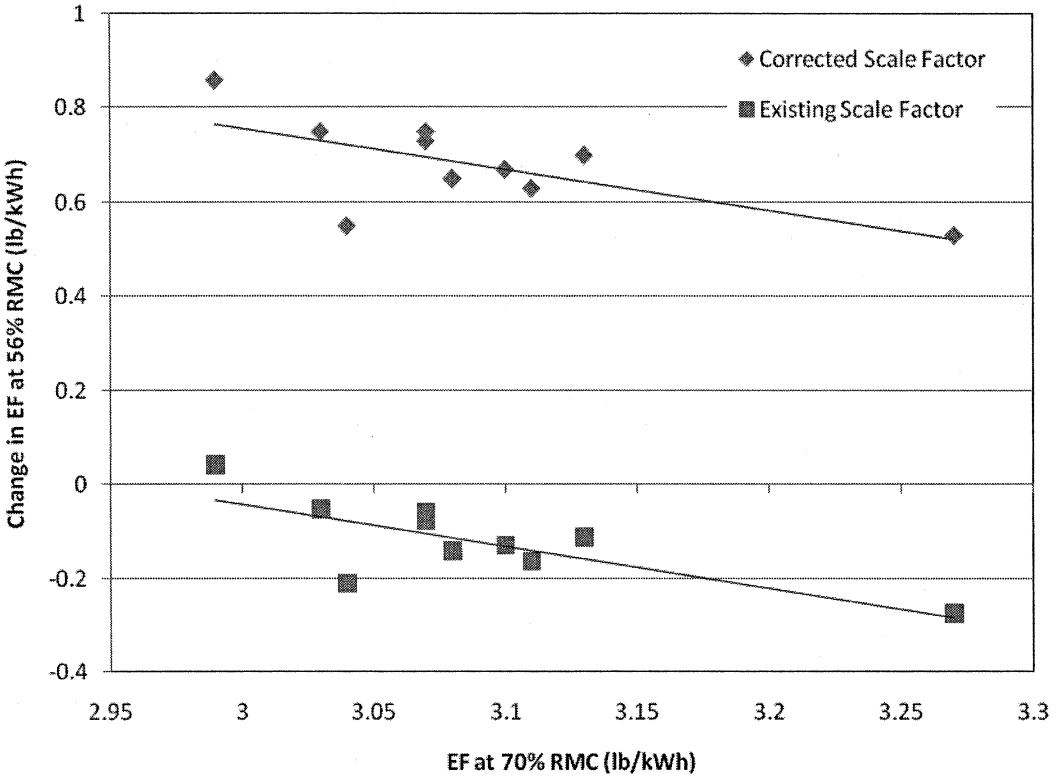

Figure 0.3 AHAM Data Submittal for the Impact of Initial RMC on Clothes Dryer Energy Factor

TABLE 0.8—AHAM DATA SUBMITTAL FOR THE IMPACT OF INITIAL RMC ON CLOTHES DRYER ENERGY FACTOR

Initial RMC *(%)*			Baseline Model EF (Using Existing Scaling Factor = 66)
Test	Target	Actual	
1a		70	3.1
2a		70.08	3.08
3a		70.08	2.99
4a		70.24	3.11
5a		70.33	3.08
6a	70	70.17	3.07
7a		69.7	3.07
8a		71.6	3.27
9a		70.5	3.03
10a		70.9	3.13
11a		70	3.04

Test	Target	Actual	Baseline Model EF (Using Revised Scaling Factor = 52)	Baseline Model EF (Using Existing Scaling Factor = 66)
1b		56	3.77	2.97
2b		55.99	3.73	2.94
3b		55.99	3.85	3.03
4b		55.99	3.74	2.95
5b		58.43	3.73	2.94
6b	56	58.58	3.8	2.99
7b		58.58	3.82	3.01
8b		55.4	3.8	2.99
9b		55.8	3.78	2.98
10b		55.7	3.83	3.02
11b		56	3.59	2.83

In order to supplement the data provided by AHAM, DOE conducted similar tests subsequent to the October 2007 Framework Document for one representative vented electric standard, vented electric compact (240 V), vented gas, and vent-less electric compact (240 V) clothes dryer in its test sample. DOE tested each of these units according to the current DOE clothes dryer test procedure, but changing the initial RMC from 70 percent ± 3.5 percent to 56 percent ± 1 percent and 39 percent ± 1 percent in order to evaluate the effects of lowering the initial RMC. DOE did not test an initial RMC of 47 percent because, at the time of testing, the shipment-weighted RMC data indicating 47 percent was representative of laundry loads after the residential clothes washer cycle was not yet available to DOE. Therefore, DOE selected a wider range of initial RMC values for testing, such that effects of changing the initial RMC to a value in between the tested values could be interpolated from the testing results. DOE selected models that minimally complied with energy conservation standards for clothes dryers, except for the one vent-less model (since vent-less clothes dryers are not currently subject to energy conservation standards.) DOE selected a vent-less unit with an EF it considered a baseline for evaluating efficiencies of vent-less products.

Table 0.9 shows the measured EF for each of the clothes dryers DOE tested at 70-percent, 56-percent, and 39-percent initial RMC, and the percentage change in EF for the reduced initial RMC compared to the 70-percent initial RMC required by the current DOE test procedure. DOE notes that the scaling factor in the calculations of per-cycle energy consumption was adjusted to 52 and 35 (from 66) for the initial RMCs of 56 percent and 39 percent, respectively, in order to represent the nominal change in percent from the initial RMC to the final RMC, as discussed above. The results from DOE testing indicate that, on average, measured EF increases by about 23 percent and 70 percent when the initial RMC is changed to 56 percent and 39 percent, respectively. DOE notes that the results showing a 23-percent increase in EF for the 56-percent initial RMC tests are in close agreement with AHAM's test results, which shows a 22-percent increase in measured EF.

TABLE 0.9—DOE TEST RESULTS EVALUATING REDUCED INITIAL RMC

Product Class	70% RMC	56% RMC		39% RMC	
	EF	EF	% Change	EF	% Change
Vented Electric Standard	3.09	3.86	25.0	5.39	74.6
Vented Electric Compact (240 V)	3.06	3.69	20.6	5.02	63.8
Vented Gas	2.81	3.43	21.9	4.79	70.5
Vent-less Electric Compact (240 V)	2.37	2.99	26.1	4.09	72.5
Average	.....	.....	23.4	.....	70.3

Plotting these test data reveals a non-linear trend in EF as a function of initial RMC, as seen in Figure III.4. DOE explored using a polynomial trend to fit the datasets in order to develop an estimate for the percentage change in EF resulting from changing the initial RMC to 47 percent, as proposed in today's SNOPR. Using the polynomial trends, an initial RMC of 47 percent would be predicted to increase measured EF by approximately 47 percent on average, as shown in Table 0.10.

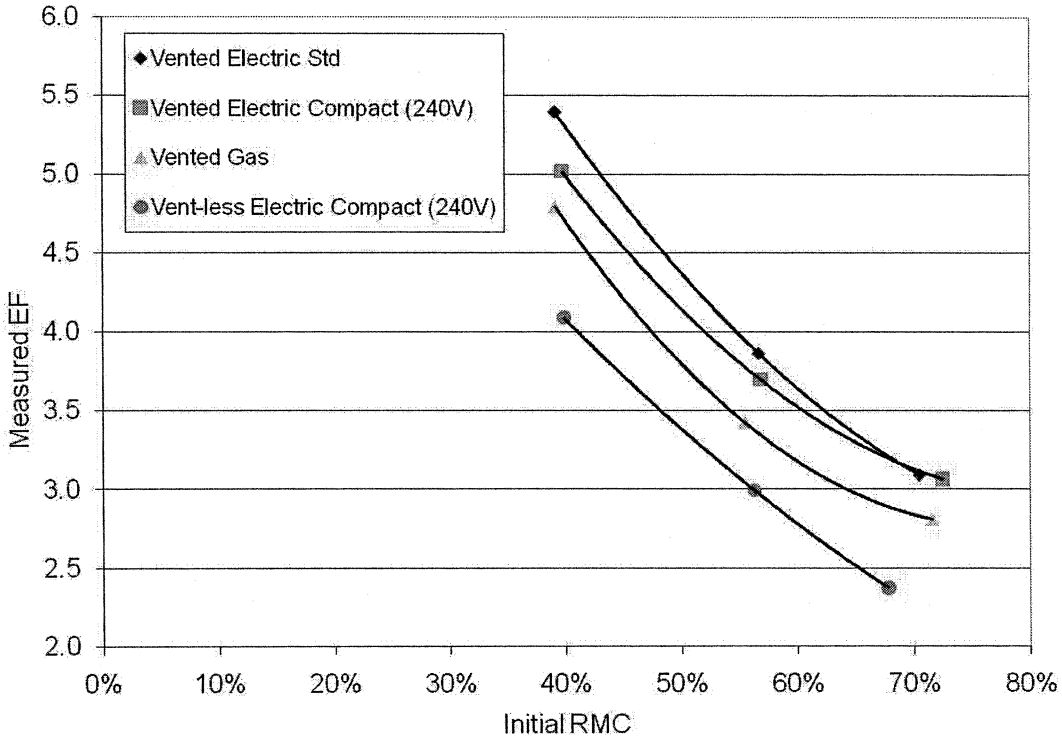

Figure 0.4 DOE Test Results for Measured Energy Factor versus Initial RMC

TABLE 0.10—CALCULATED ENERGY FACTOR USING POLYNOMIAL TREND FITS OF THE DOE TEST DATA

Product class	Calculated EF at 47% initial RMC	% Change from 70% initial RMC
Vented Electric Standard	4.63	49.8
Vented Electric Compact (240 V)	4.37	42.8
Vented Gas	4.04	43.5
Vent-less Electric Compact (240 V)	3.58	51.2
Average		46.9

After this analysis was complete, DOE conducted testing of three identical maximum-available gas clothes dryers as part of its energy conservation standards rulemaking preliminary analyses for clothes dryers. These tests investigated the measured EF for this model according to the current DOE test procedure with an initial RMC of 70 percent ± 3.5 percent. In order to supplement the test procedure analysis discussed above, DOE subsequently conducted further testing on one of these maximum-available gas clothes dryers to evaluate the effects on EF of changing the initial RMC. DOE tested the unit according to the current DOE clothes dryer test procedure at reduced initial RMCs of 56 percent ± 3.5 percent and 47 percent ± 3.5 percent. For each initial RMC, DOE conducted three tests for the test unit to determine if the results were repeatable. Table 0.11 below shows the results from this testing, which indicate that, on average, measured EF increases by about 24 percent and 41 percent when the initial RMC is reduced to 56 percent and 47 percent, respectively. DOE notes that the results showing a 24-percent increase in EF for the 56-percent initial RMC tests are in close agreement with the AHAM data submittal and previous DOE test results.

TABLE 0.11—DOE TEST RESULTS EVALUATING REDUCED INITIAL RMC USING MAXIMUM-AVAILABLE GAS CLOTHES DRYER

Test run	70% RMC	56% RMC		47% RMC	
	EF	EF	% change	EF	% change
1	2.81	3.51	24.3	3.87	37.1
2	2.82	3.52	24.6	4.04	43.2
3	2.83	3.50	23.9	4.00	41.7
Average	2.82	3.51	24.3	3.97	40.6

Based on its testing, DOE believes that a 41-percent increase in EF resulting from switching from 70-percent to 47-percent initial RMC for a minimally compliant clothes dryer is representative. For this reason, DOE believes that the current energy conservation standards in terms of EF for vented clothes dryer product classes would need to be increased by 41 percent, based upon the proposed amendments to change the initial RMC from 70 percent ± 3.5 percent to 47 percent ± 3.5 percent. DOE would consider addressing this change in the concurrent energy conservation standards rulemaking for residential clothes dryers, for which a final rule is scheduled for publication by June 30, 2011.

c. Clothes Dryer Test Load Weight

The current DOE clothes dryer test procedure requires a 7.00 lb ± .07 lb test load for standard-size dryers and a 3.00 lb ± .03 lb test load for compact-size dryers. The Joint Comment stated in response to the October 2007 Framework Document that DOE should determine whether the average test load weight for standard-capacity dryers is consistent with the current generation of washer capacities. The Joint Comment noted that, according to AHAM data, the average tub volume of washers has been increasing for a number of years. The Joint Comment indicated that between 1981, when the dryer testing protocol was established, to 2004, the average washer tub volume increased by more than 20 percent (2.52 cubic feet (ft^3) to 3.05 ft^3). The Joint Comment also pointed out that, in the current DOE clothes washer test procedure, the maximum test load weight of a 2.52 ft^3 machine is 10.5 lb, while the maximum test load weight of a 3.05 ft^3 machine is 12.5 lb. The Joint Comment stated that if the ratio of the maximum test load weights were applied to the test load weight in the clothes dryer test procedure, this would imply that the current 7-lb test load weight should be adjusted upward by about 20 percent to 8.3 lb. The Joint Comment added that DOE should request that manufacturers provide field data to document whether the current test load weight for standard-capacity dryers should be adjusted upward to account for the increased capacity of residential clothes washers. The Joint Comment also stated that DOE should interview detergent manufacturers since they are among the most knowledgeable parties in the laundry industry. Because the size of the load affects proper detergent dosing, the Joint Comment stated that detergent manufacturers are likely to have data on current load weights. (Joint Comment, STD No. 9 at pp. 11–12)

DOE contacted detergent manufacturers to obtain data on average residential clothes washer load sizes. Procter and Gamble (P&G) conducted an internal study in 2003 on household laundry habits on a representative set of the population across the United States, from which P&G provided select summary data to DOE for this rulemaking. The clothes washer load weight data, which was based on a sample size of 3367 loads of laundry from a total of 510 respondents, showed that the average load size for top-loading and front-loading clothes washers was 7.2 lb and 8.4 lb, respectively. (P&G, No. 15 at p. 1) Based on the average shipment-weighted market share for top-loading and front-loading clothes washers between 2000 and 2008 from data submitted by AHAM (shown in Table 0.7), the shipment-weighted average clothes washer load size would be approximately 7.5 lbs. However, DOE recognizes that clothes washer capacities were likely to have increased since the survey was conducted in 2003, and therefore DOE continued its analysis to factor in these capacity changes to estimate a more current average load size.

Table 0.12 shows the trends of the shipment-weighted average tub volume for residential clothes washers from 1981 to 2008, based on data from the AHAM *Trends in Energy Efficiency 2008.* The shipment-weighted average tub volume has increased from 2.52 ft^3 in 1981 to 3.22 ft^3 in 2008.

TABLE 0.12—RESIDENTIAL CLOTHES WASHER SHIPMENT-WEIGHTED AVERAGE TUB VOLUME TRENDS [35]

Year	Shipment-weighted average tub volume (ft^3)	% change since 1990
1981	2.52	
1990	2.63	
1991	2.72	3.4
1992	2.71	3.0
1993	2.71	3.0
1994	2.69	2.3
1995	2.72	3.4
1996	2.80	6.5
1997	2.83	7.6
1998	2.85	8.4
1999	2.89	9.9
2000	2.92	11.0
2001	2.96	12.5
2002	2.96	12.5
2003	3.01	14.4
2004	3.05	16.0
2005	3.08	17.2
2006	3.13	19.2
2007	3.16	20.3
2008	3.22	22.4

Section 2.7, "Test Load Sizes," in the DOE clothes washer test procedure provides the minimum, maximum, and average test load size requirements for the clothes washer test, which is determined based on the clothes container capacity. Table 0.13 shows the minimum, maximum, and average test load sizes for 2.52 ft^3 and 3.22 ft^3 container capacities, determined according to Table 5.1 in the DOE clothes washer test procedure.

TABLE 0.13—DOE CLOTHES WASHER TEST LOAD SIZE REQUIREMENTS

[Table 5.1 of 10 CFR 430 Subpart B, Appendix J1]

Container volume (ft^3)	Minimum load (*lb*)	Maximum load (*lb*)	Average load (*lb*)
≥2.50 to <2.60	3.00	10.50	6.75
≥3.20 to <3.30	3.00	13.30	8.15

[35] Association of Home Appliance Manufacturers, *Trends in Energy Efficiency 2008.* Available at: *http://www.aham.org/ht/d/Store.*

DOE notes that the average load size in the clothes washer test procedure increases by about 21 percent with the associated increase in capacity, which DOE believes proportionally impacts clothes dryer load sizes. Applying this ratio of average clothes washer test load sizes to the clothes dryer test load size would result in an increase from 7.00 lb to 8.45 lb for standard-size dryers. For these reasons, DOE is proposing to amend the clothes dryer test load size to 8.45 lb for standard-size dryers. 10 CFR part 430, subpart B, appendix D, revised section 2.7.2. DOE is proposing to amend the test load size based on the change in average load size for clothes washers rather than the maximum load size because data from RECS 2005 indicates that not all clothes that are washed are machine dried. Therefore, DOE believes that average clothes washer load size would be more representative of clothes dryer load size. DOE is also proposing to maintain the 1-percent tolerance in load sizes specified by the current DOE test procedure for both standard-size dryers (8.45 lb ± .085 lb).

DOE believes most compact clothes dryers are used in conjunction with compact-size clothes washers, and DOE does not have any information to suggest that the tub volume of such clothes washers has changed significantly. Therefore, DOE is not proposing to change the 3-lb test load size currently specified in the test procedure for compact clothes dryers. DOE welcomes data on the historical trends of compact-size clothes washer average tub volumes or any other data that would suggest a change in the clothes dryer test load size for compact clothes dryers.

As noted previously, EF for clothes dryers is the bone-dry test load weight divided by the clothes dryer energy consumption per cycle. DOE notes that the proposed amendments to the test load size would increase both the bone-dry test load weight and the energy consumption per cycle. For example, for a test in which the nominal RMC of the test load is reduced from an initial 70 percent to a final 4 percent, an 8.45-lb test load would require about 5.6 lb of water to be removed during the drying cycle, whereas a 7-lb test load would require only 4.6 lb of water to be removed. DOE also notes that, as lower nominal RMCs are reached at the end of the test cycle, the rate and efficiency of water removal from the load would be higher for the larger test load simply because there would be more water in the load, hence making it easier to remove.

In order to determine a quantifiable estimate of the change in the measured EF, DOE reviewed research and investigations of the effects of changing the load size on the measured efficiency. The National Institute of Standards and Technology (NIST) conducted testing to investigate the effects of changing the clothes dryer load size on the measured efficiency for a vented electric standard clothes dryer with a capacity of 6.3 ft^3.[36] NIST tested the clothes dryer according to the DOE clothes dryer test procedure, except the test load size was varied from 2 lb to 15 lb. Table 0.14 presents the results of the NIST testing, which shows an increase in EF when increasing the load size within the range of interest (*i.e.,* from 7 lb to 9 lb).

TABLE 0.14—NIST VENTED ELECTRIC STANDARD CLOTHES DRYER VARIABLE TEST LOAD DATA

Test number	1	2	3	4	5	6	7	8
Room Temperature, °*F*	74.1	74.4	73.8	73.3	73.8	74.1	74.4	74.4
Room Humidity, %	40	38	38	33	42	38	40	36
Nominal Bone-Dry Weight, *lb*	2	3	5	7	9	11	13	15
Measured Bone-Dry Test Load Weight, *lb*	1.99	2.99	4.99	7.00	8.99	10.98	13.01	15.01
Measured Dry Test Load Weight, *lb*	2.05	3.06	5.17	7.99	9.11	11.56	13.57	15.71
Measured Wet Test Load Weight, *lb*	3.40	5.10	8.50	11.89	15.34	18.98	22.04	25.56
Measured Energy Consumption, *kWh*	0.953	1.159	1.593	2.112	2.667	3.250	3.796	4.384
Initial RMC, %	70.30	70.67	70.52	69.99	70.67	72.81	69.35	70.34
Final RMC, %	2.84	2.48	3.73	2.88	1.28	5.27	4.29	4.67
Per-Cycle Energy Consumption, *kWh*	0.970	1.167	1.637	2.160	2.638	3.303	4.005	4.582
EF, *lb/kWh*	2.06	2.56	3.04	3.24	3.41	3.33	3.25	3.27
Percentage Change in EF Compared to 7-lb Test, %	-36.6	-20.9	-6.0	0.0	5.2	2.7	0.3	1.1

DOE estimated the percentage change in EF for an 8.45-lb test load by linearly interpolating the results for the 7-lb and 9-lb tests. Using this method, the EF would increase by about 3.8 percent when increasing the test load size from 7 lb to 8.45 lb. DOE believes that this percentage change in EF can be applied to all vented standard-size clothes dryer product classes because it believes the moisture removal mechanisms are comparable among them. For these reasons, DOE believes that the current energy conservation standards in terms of EF for vented standard-size clothes dryer product classes would need to be increased by 3.8 percent, based upon the proposed amendments to increase the test load size to 8.45 ± .085 lb for standard-size dryers. DOE would consider addressing this change in the concurrent energy conservation standards rulemaking for residential clothes dryers, for which a final rule is scheduled for publication by June 30, 2011. DOE welcomes comment and data on current clothes dryer test load sizes and additional data showing the effects of changing the clothes dryer test load size on the measured EF for both standard-size and compact-size clothes dryers.

d. Room Air Conditioner Annual Operating Hours

The DOE test procedure currently assumes room air conditioners have an average annual use of 750 hours. DOE's technical support document from September 1997, issued in support of the most recent room air conditioner energy conservation standards

[36] J. Y. Kao. 1999. Energy Test Results of a Conventional Clothes Dryer and a Condensing Clothes Dryer. *International Appliance Technical Conference, 49th. Proceedings. May 4–6, Columbus, OH, pp. 11–21, 1998.*

rulemaking, shows that the average annual operational hours are closer to 500 hours,[37] which would yield approximately 33-percent lower annual energy consumption than the annual energy consumption determined using the 750 operational hours assumed in the current test procedure.

AHAM commented in response to the October 2007 Framework Document that the room air conditioner test procedure should be changed to account for fewer annual operating hours. (AHAM, STD No. 8 at p. 2.) The Joint Comment stated that DOE should update the room air conditioner test procedure for annual operating hours to reflect the best available information and to seek justification other than manufacturer assertions. The Joint Comment suggested checking the New York State Energy Research and Development Authority (NYSERDA) or the New York Department of Public Service, which have considerable ratepayer investments in changing out room air conditioners for more efficient models, and analysis to support this program may include data on hours of operation. (Joint Comment, STD No. 9 at p. 8) CEE also believes that DOE should research the number of annual hours of usage and does not believe that the hours have declined from 750 to 500. CEE believes the number of annual hours is higher, citing a study by the Northwest Power & Planning Council's Regional Technical Forum, which is claimed to represent a low usage area, which found the average annual operating hours to be 628. (CEE, STD No. 10 at p. 2.)

DOE recognizes the uncertainty regarding room air conditioner usage patterns, and determined to investigate the annual hours of usage from a range of information sources to develop as accurate an estimate of annual operating hours as possible. DOE's investigation revealed a lack of metered and survey data for the operating hours of individual room air conditioners. DOE found that estimates of the annual operating hours of use were often based on regional climatic data rather than actual room air conditioner use. DOE did find two sources of survey data on room air conditioner use in the EIA's 2005 RECS (and previous versions) and the CEC California Statewide RASS. The CEC survey contained only aggregated residential data, which limited any analysis pertaining to the annual operating hours. Its regional scope also limited the relevance of the data. EIA's 2005 RECS provides extensive data on individual residences, while providing a more expansive and representative sample of households. Thus, DOE continued its analysis using EIA's 2005 RECS.

DOE reviewed data from the EIA's 2005 RECS to determine the annual usage of room air conditioners. As noted above, RECS is a national sample survey of housing units that collects statistical information on the consumption of and expenditures for energy in housing units along with data on energy-related characteristics of the housing units and occupants. RECS provides enough information to establish the type (*i.e.,* product class) of room air conditioner used in each household, the age of the product, and also provides an estimate of the household's annual energy consumption attributable to the room air conditioner. As a result, DOE was able to develop a household sample for the annual hours of use of a room air conditioner, which was used to calculate a weighted national average of room air conditioner usage hours. The data in the 2005 RECS indicates that the estimated room air conditioner average annual usage is 810 hours. This number of hours is higher than the current 750 hours of the test procedure, and significantly higher than the approximately 500 hours suggested by the previous energy conservation standard rulemaking analysis.

An investigation of the 2005 cooling season covered by RECS indicates that there were roughly 12-percent more cooling degree days (CDD) in 2005 than the 30-year 1971 to 2000 average. CDD is a sum of the difference between ambient temperature in °F and 65 °F for every hour of the year that the ambient temperature is higher than 65 °F for a given location, divided by 24 to convert from hours to days; DOE used data on CDD from the National Solar Radiation Database (NSRDB).[38] The Annual Energy Outlook projections of CDD for the future suggest that the higher level of CDD will continue.[39] Hence, the year 2005 can be considered representative of future climate, and the predictions of annual hours based on the 2005 RECS is relevant within a certain level of uncertainty. However, DOE does not consider the increase of 60 hours from 750 hours to 810 hours to be significant, because it does not exceed the uncertainty level associated with the RECS-based approach for estimation of this value. Hence, DOE is not proposing a change at this time in the annual operating hours used in the test procedure.

e. Room Air Conditioner Part-Load Performance

DOE noted in the October 2007 Framework Document that the current DOE room air conditioner test procedure measures full-load performance, and is not able to assess energy savings associated with technologies which improve part-load performance. AHAM commented that the room air conditioner test procedure should not include part-load performance or seasonal energy efficiency ratio (SEER) ratings, stating that these are not realistic or applicable to room air conditioners. According to AHAM, room air conditioners are a commodity item with a compressor that operates only in on/off mode, and that consumers historically have not been willing to pay for part-load performance options. (AHAM, STD No. 8 at p. 2; AHAM, Public Meeting Transcript, STD No. 4.6 at p. 24.) CEE commented that peak-load performance is of greater significance for room air conditioners than part-load performance. CEE recommended a two-part reporting requirement based on both EER and SEER. CEE stated that including part-load operation in the test procedure would have more relevance for milder climates. (CEE, STD No. 10 at p. 2.) NRDC commented that if just one energy-use metric is used, it should be EER, since peak-load performance is most important for room air conditioners, and because it is difficult to develop a SEER test procedure that accurately reflects real-world performance. However, NRDC recommended the use of two energy-use metrics—one for peak-load performance and one for part-load performance. (NRDC, Public Meeting Transcript, STD No. 4.6 at pp. 25–26.) ACEEE commented that a SEER rating is not appropriate for room air conditioners due to their impact on utility peak demand. (ACEEE, Public Meeting Transcript, STD No. 4.6 at p. 25.) Finally, the Joint Comment stated that there is no compelling reason to change from an EER rating, and that if a SEER rating is considered, it should be used in addition to EER. (Joint Comment, STD No. 9 at p. 8.)

DOE has concluded that widespread use of part-load technology in room air conditioners would probably not be stimulated by the development of a part-

[37] U.S. Department of Energy, *Technical Support Document for Energy Conservation Standards for Room Air Conditioners.* September 1997. Chapter 1, section 1.5. *http://www.eere.energy.gov/buildings/appliance_standards/residential/room_ac.html.*

[38] National Renewable Energy Laboratory, *National Solar Radiation Database 1991–2005 Update: User's Manual,* 2007. Available online at: *http://www.nrel.gov/docs/fy07osti/41364.pdf.*

[39] Energy Information Administration, *2006 State Energy Consumption, Price, and Expenditure Estimates (SEDS),* 2006. Washington, DC. Available online at: *http://www.eia.doe.gov/emeu/states/_seds.html.*

load metric, and, hence, the significant effort of development of an accurate part-load metric is not likely to be warranted by the expected minimal energy savings. A part-load metric would measure efficiency of a product when operating at conditions other than maximum capacity and/or with outdoor or indoor conditions cooler than currently used in the DOE active mode energy test. In-field use of room air conditioners with currently available technologies, when enough cooling is provided to the space, any number of events can occur to prevent over-cooling: the user may turn off the unit or adjust fan speed; or the controls might turn off the compressor, turn off both the compressor and the fan, or reduce fan speed. Delivery of cooling might be done more efficiently with part-load technologies, such as a compressor that can adjust its capacity rather than cycling on and off. However, sufficient information is not available regarding use of room air conditioner features to assess whether such alternative technologies would be cost effective. While a part-load metric would be a different measurement, it still measures the efficiency of the product's delivery of cooling. The key design changes that improve full-load efficiency also improve part-load efficiency, so the existing EER metric is already a strong indication of product efficiency over a wide range of conditions. DOE concludes that the argument to develop an additional test for part load, or to change the room air conditioner metric to a part-load test, is not supported by available information. Also, because any part-load performance metric would address the same major function (cooling) as EER, DOE cannot consider a two-part performance metric including a part-load performance metric (42 U.S.C 6295 (o)(5)). Therefore, DOE does not plan to consider amendments to its room air conditioner test procedure to measure part-load performance.

f. Room Air Conditioner Ambient Test Conditions

DOE also considered whether the ambient test conditions in its test procedure for room air conditioners are representative of typical installations. The Joint Comment recommended increasing the ambient temperature of the DOE energy test procedure from 95 °F to 115 °F, stating that room air conditioners are generally operated when the outdoor temperatures are the highest, and that they are often located on the south or west side of residences where the sun can shine on them during operation. (Joint Comment, STD No. 9 at p. 9.) DOE did not receive further information to support the specification of the higher temperature, and, therefore, is not considering an amendment to the ambient test conditions specified in the room air conditioner test procedure at this time. DOE welcomes comment and data indicating representative ambient test conditions for room air conditioners, and how changes to the ambient test conditions would affect the measured efficiency, in particular on units that minimally comply with current energy conservation standards.

6. Room Air Conditioner Referenced Test Procedures

The room air conditioner test procedure cites two test standards that are each at least 25 years old: (1) ANS Z234.1–1972 and (2) ASHRAE Standard 16–69. Both the ANS (since renamed ANSI) and ASHRAE standards have been updated since DOE last revised its room air conditioner test procedure. The current standards are ANSI/AHAM RAC–1–R2008 and ANSI/ASHRAE Standard 16–1983 (RA 2009), respectively. Because it is likely that any manufacturer rating it products is using the most recent test standards, DOE suggested in the October 2007 Framework Document to consider updating its test procedure to incorporate by reference the most recent test standards. DOE sought comment on such a test procedure revision.

AHAM and EEI both commented in response to the October 2007 Framework Document that the room air conditioner test procedure should be amended to reference the most recent ANSI and ASHRAE test standards. (AHAM, STD No. 8 at p. 2; EEI, STD No. 5 at p. 2.)

Based on these comments on the October 2007 Framework Document, DOE reviewed the differences between the test standards currently referenced by the DOE test procedure and the latest versions of these standards in order to determine if amendments to reference the latest ANSI and ASHRAE test standards are appropriate. DOE notes that the sections that would be referenced in ANSI/AHAM RAC–1–R2008 by the DOE test procedure do not introduce any new changes in the measurement of cooling capacity or power input. DOE also notes that the sections that would be referenced in ANSI/ASHRAE Standard 16–1983 (RA 2009) by the DOE test procedure would introduce changes to the determination of capacity, four new temperature measurements, and changes to the test tolerances. DOE further notes that the referenced section numbers from the old and current test standards are identical. The following discussion details the differences between the test standards.

ANSI/AHAM RAC–1–R2008 includes references to "the latest editions of ASHRAE Standard 16" and "ASHRAE Standard 58"[40] while ANS Z234.1–1972 cites ASHRAE Standard 16–1969. ANSI/AHAM RAC–1–R2008 also revised the wording of the "Nameplate" and "Voltages for Standard Measurement Test" requirements in section 5 of ANS Z234.1–1972, and included differences in rounding converted Celsius temperatures in the tolerances listed in section 4 of ANS Z234.1–1972. However, these changes do not measurably alter the measured efficiency from the value that would be obtained using the existing DOE test procedure. ANSI/AHAM RAC–1–R2008 also specifies different heating capacity test conditions as compared to ANS Z234.1–1972. It increases the outdoor side temperature from 45 °F to 47 °F, and specifies a maximum wet-bulb temperature of 60 °F for the indoor side, whereas ANS Z234.1–1972 has no such requirement for the maximum wet-bulb temperature. DOE notes that the changes to the heating capacity test conditions do not affect the measurement and calculation of cooling capacity and EER.

ANSI/ASHRAE Standard 16–1983 (RA 2009) requires reporting of four additional temperatures that are not explicitly specified in ASHRAE Standard 16–1969:

1. "Wet-bulb temperature of air leaving room side of air conditioner;"
2. "Dry-bulb [* * *] temperature of air surrounding inner compartments of balanced ambient calorimeter;"
3. "Wet-bulb temperature of air surrounding inner compartments of balanced ambient calorimeter;" and
4. "Dry-bulb temperature of air surrounding calibrated room type calorimeter"

The first additional temperature allows for flexibility in determining the condensate temperature measurement. The first additional temperature can be assumed the temperature of the condensate, since it is difficult to measure the temperature of the condensed moisture being transferred within the room air conditioner. This temperature is then used to calculate the "enthalpy of condensed moisture leaving the room-side compartment," which is an input for the calculation of the cooling capacity. While ASHRAE Standard 16–1969 mentions that the "wet-bulb temperature of the air leaving the air conditioner" may be used as the

[40] ASHRAE Standard 58, "Method of Testing for Rating Room Air Conditioner and Packaged Terminal Air Conditioner Heating Capacity"

temperature of the condensate, under the calculation of "net total room-cooling effect," it does not include this temperature in Table 2, "Data to be recorded for cooling-capacity tests." ANSI/ASHRAE Standard 16–1983 (RA 2009) adds this temperature to Table 2.

The remaining temperatures measure the conditions outside of either the calibrated room-side calorimeter set-up or the balanced ambient calorimeter set-up, and assist in calculating the heat leakages in the capacity calculation. The "dry-bulb and wet-bulb air temperatures surrounding [the] balanced ambient calorimeter" are mentioned in Table 1 of ANSI/ASHRAE Standard 16–1983 (RA 2009) as part of the rating conditions for the capacity test, but are not explicitly mentioned in Table 2. ANSI/ASHRAE Standard 16–1983 (RA 2009) adds these temperature measurements and the "dry-bulb temperature of air surrounding calibrated room type calorimeter," which is the equivalent temperature measurement for the calibrated room-type calorimeter introduced in section 4 of ANSI/ASHRAE Standard 16–1983 (RA 2009) to Table 2.

ANSI/ASHRAE Standard 16–1983 (RA 2009) also adds requirements for periodic calibration of instruments and chambers to verify the accuracy of the instruments and the performance of the indoor room-side compartment. Section 6.1.1 of ANSI/ASHRAE Standard 16–1983 (RA 2009) states that "the performance of the indoor room-side compartment" should be verified according to industry standards "at least every six months." Section 5.7 of ANSI/ASHRAE Standard 16–1983 (RA 2009) also adds the requirement to verify the accuracy of all instruments "at least annually" according to recognized standards. These requirements will add some burden to manufacturers but the low yearly occurrence will limit the overall burden, while ensuring the accuracy and repeatability of the test results.

ANSI/ASHRAE Standard 16–1983 (RA 2009) also adjusts the tolerances on the wet-bulb and dry-bulb temperatures measurements used to support calculation of airflow, to 1 °F from 0.5 °F. These temperature measurements are used to determine the density of the air for calculating the room-side calorimeter airflow. The change in required tolerance for wet-bulb and dry-bulb air temperatures may have a slight impact due the possible introduction of additional error of about 0.1 percent on the airflow measurements, but other measurement tolerances have a greater impact on the value of the airflow measurements. In particular, the differential pressure measurement tolerance of 0.005 inches of water listed in section 5.3.1 of ANSI/ASHRAE Standard 16–1983 (RA 2009) can introduce a larger uncertainty to the airflow measurement, making the change in temperature tolerance negligible in comparison. Thus, the effect on the measured airflow due to the change in tolerances will be negligible.

Section 4.2.1 of ANSI/ASHRAE Standard 16–1983 (RA 2009) "provides a method for determining cooling capacity on the room side only," subject to restrictions, whereas ASHRAE Standard 16–1969 determines cooling capacity using both room-side and outdoor-side calorimetry. Section 4.2.1 of ANSI/ASHRAE Standard 16–1983 (RA 2009) also states, "the outdoor-side capacity, if measured, provides a confirming test of the cooling and dehumidifying effect." The room-side capacity measurement is made independently of the outdoor-side measurement, and, due to the additional calibration of the compartments detailed in Section 6.1.1 of ANSI/ASHRAE Standard 16–1983 (RA 2009), provides an accurate and verifiable representation of the cooling capacity without the outdoor-side capacity determination.

Section 6.1.3 of ANSI/ASHRAE Standard 16–1983 (RA 2009) also introduces a correction factor based on the test room condition's deviation from the standard barometric pressure of 29.92 inches (in.) of mercury (Hg) (101 kilopascal (kPa)). Section 6.1.3 of ANSI/ASHRAE Standard 16–1983 (RA 2009) states that the cooling capacity may be increased 0.8 percent for each in. Hg below 29.92 in. Hg (0.24 percent for each kPa below 101 kPa). This change would not impact the measured efficiency of units tested at standard testing conditions. The capacity correction factor provides manufacturers with more flexibility in the test room conditions while normalizing results to standard conditions.

DOE further believes that additional changes in the methodology of the test procedure introduced by ANSI/ASHRAE Standard 16–1983 (RA 2009), such as the ability to use one calibrated calorimeter instead of two, will not measurably affect the measured EER and will provide greater flexibility in the measurement of room air conditioner parameters. Additional calibration of the instruments will have no effect on the measured efficiency, but will instead ensure accuracy and repeatability of testing results over time. The change in required tolerance for wet-bulb and dry-bulb air temperatures may have a slight impact on measured EER due the possible introduction of additional error of 0.1 percent on the airflow measurements, but other measurement tolerances already have a greater impact on the accuracy of the value of the airflow measurements. Therefore, DOE believes this effect will be negligible. DOE concludes that the updated test procedure would not have a measurable impact on the measured efficiency of current room air conditioners and units that complied with the energy conservation standards for room air conditioners according to the current test procedure are expected to be able to comply when tested according to the proposed test procedure.

In sum, DOE has reviewed the most recent revisions of the referenced test standards, ANSI/AHAM RAC–1–R2008 and ANSI/ASHRAE Standard 16–1983 (RA 2009), and has determined that incorporation by reference of these versions provide more accurate and repeatable measurements of capacity while providing greater flexibility to manufacturers in selecting equipment and facilities, and does not add any significant testing burden. Furthermore, these revisions would not impact the measurement of EER for this equipment. DOE also believes that manufacturers may already be using these updated standards in their testing. Therefore, DOE is proposing in today's SNOPR to amend the DOE test procedure to reference the relevant sections of ANSI/AHAM RAC–1–R2008 and ANSI/ASHRAE Standard 16–1983 (RA 2009).

If DOE determines that the proposed amendments to reference the updated room air conditioner test standards ANSI/AHAM RAC–1–R2008 and ANSI/ASHRAE Standard 16–1983 (RA 2009), discussed above, are not appropriate for the DOE room air conditioner test procedure, DOE would propose to correct the text regarding the referenced room air conditioner test standards, as proposed in the December 2008 TP NOPR. The room air conditioner test procedure currently references ASHRAE Standard 16–69, "Method of Testing for Rating Room Air Conditioners." The text in 10 CFR part 430, subpart B, appendix F, section 1, however, incorrectly identifies ASHRAE as "American Society of Heating, Refrigerating and Air Conditioning in Engineers." The actual name of the referenced organization is "American Society of Heating, Refrigerating and Air-Conditioning Engineers." DOE proposed to correct this reference in 10 CFR part 430, subpart B, appendix F, section 1 (which is being redesignated as section 2 in the

proposed amendments) in the December 2008 TP NOPR. 73 FR 74639, 74650. DOE did not receive any comments opposing this correction. Therefore, DOE would continue to propose the above text corrections regarding the referenced room air conditioner test standard if it decides not to amend the DOE room air conditioner test procedure to reference ANSI/AHAM RAC–1–R2008 and ANSI/ASHRAE Standard 16–1983 (RA 2009).

7. Clothes Dryer Referenced Test Procedure

The DOE clothes dryer test procedure currently references the industry test standard AHAM Standard HLD–1–1974, "AHAM Performance Evaluation Procedure for Household Tumble Type Clothes Dryers" (AHAM Standard HLD–1–1974.) Specifically, the DOE clothes dryer test procedure requires that the clothes dryer under test be restricted by adding the AHAM exhaust simulator described in section 3.3.5 of AHAM Standard HLD–1–1974. The AHAM test standard has been updated since DOE established its clothes dryer test procedure. The current standard is designated as AHAM Standard HLD–1–2009. Because it is likely that any manufacturer rating it products is using the most recent test standard, DOE considered potential amendments to its clothes dryer test procedure to reference AHAM Standard HLD–1–2009. DOE notes that section 3.3.5.1 of AHAM Standard HLD–1–2009 regarding exhausting conditions provides the same requirements for the exhaust simulator as required by AHAM Standard HLD–1–1974. For this reason, DOE is proposing in today's SNOPR to amend the DOE test procedure to reference AHAM Standard HLD–1–2009. Because the requirements for the exhaust simulator would be the same, DOE believes that the proposed amendments would not affect the EF rating of residential clothes dryers and would not require revisions of the existing energy conservation standards for these products.

DOE also recognizes that the newly issued AHAM Standard HLD–1–2009 allows for the optional use of a modified exhaust simulator, which is included as a more convenient option than the exhaust simulator originally specified for testing vented clothes dryers. The requirements for the modified exhaust simulator are presented in section 3.3.5.2 of AHAM Standard HLD–1–2009. The test standard notes that only limited testing has been done to compare results using the two exhaust simulators, and that users are invited to submit results and comments for both options. Because this modified exhaust simulator is new and limited data exists to compare the effects of using different exhaust simulators, DOE will continue to require the standard exhaust simulator currently referenced by the DOE clothes dryer test procedure. However, DOE welcomes data from manufacturers comparing the effects of the two exhaust simulators on the drying efficiency using the DOE test procedure. DOE also welcomes comment on whether the test procedure should be amended to allow for the optional modified exhaust simulator.

Section 1.8 in the "Definitions" section of the DOE clothes dryer test procedure also references an obsolete AHAM clothes dryer test standard, AHAM Standard HLD–2EC, "Test Method for Measuring Energy Consumption of Household Tumble Type Clothes Dryers," December 1975. No provisions of this test standard are currently used in DOE's test procedure, and, therefore, DOE proposes to remove this reference. DOE welcomes comment on this proposal.

8. Technical Correction for the Per-Cycle Gas Dryer Continuously Burning Pilot Light Gas Energy Consumption

The equation provided under section 4.4 ("Per-cycle gas dryer continuously burning pilot light gas energy consumption") of the current DOE clothes dryer test procedure contains a technical error in the equation for calculation of the per-cycle gas dryer continuously burning pilot light gas energy consumption, E_{up}, in Btu's per cycle. E_{up} is the product of the following three factors: (A) The cubic feet of gas consumed by the gas pilot in hour; (B) the total number of hours per year the pilot is consuming gas while the dryer is not operating in active mode (8,760 total hours per year minus 140 hours per year the dryer operates in active mode) divided by the representative average number of clothes dryer cycles in a year (416); and (C) the corrected gas heat value. Part (B) of this equation is currently incorrect, reading (8760—140/416) and missing the appropriate parentheses. The equation should correctly subtract the total number of hours per year the pilot is consuming gas while the dryer is not operating in active mode from the number of hours per year the dryer operates in active mode, before dividing by the average number of dryer cycles in a year. The equation should read ((8760—140)/416) to correctly calculate the per-cycle gas dryer continuously burning pilot light gas energy consumption. Therefore, DOE proposes in today's SNOPR to amend the equation, as discussed above, to correctly calculate the per-cycle gas dryer continuously burning pilot light gas energy consumption.

9. Clarification of Gas Supply Test Conditions for Gas Clothes Dryers

Section 2.3.2.1 and 2.3.2.2 of the DOE clothes dryer test procedure specifies maintaining "the gas supply to the clothes dryer at a normal inlet test pressure immediately ahead of all controls at" 7 to 10 inches of water column for natural gas or 11 to 13 inches of water column for propane gas. DOE believes that the references to "normal inlet test pressure" in sections 2.3.2.1 and 2.3.2.2 of its clothes dryer test procedure, which are provided to specify natural gas and propane supply pressure test conditions, respectively, may be confusing as to what is meant by the term "normal." DOE believes that such language is not necessary because the gas supply pressure immediately ahead of all controls is explicitly stated as either 7 to 10 inches water column for natural gas or 11 to 13 inches of water column for propane gas. Therefore, DOE proposes to revise the test pressure conditions in sections 2.3.2.1 and 2.3.2.2 of the DOE clothes dryer test procedure to specify maintaining "the gas supply to the clothes dryer immediately ahead of all controls at a pressure of" 7 to 10 inches of water column for natural gas and 11 to 13 inches of water column for propane gas.

DOE also believes that the specifications for a gas pressure regulator in sections 2.3.2.1 and 2.3.2.2 of its clothes dryer test procedure should clarify that the outlet pressure for a dryer equipped with a pressure regulator for which the manufacturer specifies an outlet pressure, should be approximately that recommended by the manufacturer. DOE is proposing to make these minor revisions to the language in these sections to clarify the outlet pressure conditions for a dryer equipped with a gas pressure regulator.

D. Compliance With Other EPCA Requirements

1. Test Burden

Section 323(b)(3) of EPCA requires that "[a]ny test procedures prescribed or amended under this section shall be reasonably designed to produce test results which measure energy efficiency, energy use * * * or estimated annual operating cost of a covered product during a representative average use cycle or period of use * * * and shall not be unduly burdensome to conduct." (42 U.S.C. 6293(b)(3)) DOE tentatively concluded in the December

2008 TP NOPR that amending the relevant DOE test procedures to incorporate clauses regarding test conditions and methods found in IEC Standard 62301 for measuring standby mode and off mode power consumption, along with the proposed clarifications and text corrections, would satisfy this requirement. 73 FR 74639, 74650 (Dec. 9, 2008)

For clothes dryers, AHAM supported the development of an empirical factor, with appropriate energy units, that might be added to the active energy-use measurements to account for the delay start and cycle finished features, thereby eliminating the need for separate measurements in these modes. AHAM added that, while assumptions would still be involved in development of this type of factor, it would ease the testing requirements and burden. (AHAM, TP No. 10 at p. 5) Whirlpool believes that this proposed regulation would not be burdensome, subject to the changes it suggested for the active, standby, and off mode definitions (as discussed in section III.B.2) and changes to the test procedure (as discussed in sections III.B.3 and III.B.4). (Whirlpool, TP No. 9 at p. 4) For the reasons discussed in section III.B.2, DOE is not proposing amendments to measure delay start and cycle finished modes in the clothes dryer test procedure in today's SNOPR, and is instead proposing simplified methodology in which the energy use associated with delay start and cycle finished modes, although determined to not be energy use in a standby mode, would be approximated by the energy in inactive and off modes. Therefore, DOE tentatively concludes that the proposed amendments to the clothes dryer test procedures for measuring standby and off modes adopted in today's SNOPR are not unduly burdensome.

AHAM commented that DOE's proposed ambient temperature of 74 °F for determining standby power for room air conditioners would substantially increase the test burden, both in terms of time and resources, resulting in higher testing costs. AHAM stated that laboratories would require another facility to run the standby test procedure due to the different ambient conditions. AHAM believes that standby power should be measured at the same temperature conditions used for determining active energy use of room air conditioners. (AHAM, TP No. 10 at p. 5) GE also commented that the smaller tolerances for ambient conditions, which are different from the conditions for cooling performance testing, represent a testing burden. (GE, Public Meeting Transcript, TP No. 8 at pp. 99–100) For the reasons noted in section III.B.3, DOE is proposing to provide manufacturers flexibility in setting the ambient conditions for standby mode and off mode testing. The proposed amendments to the room air conditioner test procedure in today's SNOPR specify maintaining the indoor test conditions at the temperature required by section 4.2 of IEC Standard 62301. Further, if the unit is tested in the cooling performance test chamber, the proposed amendments allow the manufacturer to maintain the outdoor test conditions either as specified for the DOE cooling test procedure or according to section 4.2 of IEC Standard 62301. DOE notes that the indoor temperature range for the cooling performance test falls within the temperature range allowed by IEC Standard 62301 and, along with the flexibility to the outdoor test conditions, would not require another facility to run the standby and off mode tests. In addition, DOE is not proposing amendments to the room air conditioner test procedure that would measure energy use in delay start or off-cycle modes as discussed in section III.B.2. For these reasons, DOE tentatively concludes that the test conditions proposed in today's SNOPR are not unduly burdensome, yet still produce representative standby mode and off mode energy consumption measurements.

The proposed amendments to the DOE test procedure for clothes dryers to test automatic termination control dryers are based upon an international testing standard used to determine compliance with energy conservation standards for clothes dryers in Australia. A number of manufacturers that sell dryers in the United States also sell clothes dryers in Australia, and, therefore, likely already test clothes dryers according to this test standard. DOE believes that the proposed amendments would not require testing methods and equipment that are substantially different from the test methods and equipment in the current DOE test procedures and, therefore, would not require manufacturers to make a major investment in test facilities and new equipment.

The proposed amendments to the DOE test procedure for residential clothes dryers to test vent-less clothes dryers are based on an international test standard used throughout the EU to determine compliance with energy conservation standards. A number of manufacturers that sell dryers in the United States also sell dryers in the EU, and, therefore, likely already test clothes dryers according to this test standard, which is very similar to the amended test procedure proposed in today's SNOPR. DOE believes that the proposed amendments would not require testing methods and equipment that are substantially different from the test methods and equipment in the current DOE clothes dryer test procedure.

DOE's proposed amendments to the clothes dryer test procedure, to reflect current usage patterns and capabilities, do not substantially change the testing procedures and methods such that they would become burdensome to conduct. DOE's proposed amendments to change the number of annual use cycles affects only the calculations of the per-cycle continuously burning pilot light gas energy consumption and the estimated annual operating cost for gas clothes dryers with such pilots. The number of annual use cycles does not impact the testing procedures themselves. The proposed amendments to change the initial RMC from 70 percent to 47 percent are intended to reflect current clothes loads after a wash cycle. DOE believes that such a change would likely only require a moderately longer spin time during test load preparation to achieve the proper lower moisture content, and that it would not be unduly burdensome to conduct. Finally, the proposed amendment to change the test load size for standard-size clothes dryers from 7.00 lb ± .07 lb to 8.45 lb ± .085 lb, respectively, would not impact the testing procedures themselves, and would not require manufacturers to make any significant new investment in test facilities and equipment. DOE believes that these proposed amendments to the DOE clothes dryer test procedure would produce test results that measure energy use of clothes dryers during a representative average use cycle.

The proposed amendments to update the references to external standards in the DOE room air conditioner test procedure are based on the availability of revised standards representing current industry practices and methods. The proposed amendments to reference ANSI/AHAM RAC–1–R2008 do not introduce any new changes in the measurement of cooling capacity or power input, while the proposed amendments to reference ANSI/ASHRAE Standard 16–69 would introduce four new temperature measurements, provide increased test tolerances, and allow additional flexibility in the methodology for measuring capacity. These proposed amendments would not require manufacturers to make any significant new investment in test facilities and equipment, nor require significant changes in the testing methodology.

For the reasons noted above, DOE has tentatively concluded that the amendments to the active mode test procedures would produce representative test results for both residential clothes dryers and room air conditioners, and that testing under the test procedures would not be unduly burdensome to conduct. Therefore, as discussed in section III.C.6, DOE is proposing in today's SNOPR to amend the DOE test procedure to reference the relevant sections of ANSI/AHAM RAC–1–R2008 and ANSI/ASHRAE Standard 16–1983 (RA 2009).[41]

2. Potential Incorporation of IEC Standard 62087

Section 325(gg)(2)(A) of the EISA 2007 amendments to EPCA directs DOE to consider IEC Standard 62087 when amending test procedures to include standby mode and off mode power measurements. (42 U.S.C. 6295(gg)(2)(A)) As discussed in section III.B.1 of this notice, DOE reviewed IEC Standard 62087 "Methods of measurement for the power consumption of audio, video, and related equipment" (Second Edition 2008–09) and determined that it would not be applicable to measuring power consumption of electrical appliances such as clothes dryers and room air conditioners. Therefore, DOE has determined that referencing IEC Standard 62087 is not necessary for the proposed amendments to the test procedures that are the subject of this rulemaking.

3. Integration of Standby Mode and Off Mode Energy Consumption Into the Efficiency Metrics

Section 325(gg)(2)(A) requires that standby mode and off mode energy consumption be "integrated into the overall energy efficiency, energy consumption, or other energy descriptor for each covered product" unless the current test procedures already fully account for the standby mode and off mode energy consumption or if such an integrated test procedure is technically infeasible. (42 U.S.C. 6295(gg)(2)(A)) For clothes dryers, today's SNOPR does not affect DOE's proposal in the December 2008 TP NOPR to incorporate the standby and off mode energy consumption into a "per-cycle combined total energy consumption expressed in kilowatt-hours" and into an CEF, as discussed in section III.B.5 of this notice. For room air conditioners, today's SNOPR does not affect DOE's proposal in the December 2008 TP NOPR to incorporate the standby and off mode energy consumption into a metric for "combined annual energy consumption" and into an CEER, as discussed in section III.B.5.

IV. Effects of Test Procedure Revisions on Compliance With Standards

As noted in section I, DOE must determine to what extent, if any, the proposed test procedures would alter the measured energy efficiency of covered products as determined under the existing test procedures. If DOE determines that an amended test procedure would alter the measured efficiency of a covered product, DOE must amend the applicable energy conservation standard during the rulemaking carried out with respect to such test procedure. (42 U.S.C. 6293(e))

As noted above in section II, EPCA provides that amendments to the test procedures to include standby mode and off mode energy consumption will not determine compliance with previously established standards. (U.S.C. 6295(gg)(2)(C)) Because the proposed amended test procedures for standby mode and off mode energy consumption would not alter existing measures of energy consumption or efficiency, these proposed amendments would not affect a manufacturer's ability to demonstrate compliance with previously established standards.

Based on DOE's review of the proposed amendments to the DOE clothes dryer active mode test procedure in today's SNOPR, DOE believes that only the revisions to the initial RMC, described in section III.C.5.b, and the changes to the standard-size dryer test load sizes, described in section III.C.5.c, would affect the measured EF as compared to the existing test procedure. Based upon DOE testing and analysis of minimally compliant clothes dryers and review of available research, DOE believes that the proposed amendments to the initial RMC would increase the measured EF of minimally compliant clothes dryers by 41 percent, while the proposed amendments to the test load size for standard-size clothes dryers would increase the measured EF by 3.8 percent. Because of the proposed amendments in today's SNOPR, the measured EF of minimally compliant clothes dryers would increase by about 41 percent for compact-size clothes dryers and about 46 percent for standard-size clothes dryers. Table 0.1 shows how the current energy conservation standards would be affected by the proposed amendments to the DOE clothes dryer test procedure. DOE will consider such changes in the concurrent energy conservation standards rulemaking for clothes dryers and room air conditioners.

TABLE 0.1—ENERGY FACTOR OF A MINIMALLY COMPLIANT CLOTHES DRYER WITH THE CURRENT AND PROPOSED AMENDED TEST PROCEDURE

Product class	Energy factor *(lb/kWh)*	
	Current test procedure	Proposed amended test procedure
1. Electric, Standard (4.4 ft^3 or greater capacity)	3.01	4.39
2. Electric, Compact (120 v) (less than 4.4 ft^3 capacity)	3.13	4.41
3. Electric, Compact (240 v) (less than 4.4 ft^3 capacity)	2.90	4.09
4. Gas	2.67	3.90

Because the proposed clothes dryer test procedure amendments for active mode would substantially change the existing EF metric, DOE has tentatively decided to create a new appendix D1 in 10 CFR 430 subpart B for informational purposes only. Such an appendix would contain a clothes dryer test procedure that manufacturers would be required to use on the mandatory compliance date of amended clothes dryer energy conservation standards. The final rule for the clothes dryer energy conservation standards rulemaking is due to be delivered to the **Federal Register** on June 30, 2011, and will have a compliance date 3 years later. Manufacturers must continue to use

[41] The DOE test procedure amendments reference ANSI/AHAM RAC–1–R2008 sections 4, 5, 6.1, and 6.5, and state that these provisions should be conducted in accordance with ANSI/ASHRAE Standard 16–1983 (RA 2009).

appendix D to subpart B of part 430 for clothes dryers until the energy conservation standards at 10 CFR 430.32(h) are amended to require mandatory compliance using appendix D1.

Because DOE's review of the proposed room air conditioner test procedure amendments tentatively concluded that the measured EER would not be affected, manufacturers must continue to use appendix F to measure room air conditioner active mode energy use. Manufacturers would not be required to use the proposed provisions for standby mode and off mode energy use (specifically, sections 2.2, 3.2, 4.2, and 5.3) until the mandatory compliance date of amended room air conditioner energy conservation standards.

All representations related to standby mode and off mode energy consumption of both clothes dryers and room air conditioners made 180 days after the date of publication of the test procedures final rule in the **Federal Register** and before the compliance date of amended energy conservation standards must be based upon the standby mode and off mode requirements of the amended test procedures (for clothes dryers, appendix D1 and for room air conditioners, amended appendix F.)

V. Procedural Requirements

A. Review Under Executive Order 12866

Today's proposed regulatory action is not a "significant regulatory action" under section 3(f) of Executive Order 12866, Regulatory Planning and Review, 58 FR 51735 (Oct. 4, 1993). Accordingly, this proposed action was not subject to review under the Executive Order by the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB).

B. Review Under the Regulatory Flexibility Act

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

DOE reviewed today's SNOPR under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. This SNOPR prescribes amendments to test procedures that would be used to test compliance with energy conservation standards for the products that are the subject of this rulemaking; these amendments are described in detail elsewhere in the preamble. DOE tentatively certifies that this SNOPR would not have a significant impact on a substantial number of small entities. The factual basis for this certification is as follows.

The Small Business Administration (SBA) considers an entity to be a small business if, together with its affiliates, it employs less than a threshold number of workers specified in 13 CFR part 121. The thresholds set forth in these regulations are based on size standards and codes established by the North American Industry Classification System (NAICS).[42] The threshold number for NAICS classification for 335224, which applies to household laundry equipment manufacturers and includes clothes dryer manufacturers, is 1,000 employees. Additionally, the threshold number for NAICS classification for 335224, which applies to air conditioning and warm air heating equipment and commercial and industrial refrigeration equipment, is 750 employees.

Most of the manufacturers supplying clothes dryers and room air conditioners are large multinational corporations. As part of the energy conservation standards rulemaking for residential clothes dryers and room air conditioners, DOE requested comment on whether there are any manufacturer subgroups, including potential small businesses, that it should consider for its analyses. However, DOE did not receive any comments regarding whether there are any residential clothes dryer or room air conditioner manufacturers that would be considered small businesses. Searches of the SBA Web site[43] to identify manufacturers within NAICS code 335224 that produce clothes dryers revealed only one potential small business that could be affected by these proposed test procedure amendments. DOE also investigated manufacturers registered as small businesses under NAICS codes 333415 for room air conditioners, and only one small business was identified that could be affected by these proposed test procedure amendments, out of approximately 10 manufacturers supplying room air conditioners in the United States.

The amendments set forth in today's SNOPR for standby and off mode energy use to adopt definitions of modes based on the relevant provisions from IEC Standard 62301 CDV do not impose additional impacts beyond those discussed in the December 2008 TP NOPR to amend DOE's test procedures by incorporating testing provisions to address standby mode and off mode energy consumption. DOE tentatively concluded in the December 2008 TP NOPR that the proposed measures would not have a significant impact on either small or large manufacturers under the provisions of the Regulatory Flexibility Act for the reasons set forth below.

The tests to measure standby and off mode can be conducted in the same facilities used for the current energy testing of these products, so there would be no additional facilities costs required by the proposed rule. The power meter required for these tests might require greater accuracy than the power meter used for current energy testing, but the investment required for a possible instrumentation upgrade would likely be relatively modest—on the order of two thousand dollars per power meter—for small manufacturers with lower market share that may require as few as one power meter because they have fewer units to test. This cost is small compared to the overall financial investment needed to undertake the business enterprise of testing consumer products which involves facilities, qualified staff, and specialized equipment.

The duration of the standby and off mode testing is not expected to exceed the time required to conduct current energy testing. The proposed standby and off mode test could begin immediately following the active mode efficiency test and therefore, would not require additional set up, instrumentation, or waiting period. The testing official could run simultaneous tests on other units and simply record the results of the test at the end of the standby period. For these reasons, DOE believes that these requirements for equipment and time to conduct the additional tests would not be expected to impose a significant economic impact on affected small businesses.

Accordingly, DOE stated that it did not believe that the proposed rule

[42] For more information visit: *http://www.sba.gov/.*

[43] A searchable database of certified small businesses is available online at: *http://dsbs.sba.gov/dsbs/search/dsp_dsbs.cfm.*

would have a significant economic impact on entities subject to the applicable testing requirements. 73 FR 74639, 74651–52 (Dec. 9, 2008). DOE received no comments on this issue. Because DOE believes that the proposed amendments to address standby mode and off mode energy consumption in today's SNOPR would not impose additional impacts beyond those that would be imposed by the amendments proposed in the December 2008 TP NOPR, DOE believes that the amendments in today's SNOPR regarding standby mode and off mode would not have a significant economic impact on the small entities subject to the applicable testing requirements.

The proposed rule in today's SNOPR would also amend DOE's active mode test procedures for clothes dryers and room air conditioners by: (1) Providing a clothes dryer testing procedure to properly account for automatic cycle termination; (2) providing a clothes dryer testing procedure for vent-less clothes dryers; (3) revising the clothes dryer and room air conditioner test procedures to reflect current usage patterns and capabilities; and (4) incorporating references to current external test standards for room air conditioners and clothes dryers. These proposed amendments to the test procedures can be conducted in the same facilities used for the current energy testing of these products, and because all manufacturers of vent-less clothes dryers which DOE identified also produce vented clothes dryers, no new investments would be required for the proposed addition of vent-less clothes dryers as covered products. In addition, the test time and equipment required for the proposed testing of automatic cycle termination are comparable to those for the existing clothes dryer test procedure. Further, the proposed adjustments to load size and initial RMC would require relatively minor changes in test materials and extraction time, respectively, and other proposed amendments to reflect current usage patterns and capabilities are reflected in changes to the calculations, which do not have a time impact. The proposed amendments to reference the current external clothes dryer test standard would reference the same procedures and equipment as the test standard referenced by the existing DOE clothes dryer test procedure. Finally, DOE recognizes that the proposed amendments to reference the current external room air conditioner test standards would add requirements for additional calibration of test instruments (at least once every six months). DOE estimates that such calibration would cost on the order of 1,000 to 1,500 dollars per year. Thus, such requirements for equipment and time to conduct the additional tests would not be expected to impose a significant economic impact. Accordingly, DOE does not believe that the proposed rule would have a significant economic impact on entities subject to the applicable testing requirements.

For these reasons, DOE tentatively concludes and certifies that today's SNOPR would not have a significant economic impact on a substantial number of small entities. Accordingly, DOE has not prepared a regulatory flexibility analysis for this rulemaking. DOE will transmit the certification and supporting statement of factual basis to the Chief Counsel for Advocacy of the SBA for review under 5 U.S.C. 605(b).

C. Review Under the Paperwork Reduction Act of 1995

This rule contains a collection-of-information requirement subject to the Paperwork Reduction Act (PRA) which has been approved by OMB under control number 1910–1400. Public reporting burden for compliance reporting for energy conservation standards is estimated to average 30 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate, or any other aspect of this data collection, including suggestions for reducing the burden, to DOE (*see* **ADDRESSES**) and by e-mail to *Christine_J._Kymn@omb.eop.gov.*

Notwithstanding any other provision of the 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 PRA, unless that collection of information displays a currently valid OMB Control Number.

D. Review Under the National Environmental Policy Act of 1969

In this notice, DOE is proposing test procedure amendments that it expects would be used to develop and implement future energy conservation standards for clothes dryers and room air conditioners. DOE has determined that this rule falls into a class of actions that are categorically excluded from review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and DOE's implementing regulations at 10 CFR part 1021. Specifically, this rule amends an existing rule without changing its environmental effect, and, therefore, is covered by the Categorical Exclusion in 10 CFR part 1021, subpart D, paragraph A5, which applies because this rule would establish revisions to existing test procedures that would not affect the amount, quality, or distribution of energy usage, and, therefore, would not result in any environmental impacts. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

E. Review Under Executive Order 13132

Executive Order 13132, "Federalism," imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have Federalism implications. 64 FR 43255 (Aug. 10, 1999). The Executive Order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States, and to carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process that it will follow in developing such regulations. 65 FR 13735. DOE examined this proposed rule and determined that it would not preempt State law and would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. EPCA governs and prescribes Federal preemption of State regulations as to energy conservation for the products that are the subject of today's proposed rule. States can petition DOE for exemption from such preemption to the extent, and based on criteria, set forth in EPCA. (42 U.S.C. 6297(d)) Therefore, Executive Order 13132 requires no further action.

F. Review Under Executive Order 12988

Regarding the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, "Civil Justice Reform," 61 FR 4729 (Feb. 7, 1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write

regulations to minimize litigation; (3) provide a clear legal standard for affected conduct rather than a general standard; and (4) promote simplification and burden reduction. Section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation specifies the following: (1) The preemptive effect, if any; (2) any effect on existing Federal law or regulation; (3) a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) the retroactive effect, if any; (5) definitions of key terms; and (6) other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in sections 3(a) and 3(b) to determine whether they are met or whether it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this proposed rule meets the relevant standards of Executive Order 12988.

G. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4; 2 U.S.C. 1501 *et seq.*) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. For a proposed regulatory action likely to result in a rule that may cause the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish estimates of the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)) UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a proposed "significant intergovernmental mandate," and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect such governments. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820. (The policy is also available at *http://www.gc.doe.gov*). Today's proposed rule contains neither an intergovernmental mandate nor a mandate that may result in an expenditure of $100 million or more in any year, so these requirements do not apply.

H. Review Under the Treasury and General Government Appropriations Act, 1999

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

I. Review Under Executive Order 12630

DOE has determined, under Executive Order 12630, "Governmental Actions and Interference with Constitutionally Protected Property Rights," 53 FR 8859 (March 18, 1988), that this proposed regulation would not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

J. Review Under the Treasury and General Government Appropriations Act, 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed today's notice under OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

K. Review Under Executive Order 13211

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

L. Review Under Section 32 of the Federal Energy Administration Act of 1974

Under section 301 of the DOE Organization Act (Pub. L. 95–91; 42 U.S.C. 7101 *et seq.*), DOE must comply with section 32 of the Federal Energy Administration Act of 1974, as amended by the Federal Energy Administration Authorization Act of 1977 (FEAA). (15 U.S.C. 788) Section 32 essentially provides in part that, where a proposed rule authorizes or requires use of commercial standards, the rulemaking must inform the public of the use and background of such standards. In addition, section 32(c) requires DOE to consult with the Attorney General and the Chairman of the Federal Trade Commission (FTC) concerning the impact of the commercial or industry standards on competition.

The proposed modifications to the test procedures addressed by this proposed action incorporate testing methods contained in the commercial standard, IEC Standard 62301. Specifically DOE is proposing to incorporate from section 4, ("General conditions for measurements"), paragraph 4.2, "Test room," paragraph 4.3, "Power supply." paragraph 4.4, "Supply voltage waveform," and paragraph 4.5, "Power measurement accuracy," and from section 5 ("Measurements"), paragraph 5.1, "General" and paragraph 5.3, "Procedure" of IEC Standard 62301. DOE has evaluated this standard and is unable to conclude whether it fully complies with the requirements of section 32(b) of the FEAA (*i.e.,* whether it was developed in a manner that fully provides for public participation, comment, and review.) DOE will consult with the Attorney General and

the Chairman of the FTC about the impact on competition of using the methods contained in this standard, before prescribing a final rule.

VI. Public Participation

A. Attendance at the Public Meeting

The time, date, and location of the public meeting are listed in the **DATES** and **ADDRESSES** sections at the beginning of this SNOPR. To attend the public meeting, please notify Ms. Brenda Edwards at (202) 586–2945. As explained in the **ADDRESSES** section, foreign nationals visiting DOE Headquarters are subject to advance security screening procedures.

B. Procedure for Submitting Requests to Speak

Any person who has an interest in today's notice, or who is a representative of a group or class of persons that has an interest in these issues, may request an opportunity to make an oral presentation at the public meeting. Such persons may hand-deliver requests to speak to the address shown in the **ADDRESSES** section at the beginning of this notice between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. Requests may also be sent by mail or e-mail to: Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J, 1000 Independence Avenue, SW., Washington, DC 20585–0121, or *Brenda.Edwards@ee.doe.gov.* Persons who wish to speak should include in their request a computer diskette or CD in WordPerfect, Microsoft Word, PDF, or text (ASCII) file format that briefly describes the nature of their interest in this rulemaking and the topics they wish to discuss. Such persons should also provide a daytime telephone number where they can be reached.

DOE requests persons scheduled to make an oral presentation to submit an advance copy of their statements at least one week before the public meeting. DOE may permit persons who cannot supply an advance copy of their statement to participate, if those persons have made advance alternative arrangements with the Building Technologies Program. Requests to give an oral presentation should ask for such alternative arrangements.

C. Conduct of Public Meeting

DOE will designate a DOE official to preside at the public meeting and may use a professional facilitator to aid discussion. The meeting will not be a judicial or evidentiary-type public hearing, but DOE will conduct it in accordance with section 336 of EPCA (42 U.S.C. 6306). A court reporter will be present to record the proceedings and prepare a transcript. DOE reserves the right to schedule the order of presentations and to establish the procedures governing the conduct of the public meeting. After the public meeting, interested parties may submit further comments on the proceedings as well as on any aspect of the rulemaking until the end of the comment period.

The public meeting will be conducted in an informal, conference style. DOE will present summaries of comments received before the public meeting, allow time for presentations by participants, and encourage all interested parties to share their views on issues affecting this rulemaking. Each participant will be allowed to make a prepared general statement (within time limits determined by DOE), before the discussion of specific topics. DOE will permit other participants to comment briefly on any general statements. At the end of all prepared statements on each specific topic, DOE will permit participants to clarify their statements briefly and to comment on statements made by others.

Participants should be prepared to answer DOE's and other participants' questions. DOE representatives may also ask participants about other matters relevant to this rulemaking. The official conducting the public meeting will accept additional comments or questions from those attending, as time permits. The presiding official will announce any further procedural rules or modification of the above procedures that may be needed for the proper conduct of the public meeting.

DOE will make the entire record of this proposed rulemaking, including the transcript from the public meeting, available for inspection at the U.S. Department of Energy, 6th Floor, 950 L'Enfant Plaza, SW., Washington, DC 20024, (202) 586–2945, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. Copies of the transcript are available for purchase from the transcribing reporter.

D. Submission of Comments

DOE will accept comments, data, and information regarding the proposed rule before or after the public meeting, but no later than the date provided at the beginning of this notice. Comments, data, and information submitted to DOE's e-mail address for this rulemaking should be provided in WordPerfect, Microsoft Word, PDF, or text (ASCII) file format. Interested parties should avoid the use of special characters or any form of encryption, and wherever possible, comments should include the electronic signature of the author. Comments, data, and information submitted to DOE via mail or hand delivery/courier should include one signed original paper copy. No telefacsimiles (faxes) will be accepted.

Pursuant to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit two copies: One copy of the document that includes all of the information believed to be confidential, and one copy of the document with that information deleted. DOE will determine the confidential status of the information and treat it accordingly.

Factors of interest to DOE when evaluating requests to treat submitted information as confidential include: (1) A description of the items; (2) whether and why such items are customarily treated as confidential within the industry; (3) whether the information is generally known by or available from other sources; (4) whether the information was previously made available to others without obligation concerning its confidentiality; (5) an explanation of the competitive injury to the submitting person that would result from public disclosure; (6) when such information might lose its confidential character due to the passage of time; and (7) why disclosure of the information would be contrary to the public interest.

E. Issues on Which DOE Seeks Comment

DOE is particularly interested in receiving comments and views of interested parties on the following issues:

1. *Incorporation of IEC Standard 62301.* DOE invites comment on the adequacy of IEC Standard 62301 to measure standby power for clothes dryers and room air conditioners in general, and on the suitability of incorporating into DOE regulations the following specific provisions from IEC Standard 62301: Section 4 ("General conditions for measurements"), paragraph 4.2, "Test room,", paragraph 4.3 "Power supply" (for room air conditioners only), paragraph 4.4, "Supply voltage waveform," and paragraph 4.5, "Power measurement accuracy," and section 5 ("Measurements"), paragraph 5.1, "General" and paragraph 5.3, "Procedure." (*See* section III.B.1.)

2. "*Standby mode*" *definitions.* DOE invites comment on the proposed definition of "standby mode," which is based on the definition provided in IEC Standard 62301 CDV. (*See* section III.B.2.)

3. *Clothes dryer standby modes.* DOE invites comment on the establishment of inactive mode as the only standby mode for clothes dryers and the determination that delay start mode and cycle finished mode would not be considered standby modes. DOE further invites comment on the

proposed mode definitions and on the question of whether there are any modes consistent with the "active mode," "standby mode," or "off mode" definitions under the proposed definitions that have not been identified and that can represent significant energy use. (*See* section III.B.2.)

4. *Room air conditioner standby modes.* DOE invites comment on the establishment of inactive mode as the only standby mode for room air conditioners and the determination that delay start mode and off-cycle mode would not be considered standby modes. DOE further invites comment on the proposed mode definitions and on the question of whether there are any modes consistent with the "active mode," "standby mode," or "off mode" definitions under the proposed definitions that have not been identified and that can represent significant energy use. (*See* section III.B.2.)

5. *Network mode.* DOE welcomes comment on whether clothes dryers and room air conditioners are currently available that incorporate a networking function and whether definitions and testing procedures for a network mode should be incorporated into the DOE test procedure. DOE also requests comment on appropriate methodologies for measuring energy consumption in a network mode, and data on the results and repeatability of such testing methodology. (*See* section III.B.2.)

6. *Test room conditions.* DOE requests comment on the proposed room ambient temperature range for standby mode and off mode power measurements for room air conditioners and clothes dryers. (*See* section III.B.3.)

7. *Energy-use calculation for standby mode and off mode for clothes dryers.* DOE invites comment on the approach for determining total energy use for standby mode and off mode for clothes dryers, including its accuracy and test burden. DOE also invites comment and requests data on the estimates for annual hours associated with each mode, including the 140 hours specified by the current test procedure for active mode (drying). (*See* section III.B.4.a.)

8. *Energy-use calculation for standby mode and off mode for room air conditioners.* DOE invites comment on the approach for determining total energy use for standby mode and off mode for room air conditioners, including its accuracy and test burden. DOE also invites comment and requests data on the estimates for annual hours associated with each mode, including the estimate of "unplugged" time. (*See* section III.B.4.b.)

9. *Clothes dryer testing procedures to account for automatic cycle termination.* DOE invites comment on the adequacy of AS/NZS Standard 2442, along with proposed definitions and clarifications, to measure energy consumption for timer and automatic termination control clothes dryers to account for over-drying energy consumption. DOE further invites comments on whether the proposed FU factor credits for timer and automatic termination control dryers, along with the revised calculations for per-cycle energy consumption, are appropriate. In addition, DOE welcomes comment on whether a final RMC of 5 percent is appropriate, and, if not, what a representative final RMC would be. DOE also welcomes data from dryers tested according to the proposed test procedure, in particular for units which minimally comply with current energy conservation standards, as well as data showing whether one sensor technology is more accurate, and reduces over-drying, than another. (*See* section III.C.2.)

10. *Water temperature for clothes dryer test load preparation.* DOE invites comment on whether the existing water temperature of 100° ± 5 °F for test load preparation in the existing test procedure is representative of consumer usage habits, and, if not, what would be a representative value. DOE also requests data quantifying how changes to the water temperature for clothes dryer test load preparation would affect the measured efficiency as compared to the existing DOE test procedure, in particular for those units that are minimally compliant with current energy conservation standards.

11. *Cycles and settings for timer dryer and automatic termination control dryer testing.* DOE invites comment on whether using the maximum temperature setting for timer dryers is representative of current consumer usage habits. DOE also invites comment on whether the proposed cycles and settings for the automatic termination control dryer tests are representative of current consumer usage habits. DOE requests comment on whether multiple cycles and settings should be tested and how the results from those multiple tests should be evaluated, and if so, how testing multiple cycles and settings would affect the measured efficiency as compared to the existing DOE clothes dryer test procedure. (*See* section III.C.2.)

12. *Cool-down period for automatic termination control dryer testing.* DOE welcomes comment on whether the cool-down period should be included as part of the active mode test cycle for automatic termination control dryers. In addition, DOE also welcomes data quantifying how including the cool-down period in the test cycle would affect the measured efficiency of clothes dryers as compared to the existing DOE test procedure, in particular for those units that are minimally compliant with current energy conservation standards. (*See* section III.C.2.)

13. *Incorporation of testing procedures for vent-less clothes dryers.* DOE invites comment on the adequacy of proposed definitions and installation conditions for vent-less clothes dryers, which are based upon the alternate test procedure adopted in the LG Petition for Waiver. DOE further invites comment on the proposed additional clarifications to the installation conditions, condensation boxes, dryer preconditioning, and testing conditions based on EN Standard 61121 and Whirlpool's proposed amendments. Finally, DOE requests comment and data on the water consumption of vent-less clothes dryers and if measurement of water consumption should be included in the DOE clothes dryer test procedure. (*See* section III.C.3.)

14. *Number of valid clothes dryer test cycles.* DOE invites comment and data suggesting that test-to-test variation is sufficient to warrant a requirement for more than one clothes dryer test cycle. (*See* section III.C.3)

15. *Detergent specifications for test cloth preconditioning.* DOE invites comment on the proposed revisions to the detergent formulation and dosage specifications, requiring 60.8 g of AHAM standard test detergent Formula 3 for clothes dryer test cloth preconditioning. DOE also welcomes data showing the effects of changing the detergent specifications for test cloth preconditioning on the measured EF for clothes dryers. (*See* section III.C.4)

16. *Clothes dryer number of annual use cycles.* DOE seeks comment on the proposed amendment to change the number of clothes dryer annual use cycles to 283 cycles for all product classes of clothes dryers based upon data from the 2005 RECS. (*See* section III.C.5.a.)

17. *Clothes dryer initial remaining moisture content.* DOE seeks comment on the proposed amendments to the DOE clothes dryer test procedure to change the initial RMC to 47 percent ± 3.5 percent to reflect current consumer usage habits, based on the trends of the shipment-weighted average RMC of clothes washers shown in data submitted by AHAM. DOE further welcomes comment and data indicating an appropriate initial RMC and how that initial RMC would affect the measured EF of clothes dryers, in particular units that are minimally compliant with current energy conservation standards. (*See* section III.C.5.b.)

18. *Clothes Dryer Test Load Weight.* DOE seeks comment on the proposed amendments to the DOE clothes dryer test procedure to change the clothes dryer test load size to 8.45 lb ± .085 lb for standard-size dryers. DOE also welcomes data on clothes washer and clothes dryer test load sizes representative of current consumer usage habits for both compact-size and standard-size units. DOE further requests data on how any changes in test load size would affect the measured EF of clothes dryers, in particular units that are minimally compliant with current energy conservation standards. (*See* section III.C.5.c.)

19. *Room air conditioner annual operating hours.* DOE seeks comment on the determination that the 750 annual operating hours specified by the current DOE test procedure for room air conditioners is still representative based upon data from the 2005 RECS. (*See* section III.C.5.d.)

20. *Room air conditioner ambient test conditions.* DOE invites comment and data indicating representative ambient test conditions for the DOE room air conditioner test procedure. DOE further requests data showing how any changes to the ambient conditions would affect the measured EER of room air conditioners, in particular units that are minimally compliant with current energy conservation standards. (*See* section III.C.5.f.)

21. *Room air conditioner referenced test procedures.* DOE invites comment on the proposed amendments to update the references in the DOE room air conditioner test procedure to reference the latest ANSI and ASHRAE test standards, ANSI/AHAM RAC–1–R2008 and ANSI/ASHRAE Standard 16–1983 (RA 2009). (*See* section III.C.6.)

22. *Clothes dryer referenced test procedure.* DOE invites comment on the proposed amendments to update the reference in the DOE clothes dryer test procedure to reference

the latest AHAM clothes dryer test standard, AHAM Standard HLD–1–2009, and to eliminate the reference to obsolete AHAM Standard HLD–2EC. DOE also invites comment on whether the optional modified exhaust simulator in AHAM Standard HLD–1–2009 is appropriate for incorporation into the DOE clothes dryer test procedure. DOE seeks data comparing the effects of the two exhaust simulators in AHAM Standard HLD–1–2009 on the measured EF, in particular for units that minimally comply with current energy conservation standards. (*See* section III.C.7.)

23. *Technical correction for the per-cycle gas dryer continuously burning pilot light gas energy consumption.* DOE seeks comment on its proposed correction to the calculation of the per-cycle gas dryer continuously burning pilot light gas energy consumption. (*See* section III.C.8.)

24. *Clarification of gas supply test conditions for gas clothes dryers.* DOE seeks comment on its proposed clarifying language for specifying the natural gas and propane supply pressure conditions for testing gas clothes dryers.

25. *Effects of test procedure revisions on compliance with energy conservation standards.* DOE invites comment on how the proposed amendments to the DOE test procedures for clothes dryers and room air conditioners will affect the measured efficiency of products. In particular, DOE seeks data showing how certain proposed amendments affect the EF or EER of minimally compliant clothes dryers or room air conditioners, respectively. (*See* section IV.)

VII. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this notice of proposed rulemaking.

List of Subjects in 10 CFR Part 430

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Imports, Incorporation by reference, Intergovernmental relations, Small businesses.

Issued in Washington, DC, on June 11, 2010.

Cathy Zoi,

Assistant Secretary, Energy Efficiency and Renewable Energy.

For the reasons stated in the preamble, DOE proposes to amend part 430 of chapter II of title 10, of the Code of Federal Regulations, to read as set forth below:

PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS

1. The authority citation for part 430 continues to read as follows:

Authority: 42 U.S.C. 6291–6309; 28 U.S.C. 2461 note.

2. Section 430.3 is amended by:

a. Redesignating paragraphs (e)(1) through (e)(9) as (e)(2) through (e)(10).

b. Adding a new paragraph (e)(1).

c. Adding a new paragraph (g)(2).

d. Adding a new paragraph (g)(3).

e. Adding a new paragraph (l)(3).

The additions read as follows:

§ 430.3 Materials incorporated by reference.

* * * * *

(e) * * *

(1) ANSI/ASHRAE 16–1983 ("ANSI/ASHRAE 16") (Reaffirmed 2009), Method of Testing for Rating Room Air Conditioners and Packaged Terminal Air Conditioners, approved December 1, 1983, IBR approved for Appendix F to Subpart B.

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(g) * * *

(2) AHAM HLD–1–2009 ("AHAM HLD–1"), Household Tumble Type Clothes Dryers, approved October 2, 2009, IBR approved for Appendix D1 to Subpart B.

(3) ANSI/AHAM RAC–1–R2008 ("ANSI/AHAM RAC–1"), Room Air Conditioners, ANSI approved July 7, 2008, IBR approved for Appendix F to Subpart B.

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(l) * * *

(3) IEC 62301–2005–06 ("IEC 62301"), Household electrical appliances—Measurement of standby power (First Edition 2005–06), approved June 13, 2005, IBR approved for Appendix D1 and Appendix F to Subpart B.

* * * * *

3. Section 430.23 is amended by revising paragraphs (d) and (f) to read as follows:

§ 430.23 Test procedures for the measurement of energy and water consumption.

* * * * *

(d) *Clothes dryers.* (1) The estimated annual operating cost for clothes dryers shall be–

(i) For an electric clothes dryer, the product of the following three factors:

(A) The representative average-use cycle of 283 cycles per year,

(B) The total per-cycle electric dryer energy consumption in kilowatt-hours per-cycle, determined according to 4.1 of appendix D to this subpart before the date that appendix D1 becomes mandatory and 4.2 of appendix D1 upon the date that appendix D1 to this subpart becomes mandatory (see the note at the beginning of appendix D1), and

(C) The representative average unit cost in dollars per kilowatt-hour as provided by the Secretary, the resulting product then being rounded off to the nearest dollar per year, and

(ii) For a gas clothes dryer, the product of the representative average-use cycle of 283 cycles per year times the sum of:

(A) The product of the per-cycle gas dryer electric energy consumption in kilowatt-hours per cycle, determined according to 4.2 of appendix D to this subpart before the date that appendix D1 becomes mandatory and 4.4 of appendix D1 upon the date that appendix D1 to this subpart becomes mandatory, times the representative average unit cost in dollars per kilowatt-hour as provided by the Secretary plus,

(B) The product of the total gas dryer gas energy consumption per cycle, in Btu's per cycle, determined according to 4.5 of appendix D of this subpart before the date that appendix D1 becomes mandatory and 4.8 of appendix D1 upon the date that appendix D1 to this subpart becomes mandatory, times the representative average unit cost in dollars per Btu as provided by the Secretary, the resulting product then being rounded off to the nearest dollar per year.

(2) The energy factor, expressed in pounds of clothes per kilowatt-hour, for clothes dryers shall be either the quotient of a 3-pound bone-dry test load for compact dryers, as defined by 2.7.1 of appendix D to this subpart before the date that appendix D1 becomes mandatory or by 2.7.1 of appendix D1 upon the date that appendix D1 to this subpart becomes mandatory, or the quotient of a 7-pound bone-dry test load for standard dryers, as defined by 2.7.2 of appendix D to this subpart before the date that appendix D1 becomes mandatory or an 8.45-pound bone-dry test load for standard dryers, as defined by 2.7.2 of appendix D1 upon the date that appendix D1 to this subpart becomes mandatory, as applicable, divided by the clothes dryer energy consumption per cycle, as determined according to 4.1 for electric clothes dryers and 4.6 for gas clothes dryers of appendix D to this subpart before the date that appendix D1 becomes mandatory and 4.2 for electric clothes dryers and 4.9 for gas clothes dryers of appendix D1 upon the date that appendix D1 to this subpart becomes mandatory, the resulting quotient then being rounded off to the nearest hundredth (.01).

(3) The combined energy factor, expressed in pounds of clothes per kilowatt-hour, for clothes dryers shall be either the quotient of a 3-pound bone-dry test load for compact dryers, as defined by 2.7.1 of appendix D1 to this subpart, or the quotient of a 8.45-pound

bone-dry test load for standard dryers, as defined by 2.7.2 of appendix D1 to this subpart, as applicable, divided by the clothes dryer combined energy consumption per cycle, as determined according to 4.11 of appendix D1 to this subpart, the resulting quotient then being rounded off to the nearest hundredth (.01).

(4) Other useful measures of energy consumption for clothes dryers shall be those measures of energy consumption for clothes dryers which the Secretary determines are likely to assist consumers in making purchasing decisions and which are derived from the application of appendix D to this subpart before the date that appendix D1 becomes mandatory and appendix D1 upon the date that appendix D1 to this subpart becomes mandatory.

* * * * *

(f) *Room air conditioners.* (1) The estimated annual operating cost for room air conditioners, expressed in dollars per year, shall be determined by multiplying the following three factors:

(i) Electrical input power in kilowatts as determined in accordance with 5.2 of appendix F to this subpart,

(ii) The representative average-use cycle of 750 hours of compressor operation per year, and

(iii) A representative average unit cost of electrical energy in dollars per kilowatt-hour as provided by the Secretary, the resulting product then being rounded off to the nearest dollar per year.

(2) The energy efficiency ratio for room air conditioners, expressed in Btu's per watt-hour, shall be the quotient of:

(i) The cooling capacity in Btu's per hour as determined in accordance with 5.1 of appendix F to this subpart divided by:

(ii) The electrical input power in watts as determined in accordance with 5.2 of appendix F to this subpart, the resulting quotient then being rounded off to the nearest 0.1 Btu per watt-hour.

(3) The average annual energy consumption for room air conditioners, expressed in kilowatt-hours per year, shall be determined by multiplying together the following two factors:

(i) Electrical input power in kilowatts as determined in accordance with 5.2 of appendix F to this subpart, and

(ii) The representative average-use cycle of 750 hours of compressor operation per year, the resulting product then being rounded off to the nearest kilowatt-hour per year.

(4) The combined annual energy consumption for room air conditioners, expressed in kilowatt-hours per year, shall be the sum of:

(i) The average annual energy consumption as determined in accordance with paragraph (f)(3) of this section, and

(ii) The standby mode and off mode energy consumption, as determined in accordance with 5.3 of appendix F to this subpart, the resulting sum then being rounded off to the nearest kilowatt-hour per year.

(5) The combined energy efficiency ratio for room air conditioners, expressed in Btu's per watt-hour, shall be the quotient of:

(i) The cooling capacity in Btu's per hour as determined in accordance with 5.1 of appendix F to this subpart multiplied by the representative average-use cycle of 750 hours of compressor operation per year, divided by

(ii) The combined annual energy consumption as determined in accordance with section (4) multiplied by a conversion factor of 1,000 to convert kilowatt-hours to watt-hours, the resulting quotient then being rounded off to the nearest 0.1 Btu per watt-hour.

* * * * *

4. Appendix D to subpart B of part 430 is amended by adding a Note after the heading to read as follows:

Appendix D to Subpart B of Part 430–Uniform Test Method for Measuring the Energy Consumption of Clothes Dryers

Note: Manufacturers must continue to use appendix D to subpart B of part 430 until the energy conservation standards for clothes dryers at 10 CFR 430.32(h) are amended to require mandatory compliance using appendix D1.

* * * * *

5. Appendix D1 is added to subpart B of part 430 to read as follows:

Appendix D1 to Subpart B of Part 430–Uniform Test Method for Measuring the Energy Consumption of Clothes Dryers

Note: Appendix D1 to subpart B of part 430 is informational only. Manufacturers must continue to use appendix D to subpart B of part 430 until the energy conservation standards for clothes dryers at 10 CFR 430.32(h) are amended to require mandatory compliance using appendix D1.

1. Definitions

1.1 "Active mode" means a mode in which the clothes dryer is connected to a main power source, has been activated and is performing the main function of tumbling the clothing with or without heated or unheated forced air circulation to remove moisture from and/or remove or prevent wrinkling of the clothing.

1.2 "AHAM" means the Association of Home Appliance Manufacturers.

1.3 "Automatic termination control" means a dryer control system with a sensor which monitors either the dryer load temperature or its moisture content and with a controller which automatically terminates the drying process. A mark or detent which indicates a preferred automatic termination control setting must be present if the dryer is to be classified as having an "automatic termination control." A mark is a visible single control setting on one or more dryer controls.

1.4 "*Automatic termination control dryer*" means a clothes dryer which can be preset to carry out at least one sequence of operations to be terminated by means of a system assessing, directly or indirectly, the moisture content of the load. An automatic termination control dryer with supplementary timer shall be tested as an automatic termination control dryer.

1.5 "*Bone dry*" means a condition of a load of test clothes which has been dried in a dryer at maximum temperature for a minimum of 10 minutes, removed, and weighed before cool down, and then dried again for 10-minute periods until the final weight change of the load is 1 percent or less.

1.6 "*Compact*" or "compact size" means a clothes dryer with a drum capacity of less than 4.4 cubic feet.

1.7 "*Conventional clothes dryer*" means a clothes dryer that exhausts the evaporated moisture from the cabinet.

1.8 "*Cool down*" means that portion of the clothes drying cycle when the added gas or electric heat is terminated and the clothes continue to tumble and dry within the drum.

1.9 "*Cycle*" means a sequence of operation of a clothes dryer which performs a clothes drying operation, and may include variations or combinations of the functions of heating, tumbling and drying.

1.10 "*Drum capacity*" means the volume of the drying drum in cubic feet.

1.11 "*HLD–1*" means the test standard published by the Association of Home Appliance Manufacturers, titled "Household Tumble Type Clothes Dryers", October 2009, AHAM HLD–1–2009 (incorporated by reference; *see* § 430.3).

1.12 "*IEC 62301*" means the test standard published by the International Electrotechnical Commission, titled "Household electrical appliances–Measurement of standby power," Publication 62301 (First Edition, 2005–06), IEC 62301–2005–06 (incorporated by reference; *see* § 430.3).

1.13 "*Inactive mode*" means a standby mode that facilitates the activation of active mode by remote switch (including remote control), internal sensor, or timer, or that provides continuous status display.

1.14 "*Moisture content*" means the ratio of the weight of water contained by the test load to the bone-dry weight of the test load, expressed as a percent.

1.15 "*Moisture sensing control*" means a system which utilizes a moisture sensing element within the dryer drum that monitors the amount of moisture in the clothes and automatically terminates the dryer cycle.

1.16 "*Off mode*" means a mode in which the clothes dryer is connected to a main power source and is not providing any active

or standby mode function, and where the mode may persist for an indefinite time. An indicator that only shows the user that the product is in the off position is included within the clasification of an off mode.

1.17 "*Standard size*" means a clothes dryer with a drum capacity of 4.4 cubic feet or greater.

1.18 "*Standby mode*" means any product modes where the energy using product is connected to a mains power source and offers one or more of the following user oriented or protective functions which may persist for an indefinite time:

(a) To facilitate the activation of other modes (including activation or deactivation of active mode) by remote switch (including remote control), internal sensor, or timer.

(b) Continuous functions, including information or status displays (including clocks) or sensor-based functions. A timer is a continuous clock function (which may or may not be associated with a display) that provides regular scheduled tasks (e.g., switching) and that operates on a continuous basis.

1.19 "*Temperature sensing control*" means a system which monitors dryer exhaust air temperature and automatically terminates the dryer cycle.

1.20 "*Timer dryer*" means a clothes dryer that can be preset to carry out at least one sequence of operations to be terminated by a timer, but may also be manually controlled.

1.21 "*Vent-less clothes dryer*" means a clothes dryer that uses a closed-loop system with an internal condenser to remove the evaporated moisture from the heated air. The moist air is not discharged from the cabinet.

2. Testing Conditions

2.1 *Installation.* Install the clothes dryer in accordance with manufacturer's instructions. For conventional clothes dryers, as defined in 1.7, the dryer exhaust shall be restricted by adding the AHAM exhaust simulator described in 3.3.5.1 of HLD–1 (incorporated by reference; *see* § 430.3). For vent-less clothes dryers, as defined in 1.21, the dryer shall be tested without the AHAM exhaust simulator. Where the manufacturer gives the option to use the dryer both with and without a duct, the dryer shall be tested without the exhaust simulator. All external joints should be taped to avoid air leakage. If the manufacturer gives the option to use a vent-less clothes dryer, as defined in 1.21, with or without a condensation box, the dryer shall be tested with the condensation box installed. For vent-less clothes dryers, the condenser unit of dryer must remain in place and not be taken out of the dryer for any reason between tests. For drying testing, disconnect all console lights or other lighting systems on the clothes dryer which do not consume more than 10 watts during the clothes dryer test cycle. For standby and off mode testing, do not disconnect console lights or other lighting systems.

2.2 *Ambient temperature and humidity.*

2.2.1 For drying testing, maintain the room ambient air temperature at 75 ± 3 °F and the room relative humidity at 50 ± 10 percent relative humidity.

2.2.2 For standby and off mode testing, maintain room ambient air temperature conditions as specified in section 4, paragraph 4.2 of IEC 62301 (incorporated by reference; *see* § 430.3).

2.3 *Energy supply.*

2.3.1 *Electrical supply.* Maintain the electrical supply at the clothes dryer terminal block within 1 percent of 120/240 or 120/208Y or 120 volts as applicable to the particular terminal block wiring system and within 1 percent of the nameplate frequency as specified by the manufacturer. If the dryer has a dual voltage conversion capability, conduct test at the highest voltage specified by the manufacturer.

2.3.1.1 *Supply voltage waveform.* For the clothes dryer standby mode and off mode testing, maintain the electrical supply voltage waveform indicated in section 4, paragraph 4.4 of IEC 62301 (incorporated by reference; *see* § 430.3).

2.3.2 *Gas supply.*

2.3.2.1 *Natural gas.* Maintain the gas supply to the clothes dryer immediately ahead of all controls at a pressure of 7 to 10 inches of water column. If the clothes dryer is equipped with a gas appliance pressure regulator for which the manufacturer specifies an outlet pressure, the regulator outlet pressure shall be approximately that recommended by the manufacturer. The hourly Btu rating of the burner shall be maintained within ±5 percent of the rating specified by the manufacturer. The natural gas supplied should have a heating value of approximately 1,025 Btus per standard cubic foot. The actual heating value, H_n2, in Btus per standard cubic foot, for the natural gas to be used in the test shall be obtained either from measurements made by the manufacturer conducting the test using a standard continuous flow calorimeter as described in 2.4.6 or by the purchase of bottled natural gas whose Btu rating is certified to be at least as accurate a rating as could be obtained from measurements with a standard continuous flow calorimeter as described in 2.4.6.

2.3.2.2 *Propane gas.* Maintain the gas supply to the clothes dryer immediately ahead of all controls at a pressure of 11 to 13 inches of water column. If the clothes dryer is equipped with a gas appliance pressure regulator for which the manufacturer specifies an outlet pressure, the regulator outlet pressure shall be approximately that recommended by the manufacturer. The hourly Btu rating of the burner shall be maintained within ±5 percent of the rating specified by the manufacturer. The propane gas supplied should have a heating value of approximately 2,500 Btus per standard cubic foot. The actual heating value, H_p, in Btus per standard cubic foot, for the propane gas to be used in the test shall be obtained either from measurements made by the manufacturer conducting the test using a standard continuous flow calorimeter as described in 2.4.6 or by the purchase of bottled gas whose Btu rating is certified to be at least as accurate a rating as could be obtained from measurement with a standard continuous calorimeter as described in 2.4.6.

2.4 *Instrumentation.* Perform all test measurements using the following instruments as appropriate.

2.4.1 *Weighing scale for test cloth.* The scale shall have a range of 0 to a maximum of 30 pounds with a resolution of at least 0.2 ounces and a maximum error no greater than 0.3 percent of any measured value within the range of 3 to 15 pounds.

2.4.1.2 *Weighing scale for drum capacity measurements.* The scale should have a range of 0 to a maximum of 500 pounds with resolution of 0.50 pounds and a maximum error no greater than 0.5 percent of the measured value.

2.4.2 *Kilowatt-hour meter.* The kilowatt-hour meter shall have a resolution of 0.001 kilowatt-hours and a maximum error no greater than 0.5 percent of the measured value.

2.4.3 *Gas meter.* The gas meter shall have a resolution of 0.001 cubic feet and a maximum error no greater than 0.5 percent of the measured value.

2.4.4 *Dry and wet bulb psychrometer.* The dry and wet bulb psychrometer shall have an error no greater than ±1 °F.

2.4.5 *Temperature.* The temperature sensor shall have an error no greater than ±1 °F.

2.4.6 *Standard Continuous Flow Calorimeter.* The Calorimeter shall have an operating range of 750 to 3,500 Btu per cubic feet. The maximum error of the basic calorimeter shall be no greater than 0.2 percent of the actual heating value of the gas used in the test. The indicator readout shall have a maximum error no greater than 0.5 percent of the measured value within the operating range and a resolution of 0.2 percent of the full-scale reading of the indicator instrument.

2.4.7 *Standby mode and off mode watt meter.* The watt meter used to measure standby mode and off mode power consumption of the clothes dryer shall have the resolution specified in section 4, paragraph 4.5 of IEC 62301(incorporated by reference; *see* § 430.3). The watt meter shall also be able to record a "true" average power as specified in section 5, paragraph 5.3.2(a) of IEC 62301.

2.5 *Lint trap.* Clean the lint trap thoroughly before each test run.

2.6 *Test Clothes.*

2.6.1 *Energy test cloth.* The energy test cloth shall be clean and consist of the following:

(a) Pure finished bleached cloth, made with a momie or granite weave, which is a blended fabric of 50-percent cotton and 50-percent polyester and weighs within +10 percent of 5.75 ounces per square yard after test cloth preconditioning, and has 65 ends on the warp and 57 picks on the fill. The individual warp and fill yarns are a blend of 50-percent cotton and 50-percent polyester fibers.

(b) Cloth material that is 24 inches by 36 inches and has been hemmed to 22 inches by 34 inches before washing. The maximum shrinkage after five washes shall not be more than 4 percent on the length and width.

(c) The number of test runs on the same energy test cloth shall not exceed 25 runs.

2.6.2 *Energy stuffer cloths.* The energy stuffer cloths shall be made from energy test cloth material, and shall consist of pieces of material that are 12 inches by 12 inches and have been hemmed to 10 inches by 10 inches before washing. The maximum shrinkage

after five washes shall not be more than 4 percent on the length and width. The number of test runs on the same energy stuffer cloth shall not exceed 25 runs after test cloth preconditioning.

2.6.3 *Test Cloth Preconditioning.*

A new test cloth load and energy stuffer cloths shall be treated as follows:

(1) Bone dry the load to a weight change of ± 1 percent, or less, as prescribed in section 1.5.

(2) Place test cloth load in a standard clothes washer set at the maximum water fill level. Wash the load for 10 minutes in soft water (17 parts per million hardness or less), using 60.8 grams of AHAM standard test detergent Formula 3. Wash water temperature is to be controlled at 140 ° ± 5 °F (60 ° ± 2.7 °C). Rinse water temperature is to be controlled at 100 ° ± 5 °F (37.7 ± 2.7 °C).

(3) Rinse the load again at the same water temperature.

(4) Bone dry the load as prescribed in Section 1.5 and weigh the load.

(5) This procedure is repeated until there is a weight change of 1 percent or less.

(6) A final cycle is to be a hot water wash with no detergent, followed by two warm water rinses.

2.7 *Test loads.*

2.7.1 *Compact size dryer load.* Prepare a bone-dry test load of energy cloths which weighs 3.00 pounds ± .03 pounds. Adjustments to the test load to achieve the proper weight can be made by the use of energy stuffer cloths, with no more than five stuffer cloths per load. Dampen the load by agitating it in water whose temperature is 100 °F ± 5 °F and consists of 0 to 17 parts per million hardness for approximately two minutes in order to saturate the fabric. Then, extract water from the wet test load by spinning the load until the moisture content of the load is between 42–47 percent of the bone-dry weight of the test load. Make a final mass adjustment, such that the moisture content is 47 percent ± 0.33 percent by adding water uniformly to the load in a very fine spray.

2.7.2 *Standard size dryer load.* Prepare a bone-dry test load of energy cloths which weighs 8.45 pounds ± .085 pounds. Adjustments to the test load to achieve the proper weight can be made by the use of energy stuffer cloths, with no more than five stuffer cloths per load. Dampen the load by agitating it in water whose temperature is 100 °F ± 5 °F and consists of 0 to 17 parts per million hardness for approximately two minutes in order to saturate the fabric. Then, extract water from the wet test load by spinning the load until the moisture content of the load is between 42–47 percent of the bone-dry weight of the test load. Make a final mass adjustment, such that the moisture content is 47 percent ± 0.33 percent by adding water uniformly to the load in a very fine spray.

2.7.3 *Method of loading.* Load the energy test cloths by grasping them in the center, shaking them to hang loosely, and then dropping them in the dryer at random.

2.8 *Clothes dryer preconditioning.*

2.8.1 *Conventional clothes dryers.* For conventional clothes dryers, before any test cycle, operate the dryer without a test load in the non-heat mode for 15 minutes or until the discharge air temperature is varying less than 1 °F for 10 minutes—whichever is longer—in the test installation location with the ambient conditions within the specified test condition tolerances of 2.2.

2.8.2 *Vent-less clothes dryers.* For vent-less clothes dryers, before any test cycle, the steady-state temperature must be equal to ambient room temperature described in 2.2.1. This can be done by leaving the machine at ambient room conditions for at least 12 hours but not more than 36 hours between tests.

3. Test Procedures and Measurements

3.1 *Drum Capacity.* Measure the drum capacity by sealing all openings in the drum except the loading port with a plastic bag, and ensure that all corners and depressions are filled and that there are no extrusions of the plastic bag through the opening in the drum. Support the dryer's rear drum surface on a platform scale to prevent deflection of the dryer, and record the weight of the empty dryer. Fill the drum with water to a level determined by the intersection of the door plane and the loading port. Record the temperature of the water and then the weight of the dryer with the added water and then determine the mass of the water in pounds. Add or subtract the appropriate volume depending on whether or not the plastic bag protrudes into the drum interior. The drum capacity is calculated as follows:

$C = w/d$

C= capacity in cubic feet.

w= weight of water in pounds.

d= density of water at the measured temperature in pounds per cubic feet.

3.2 *Dryer Loading.* Load the dryer as specified in 2.7.

3.3 *Test cycle*

3.3.1 *Timer dryers.* For timer dryers, as defined in 1.20, operate the clothes dryer at the maximum temperature setting and, if equipped with a timer, at the maximum time setting and dry the load until the moisture content of the test load is between 5 and 6 percent of the bone-dry weight of the test load, but do not permit the dryer to advance into cool down. If required, reset the timer. Record the data specified by section 3.4. Repeat the procedure to dry the load until the moisture content of the test load is between 4 and 5 percent of the bone-dry weight of the test load. If the dryer automatically stops during a cycle and the reason is that the condensation box is full of water, the test is stopped, and the test run is invalid. The first test cycle after a period of non-operation longer than 36 hours for vent-less dryers, as defined in 1.21, shall not be used for evaluation. For vent-less dryers, during the time between two cycles, the door of the dryer shall be closed except for loading (and unloading).

3.3.2 *Automatic termination control dryers.* For automatic termination control dryers, as defined in 1.4, a "normal" program shall be selected for the test cycle. Where the drying temperature can be chosen independently of the program, it shall be set to the maximum. Operate the clothes dryer and monitor the dryer as it progresses through the program. When the heater switches off for the final time, immediately before the cool-down period begins, stop the dryer. Record the data specified by 3.4. If the final moisture content is greater than 5 percent, the test shall be invalid and a new run shall be conducted using the highest dryness level setting. If the dryer automatically stops during a cycle and the reason is that the condensation box is full of water, the test is stopped, and the test run is invalid. The first test cycle after a period of non-operation longer than 36 hours for vent-less dryers, as defined in 1.21, shall not be used for evaluation. For vent-less dryers, during the time between two cycles, the door of the dryer shall be closed except for loading (and unloading).

3.4 *Data recording.* Record for each test cycle:

3.4.1 Bone-dry weight of the test load described in 2.7.

3.4.2 Moisture content of the wet test load before the test, as described in 2.7.

3.4.3 Moisture content of the dry test load obtained after the test described in 3.3.

3.4.4 Test room conditions, temperature, and percent relative humidity described in 2.2.1.

3.4.5 For electric dryers—the total kilowatt-hours of electric energy, E_t, consumed during the test described in 3.3.

3.4.6 For gas dryers:

3.4.6.1 Total kilowatt-hours of electrical energy, E_{te}, consumed during the test described in 3.3.

3.4.6.2 Cubic feet of gas per cycle, E_{tg}, consumed during the test described in 3.3.

3.4.6.3 On gas dryers using a continuously burning pilot light—the cubic feet of gas, E_{pg}, consumed by the gas pilot light in one hour.

3.4.6.4 Correct the gas heating value, GEF, as measured in 2.3.2.1 and 2.3.2.2, to standard pressure and temperature conditions in accordance with U.S. Bureau of Standards, circular C417, 1938.

3.4.7 The cycle settings selected for the automatic termination control dryer test in 3.3.2.

3.5 *Test for automatic termination field use factor credits.* Credit for automatic termination can be claimed for those dryers which meet the requirements for either temperature-sensing control, 1.19, or moisture-sensing control, 1.15, and having present the appropriate mark or detent feed defined in 1.3.

3.6 *Standby mode and off mode power.* Establish the testing conditions set forth in Section 2, "Testing Conditions," of this appendix, omitting the requirement to disconnect all console light or other lighting systems on the clothes dryer that do not consume more than 10 watts during the clothes dryer test cycle in section 2.1. Prior to the initiation of the test measurements, the clothes dryer should be configured in the settings that produce the highest power consumption level, consistent with the particular mode definition under test. If the clothes dryer waits in a higher power state at the start of standby mode or off mode before dropping to a lower power state, as discussed in section 5, paragraph 5.1, note 1 of IEC 62301 (incorporated by reference; see § 430.3),wait until the clothes dryer passes

into the lower power state before starting the measurement. Follow the test procedure specified in section 5, paragraph 5.3 of IEC 62301 for testing in each possible mode as described in 3.6.1 and 3.6.2, except allowing the product to stabilize for 30 to 40 minutes and using an energy use measurement period of 10 minutes. For units in which power varies over a cycle, as described in section 5, paragraph 5.3.2 of IEC 62301, use the average power approach described in paragraph 5.3.2(a) of IEC 62301, except allowing the product to stabilize for 30 to 40 minutes and using an energy use measurement period not less than 10 minutes.

3.6.1 If a clothes dryer has an inactive mode, as defined in 1.13, measure and record the average inactive mode power of the clothes dryer, P_{IA}, in watts.

3.6.2 If a clothes dryer has an off mode, as defined in 1.16, measure and record the average off mode power of the clothes dryer, P_{OFF}, in watts.

4. Calculation of Derived Results From Test Measurements

4.1 *Per-cycle electric timer dryer energy consumption for 5-percent final moisture content.* Calculate the electric timer dryer energy consumption per cycle, E_t, expressed in kilowatt-hours per cycle and defined as:

$$E_t = E_{t1} + [(RMC_1 - RMC_3) \times (E_{t2} - E_{t1})/(RMC_1 - RMC_2)],$$

E_{t1} = the energy recorded in 3.4.5 for the test described in 3.3 for timer dryers for a final moisture content between 5 and 6 percent.

E_{t2} = the energy recorded in 3.4.5 for the test described in 3.3 for timer dryers for a final moisture content between 4 and 5 percent.

RMC_1 = the moisture content in 3.4.3 for the test described in 3.3 for timer dryers for a final moisture content between 5 and 6 percent.

RMC_2 = the moisture content in 3.4.3 for the test described in 3.3 for timer dryers for a final moisture content between 4 and 5 percent.

RMC_3 = 5 percent.

4.2 *Total per-cycle electric dryer energy consumption.* Calculate the total electric dryer energy consumption per cycle, E_{ce}, expressed in kilowatt-hours per cycle and defined as:

$$E_{ce} = E_t \times FU,$$

Where

E_t = the energy calculated in 4.1 for timer dryers or recorded in 3.4.5 for automatic termination control dryers

FU = Field use factor

=1.18 for timer dryers, as defined in 1.20.

=1.0 for automatic termination control dryers, as defined in 1.4.

4.3 *Per-cycle gas timer dryer electrical energy consumption for 5-percent final moisture content.* Calculate the gas timer dryer electrical energy consumption per cycle, E_{te}, expressed in kilowatt-hours per cycle and defined as:

$$E_{te} = E_{te1} + [(RMC_1 - RMC_3) \times (E_{te2} - E_{te1})/(RMC_1 - RMC_2)],$$

Where

E_{te1} = the energy recorded in 3.4.6.1 for the test described in 3.3 for timer dryers for a final moisture content between 5 and 6 percent.

E_{te2} = the energy recorded in 3.4.6.1 for the test described in 3.3 for timer dryers for a final moisture content between 4 and 5 percent.

RMC_1, RMC_2, RMC_3 as defined in 4.1.

4.4 *Total per-cycle gas dryer electrical energy consumption.* Calculate the gas dryer electrical energy consumption per cycle, E_{ge}, expressed in kilowatt-hours per cycle and defined as:

$$E_{ge} = E_{te} \times FU,$$

Where

E_{te} = the energy calculated in 4.3 for timer dryers or recorded in 3.4.6.1 for automatic termination control dryers.

FU = as defined in 4.2.

4.5 *Per-cycle gas timer dryer gas energy consumption for 5-percent final moisture content.* Calculate the gas timer dryer energy consumption per cycle, E_{tg}, expressed in Btu's per cycle and defined as:

$$E_{tg} = E_{tg1} + [(RMC_1 - RMC_3) \times (E_{tg2} - E_{tg1})/(RMC_1 - RMC_2),$$

Where

E_{tg1} = the energy recorded in 3.4.6.2 for the test described in 3.3 for timer dryers for a final moisture content between 5 and 6 percent.

E_{tg2} = the energy recorded in 3.4.6.2 for the test described in 3.3 for timer dryers for a final moisture content between 4 and 5 percent.

RMC_1, RMC_2, RMC_3 as defined in 4.1.

4.6 *Total per-cycle gas dryer gas energy consumption.* Calculate the gas dryer gas energy consumption per cycle, E_{gg}, expressed in Btu's per cycle and defined as:

$$E_{gg} = E_{tg} \times FU \times GEF,$$

Where

E_{tg} = the energy calculated in 4.5 for timer dryers or recorded in 3.4.6.2 for automatic termination control dryers.

FU = as defined in 4.2.

GEF = corrected gas heat value (Btu per cubic feet) as defined in 3.4.6.4.

4.7 *Per-cycle gas dryer continuously burning pilot light gas energy consumption.* Calculate the gas dryer continuously burning pilot light gas energy consumption per cycle, E_{up}, expressed in Btu's per cycle and defined as:

$$E_{up} = E_{pg} \times ((8760 - 140)/283) \times GEF,$$

E_{pg} = the energy recorded in 3.4.6.3

8760 = number of hours in a year

283 = representative average number of clothes dryer cycles in a year

140 = estimated number of hours that the continuously burning pilot light is on during the operation of the clothes dryer for the representative average use cycle for clothes dryers (283 cycles per year)

GEF as defined in 4.6

4.8 *Total per-cycle gas dryer gas energy consumption expressed in Btu's.* Calculate the total gas dryer energy consumption per cycle, E_g, expressed in Btu's per cycle and defined as:

$$E_g = E_{gg} + E_{up}$$

E_{gg} as defined in 4.6

E_{up} as defined in 4.7

4.9 *Total per-cycle gas dryer energy consumption expressed in kilowatt-hours.* Calculate the total gas dryer energy consumption per cycle, E_{cg}, expressed in kilowatt-hours per cycle and defined as:

$$E_{cg} = E_{ge} + (E_g/3412 \text{ Btu/kWh})$$

E_{ge} as defined in 4.4

E_g as defined in 4.8

4.10 *Per-cycle standby mode and off mode energy consumption.* Calculate the dryer inactive mode and off mode energy consumption per cycle, E_{TSO}, expressed in kWh per cycle and defined as:

$$E_{TSO} = [(P_{IA} \times S_{IA}) + (P_{OFF} \times S_{OFF})] \times K/283$$

Where:

P_{IA}= dryer inactive mode power, in watts, as measured in section 3.6.1;

P_{OFF} = dryer off mode power, in watts, as measured in section 3.6.2.

If the clothes dryer has both inactive mode and off mode, S_{IA} and S_{OFF} both equal 8,620 ÷ 2 = 4,310, where 8,620 is the total inactive and off mode annual hours;

If the clothes dryer has an inactive mode but no off mode, the inactive mode annual hours, S_{IA}, is equal to 8,620 and the off mode annual hours, S_{OFF}, is equal to 0;

If the clothes dryer has an off mode but no inactive mode, S_{IA} is equal to 0 and S_{OFF} is equal to 8,156

Where

K = 0.001 kWh/Wh conversion factor for watt-hours to kilowatt-hours; and

283 = representative average number of clothes dryer cycles in a year.

4.11 *Per-cycle combined total energy consumption expressed in kilowatt-hours.* Calculate the per-cycle combined total energy consumption, E_{CC}, expressed in kilowatt-hours per cycle and defined for an electric clothes dryer as:

$$E_{CC} = E_{ce} + E_{TSO}$$

Where:

E_{ce} = the energy recorded in 4.2, and

E_{TSO} = the energy recorded in 4.10,

and defined for a gas clothes dryer as:

$$E_{CC} = E_{cg} + E_{TSO}$$

Where:

E_{cg} = the energy recorded in 4.9, and

E_{TSO} = the energy recorded in 4.10.

6. Appendix F to subpart B of part 430 is revised to read as follows:

Appendix F to Subpart B of Part 430—Uniform Test Method for Measuring the Energy Consumption of Room Air Conditioners

Note: Manufacturers are not required to use the test procedures and calculations that refer to standby mode and off mode energy consumption, (specifically, sections 2.2, 3.2, 4.2, and 5.3 of this appendix F) until the mandatory compliance date of amended energy conservation standards for room air conditioners at 10 CFR 430.32(b).

1. Definitions

1.1 "Active mode" means a mode in which the room air conditioner is connected to a mains power source, has been activated and is performing the main function of cooling or heating the conditioned space, or circulating air through activation of its fan or blower, with or without energizing active air-cleaning components or devices such as ultraviolet (UV) radiation, electrostatic filters, ozone generators, or other air-cleaning devices.

1.2 "*ANSI/AHAM RAC–1*" means the test standard published by jointly by the American National Standards Institute and the Association of Home Appliance Manufacturers, titled "Room Air Conditioners," Standard RAC–1–2008 (incorporated by reference; see § 430.3).

1.3 "*ANSI/ASHRAE 16*" means the test standard published by jointly by the American National Standards Institute and the American Society of Heating, Refrigerating, and Air-Conditioning Engineers, titled "Method of Testing for Rating Room Air Conditioners and Packaged Terminal Air Conditioners," Standard 16–1983 (reaffirmed 2009) (incorporated by reference; see § 430.3).

1.4 "*IEC 62301*" means the test standard published by the International Electrotechnical Commission, titled "Household electrical appliances—Measurement of standby power," Publication 62301 (First Edition 2005–06), IEC 62301–2005–6 (incorporated by reference; see § 430.3).

1.5 "*Inactive mode*" means a standby mode that facilitates the activation of active mode by remote switch (including remote control) or internal sensor or which provides continuous status display.

1.6 "*Off mode*" means a mode in which a room air conditioner is connected to a mains power source and is not providing any active or standby mode function and where the mode may persist for an indefinite time. An indicator that only shows the user that the product is in the off position is included within the clasification of an off mode.

1.7 "*Standby mode*" means any product modes where the where the energy using product is connected to a mains power source and offers one or more of the following user oriented or protective functions which may persist for an indefinite time:

(a) To facilitate the activation of other modes (including activation or deactivation of active mode) by remote switch (including remote control), internal sensor, or timer.

(b) Continuous functions, including information or status displays (including clocks) or sensor-based functions. A timer is a continuous clock function (which may or may not be associated with a display) that provides regular scheduled tasks (*e.g.,* switching) and that operates on a continuous basis.

2. Test Methods

2.1 *Cooling.* The test method for testing room air conditioners in cooling mode shall consist of application of the methods and conditions in ANSI/AHAM RAC–1 sections 4, 5, 6.1, and 6.5 (incorporated by reference; see § 430.3), and in ANSI/ASHRAE 16 (incorporated by reference; see § 430.3).

2.2 *Standby and off modes.* The method for testing room air conditioners in standby and off modes shall consist of application of the methods and conditions in IEC 62301 (incorporated by reference; *see* § 430.3), as modified by the requirements of this standard. The testing may be conducted in test facilities used for testing cooling performance. If testing is not conducted in such a facility, the test facility shall comply with IEC 62301 section 4.2.

3. Test Conditions

3.1 *Cooling mode.* Establish the test conditions described in sections 4 and 5 of ANSI/AHAM RAC–1 (incorporated by reference; see § 430.3) and in accordance with ANSI/ASHRAE 16 (incorporated by reference; see § 430.3).

3.2 *Standby and off modes.*

3.2.1 *Test room conditions.* Maintain the indoor test conditions as required by section 4.2 of IEC 62301 (incorporated by reference; see § 430.3). If the standby and off mode testing is conducted in a facility that is also used for testing cooling performance, maintain the outdoor test conditions either as required by section 4.2 of IEC 62301or as described in section 3.1. If the unit is equipped with an outdoor air ventilation damper, close this damper during testing.

3.2.2 *Power supply.* Maintain power supply conditions specified in section 4.3 of IEC 62301 (incorporated by reference; see § 430.3). Use room air conditioner nameplate voltage and frequency as the basis for power supply conditions. Maintain power supply voltage waveform according to the requirements of section 4.4 of IEC 62301.

3.2.3 *Watt meter.* The watt meter used to measure standby mode and off mode power consumption of the room air conditioner shall have the resolution specified in section 4, paragraph 4.5 of IEC 62301 (incorporated by reference; see § 430.3). The watt meter shall also be able to record a "true" average power specified in section 5, paragraph 5.3.2(a) of IEC 62301.

4. Measurements

4.1 *Cooling mode.* Measure the quantities delineated in section 5 of ANSI/AHAM RAC–1 (incorporated by reference; see § 430.3).

4.2 *Standby and off modes.* Establish the testing conditions set forth in section 3.2. Prior to the initiation of the test measurements, the room air conditioner should be configured in the settings that produce the highest power consumption level, consistent with the particular mode definition under test. For room air conditioners that drop from a higher power state to a lower power state as discussed in section 5, paragraph 5.1, note 1 of IEC 62301 (incorporated by reference; see § 430.3), allow sufficient time for the room air conditioner to reach the lower power state before proceeding with the test measurement. Follow the test procedure specified in section 5, paragraph 5.3 of IEC 62301 for testing in each possible mode as described in 4.2.1 and 4.2.2, except allowing the product to stabilize for 5 to 10 minutes and using an energy use measurement period of 5 minutes. For units in which power varies over a cycle, as described in section 5, paragraph 5.3.2 of IEC 62301, use the average power approach in paragraph 5.3.2(a).

4.2.1 If a room air conditioner has an inactive mode, as defined in 1.5, measure and record the average inactive mode power of the room air conditioner, P_{IA}, in watts.

4.2.2 If a room air conditioner has an off mode, as defined in 1.6, measure and record the average off mode power of the room air conditioner, P_{OFF}, in watts.

5. Calculations

5.1 Calculate the cooling capacity (expressed in Btu/hr) as required in section 6.1 of ANSI/AHAM RAC–1 (incorporated by reference; see § 430.3) and in accordance with ANSI/ASHRAE 16 (incorporated by reference; see § 430.3).

5.2 Determine the electrical power input (expressed in watts) as required by section 6.5 of ANSI/AHAM RAC–1 (incorporated by reference; see § 430.3) and in accordance with ANSI/ASHRAE 16 (incorporated by reference; see § 430.3).

5.3 *Standby mode and off mode annual energy consumption.* Calculate the standby mode and off mode annual energy consumption for room air conditioners, E_{TSO}, expressed in kilowatt-hours per year, according to the following:

$$E_{TSO} = [(P_{IA} \times S_{IA}) + (P_{OFF} \times S_{OFF})] \times K$$

Where:

P_{IA}= room air conditioner inactive mode power, in watts, as measured in section 4.2.1

P_{OFF} = room air conditioner off mode power, in watts, as measured in section 4.2.2.

If the room air conditioner has both inactive mode and off mode, S_{IA} and S_{OFF} both equal 5,115 ÷ 2 = 2,557.5, where 5,115 is the total inactive and off mode annual hours;

If the room air conditioner has an inactive mode but no off mode, the inactive mode annual hours, S_{IA}, is equal to 5,115 and the off mode annual hours, S_{OFF}, is equal to 0;

If the room air conditioner has an off mode but no inactive mode, S_{IA} is equal to 0 and

S_{OFF} is equal to S_{TOT};

K = 0.001 kWh/Wh conversion factor for watt-hours to kilowatt-hours.

[FR Doc. 2010–15025 Filed 7–22–10; 8:45 am]

BILLING CODE 6450–01–P

Federal Register

Tuesday,
June 29, 2010

Part IV

Department of Justice

Antitrust Division

United States et al. v. Ticketmaster Entertainment, Inc. et al.; Public Comments and Response on Proposed Final Judgment; Notice

DEPARTMENT OF JUSTICE

Antitrust Division

United States et al. v. Ticketmaster Entertainment, Inc. et al.; Public Comments and Response on Proposed Final Judgment

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), the United States hereby publishes below the comments (without attachments) received on the proposed Final Judgment in *United States et al.* v. *Ticketmaster Entertainment, Inc. et al.,* Civil Action No. 1:10–CV–00139–RMC, which were filed in the United States District Court for the District of Columbia on June 17, 2010, together with the response of the United States to the comments.

Complete copies of the comments with attachments, and the United States' response, are available for inspection at the Department of Justice Antitrust Division, 450 Fifth Street, NW., Suite 1010, Washington, DC 20530 (telephone: 202–514–2481), on the Department of Justice's Web site at *http://www.justice.gov/atr/cases/ticket.htm,* and at the Office of the Clerk of the United States District Court for the District of Columbia, 333 Constitution Avenue, NW., Washington, DC 20001. Copies of any of these materials may be obtained upon request and payment of a copying fee.

J. Robert Kramer II,

Director of Operations and Civil Enforcement.

United States District Court for the District of Columbia

United States of America, et al., Plaintiffs, v. *Ticketmaster Entertainment, Inc., et al., Defendants.*

Case: 1:10–cv–00139.
Assigned to: Collyer, Rosemary M.
Assign. Date: 1/25/2010.
Description: Antitrust.

Plaintiff United States' Response to Public Comments

Pursuant to the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h) ("APPA" or "Tunney Act"), the United States hereby files the public comments concerning the proposed Final Judgment in this case and the United States' response to those comments. After careful consideration of the comments, the United States continues to believe that the proposed Final Judgment will provide an effective and appropriate remedy for the antitrust violations alleged in the Amended Complaint. The United States will move the Court, pursuant to 15 U.S.C. 16(b)–(h), for entry of the proposed Final Judgment after the public comments and this Response have been published.[1]

I. Procedural History

On January 25, 2010, the United States and the States of Arizona, Arkansas, California, Florida, Illinois, Iowa, Louisiana, Nebraska, Nevada, Ohio, Oregon, Rhode Island, Tennessee, Texas, and Wisconsin, and the Commonwealths of Massachusetts and Pennsylvania (the "States") filed the Complaint in this matter, alleging that the merger of Ticketmaster Entertainment, Inc. ("Ticketmaster") and Live Nation, Inc. ("Live Nation"), if permitted to proceed, would substantially lessen competition in the market for primary ticketing services to major concert venues in violation of Section 7 of the Clayton Act, 15 U.S.C. 18.[2] Simultaneously, the United States filed a Competitive Impact Statement ("CIS"), a proposed Final Judgment, and a Hold Separate Stipulation and Order signed by the United States, the States, and the defendants consenting to the entry of the proposed Final Judgment after compliance with the requirements of the APPA.

The proposed Final Judgment and CIS were published in the **Federal Register** on February 10, 2010. *See* 75 FR 6,709 (2010). A summary of the terms of the proposed Final Judgment and CIS, together with directions for the submission of written comments relating to the proposed Final Judgment, were published for seven days in The Washington Post from February 26, 2010, through March 4, 2010. The Defendants filed the statement required by 15 U.S.C. 16(g) on February 12, 2010. The 60-day period for public comments ended on May 3, 2010, and twelve comments were received as described below and attached hereto.

II. The Investigation and Proposed Resolution

A. Investigation

On February 10, 2009, Ticketmaster and Live Nation entered into a definitive merger agreement. Over the following eleven and a half months, the United States Department of Justice ("Department") conducted an extensive, detailed investigation into the potential competitive effects of the proposed merger. As part of the investigation, the Department issued Second Requests and twelve Civil Investigative Demands ("CIDs") to the merging parties, as well as more than fifty CIDs to third parties. The Department considered more than 2.5 million documents received in response to the Second Requests and CIDs. More than 250 interviews were conducted with customers, competitors, and other individuals with knowledge of the industry, including two commenters here—Jam Productions, Ltd. and the group led by It's My Party, Inc.—which are competitors and complainants about the proposed transaction. The investigative team analyzed their concerns, as well as the views and data presented by hundreds of others. While the Department was reviewing this transaction, a group of state Attorneys General and the Canadian competition authorities conducted their own antitrust investigations. Nineteen states joined the United States' Amended Complaint and the proposed Final Judgment resolving the Amended Complaint; no state has filed a separate lawsuit to block the merger or has opposed the proposed Final Judgment before this Court. At the conclusion of its investigation, Canada imposed parallel relief that is substantively identical to that contained in the proposed Final Judgment.[3]

As part of its investigation, the Department considered the potential competitive effects of the merger on numerous products and services, customer groups, and geographic areas. For the vast majority of these, including the provision of services to promote live entertainment events, the Department determined that the proposed merger was unlikely to reduce competition substantially. Because Ticketmaster and Live Nation were the two largest providers of primary ticketing services, the Department appropriately devoted significant time and resources to analyzing whether the combination of the parties' primary ticketing services would likely reduce competition. The United States concluded that the combination of Ticketmaster and Live Nation likely would lessen competition in the provision and sale of primary ticketing services for major concert venues in the United States.

[1] As approved by the Court in a Minute Order dated June 15, 2010, the United States will publish the Response and the comments without attachments or exhibits in the **Federal Register**. The United States will post complete versions of the comments with attachments and exhibits on the Antitrust Division's Web site at: *http://www.justice.gov/atr/cases/ticket.htm.*

[2] An Amended Complaint was filed on January 28, 2010, solely to add the States of New Jersey and Washington as plaintiffs.

[3] Competition authorities in the United Kingdom also reviewed the transaction and ultimately cleared the merger without imposing any conditions; market conditions in the United Kingdom, however, differ substantially from those prevailing in the United States and Canada.

Primary ticketing is the initial distribution of tickets to an event. Ticketing companies are responsible for distributing primary ticket inventory through channels such as the Internet, call centers, and retail outlets and for enabling the venue to sell tickets at its box office. The primary ticketing company provides the technology infrastructure for ticket distribution. Primary ticketing firms also may provide technology and hardware that allow venues to manage fan entry at the event, including everything from handheld scanners that ushers use to check fans' tickets to the bar codes on the tickets themselves. The overall price a consumer pays for a ticket generally includes the face value of the ticket and a variety of service fees above the face value of the ticket. Such fees are most often charged by the provider of primary ticketing services. The primary ticketing provider, however, does not set the face value of the ticket. It is set by the promoter and artist.

The complexity and demands of selling tickets to major concert venues requires sophisticated primary ticketing services. A major concert venue's primary ticketing provider must be able to withstand the heavy transaction volume associated with the first hours when tickets to popular concerts become available to concert-goers, offer integrated marketing capabilities, and otherwise have a proven track record of high quality service. As such, major concert venues have had few choices for primary ticketing providers. Ticketmaster had a long-standing track record of filling these needs. When Ticketmaster and Live Nation announced their merger, Live Nation had recently begun engaging in primary ticketing services, primarily selling tickets to concerts at its own venues as a way to demonstrate to other venues that its primary ticketing platform performed well. No primary ticketing company other than Ticketmaster and Live Nation had amassed or likely could have amassed in the near term sufficient scale to develop a reputation for successfully delivering similarly sophisticated primary ticketing services.

Primary ticketing services are sold pursuant to contracts individually negotiated with venues. Because primary ticketing companies can price discriminate among different venues, the Department determined that the proposed transaction could affect different classes of venues differently. Specifically, the Department found that major concert venues, because of their need for the most sophisticated ticketing services, have few ticketing options. These venues can be readily identified, and market power can be selectively exercised against them. Furthermore, the Department determined that because the merged firm could price discriminate, any effects of the proposed transaction on foreign venues would be distinct from any effects on domestic venues, and thus it was appropriate to include only major concert venues located in the United States within the relevant market.

After its investigation, the United States determined that the proposed merger would likely substantially lessen competition for primary ticketing services to major concert venues in the United States. As explained more fully in the Amended Complaint and CIS, this loss of competition would eliminate financial benefits that venues enjoyed during the period when Live Nation exerted competitive pressure against Ticketmaster, and would reduce incentives to innovate and improve primary ticketing services.[1] As alleged in the Amended Complaint, the proposed merger of Ticketmaster and Live Nation would remove Live Nation's competitive presence from an already highly concentrated and difficult-to-enter market.[2] The resulting increase in concentration, loss of competition, and absence of any reasonable prospect of significant new entry or expansion by market incumbents likely would result in higher prices for major concert venues and reduce innovation in primary ticketing services.[3]

B. Proposed Final Judgment

The proposed Final Judgment is designed to preserve competition in the market for primary ticketing services to major concert venues in the United States by requiring divestitures of assets and mandating certain conduct remedies. First, the proposed Final Judgment creates a new, vertically integrated primary ticketing company and bolsters another company to compete against Live Nation Entertainment.[4] Second, the conduct restraints in the proposed Final Judgment supplement these divestitures to ensure that competitive ticketing firms will not be improperly foreclosed from the market by the merged firm's conduct.

The proposed Final Judgment establishes Anschutz Entertainment Group, Inc. ("AEG") as an entrant into primary ticketing services. AEG is the second largest promoter in the United States (behind Live Nation). AEG also owns, operates, or manages more than 30 major concert venues in the United States, owns part of an artist management firm, and owns the Los Angeles Kings hockey franchise. Entry will occur via a two-stage process. In the first part of the process, the merged firm must provide AEG with an AEG-branded ticketing website based on the Ticketmaster Host platform, Ticketmaster's primary platform for selling tickets.[5] AEG has the right to use the AEG-branded ticketing website to sell tickets at venues it owns, operates, or manages as well as to events at any other venues from which AEG secures the right to provide primary ticketing services. AEG has the freedom to compete with Ticketmaster on the prices it charges to venues for ticketing services and on the service fees that are added to a ticket's price.[6] In the second part of the process, AEG may exercise an already negotiated right to acquire a perpetual, fully paid-up license to the then-current version of the Ticketmaster Host platform, including a copy of the source code, which the merged firm must install.[7] The agreement between AEG and the merged firm contains financial incentives for AEG to exercise the right. Finally, the proposed Final Judgment prohibits the merged firm from providing primary ticketing services to AEG's venues after AEG's right to use the AEG-branded ticketing website expires, which will take place five years after execution of the license.[8] This provision is critical to preserving competition in the primary ticketing services market, because it guarantees that within five years, AEG will have to either remain a full fledged primary ticketing services competitor or bolster another primary ticketing competitor by using them to meet its ticketing needs.

The proposed Final Judgment also requires the merged firm to divest Ticketmaster's entire Paciolan line of business[9] to an independent and economically viable competitor in the market for primary ticketing services to

[1] Amended Complaint ¶ 40 *et seq.;* CIS § II(D).

[2] Amended Complaint ¶¶ 38, 40, 43, 44; CIS § II(D).

[3] Amended Complaint ¶ 40 *et seq.;* CIS § II(D).

[4] Live Nation Entertainment is the name of the newly merged entity. Throughout this Response, the historical Ticketmaster ticketing operation is referred to as "Ticketmaster," the artist management business is referred to as "Front Line," and the promotions and venue management business is referred to as "Live Nation."

[5] Proposed Final Judgment § IV.A.2.

[6] *Id.*

[7] *Id.* § IV.A.1.

[8] *Id.* § XIII.B.

[9] In 2008, Paciolan directly handled the sale for more than 9 million concert and sporting tickets. It also provided in-house ticketing solutions for more than 250 clients, including Tickets West, Comcast-Spectacor's ticketing solution New Era, and numerous colleges, universities and performing arts centers throughout the U.S.

major concert venues.[10] The merged firm has already divested this business to Comcast-Spectacor, LP ("Comcast-Spectacor"), a vertically-integrated company whose subsidiary New Era Tickets ("New Era") was one of many licensees of the Paciolan platform prior to the divestiture. In addition to its interest in New Era, Comcast-Spectacor owns two major U.S. concert venues, a venue management firm that manages fifteen other major concert venues, the Philadelphia Flyers, the Philadelphia 76ers, a venue/sports marketing company, and a food services company whose clients include major concert venues. Comcast-Spectacor's ticketing business model is different from Ticketmaster's in that venue clients, rather than Comcast-Spectacor, independently set service fees and venue clients maintain ownership of their ticketing data.

The proposed Final Judgment also prohibits the merged firm from engaging in certain conduct that could, in theory, prevent equally efficient firms from competing effectively.[11] The proposed Final Judgment proscribes retaliation against venue owners who contract or consider contracting for primary ticketing services with the merged firm's competitors.[12] The proposed Final Judgment also prohibits the merged firm from explicitly or practically requiring venues, or threatening to require venues, to take their primary ticketing services in order to be allowed to present concerts Live Nation promotes or concerts by artists Front Line manages. It likewise prohibits the merged firm from explicitly or practically requiring venues, or threatening to require venues, to take concerts the merged firm promotes or concerts by artists it manages in order to be allowed to purchase the merged firm's primary ticketing services.[13] Further, the Final Judgment prohibits the merged firm from using certain ticketing data in its non-ticketing business and from providing that data to internal promoters and artist managers.[14] Finally, the proposed Final Judgment mandates that the merged firm provide any current primary ticketing client with that client's ticketing data promptly upon request, if the client chooses not to renew its primary ticketing contract.[15]

In sum, the perpetual license of the Ticketmaster Host platform, the divestiture of Paciolan, and the conduct remedies will ensure that major concert venues will continue to receive the benefits of competition in the primary ticketing services market that otherwise would be lost as a result of the merger.

III. Standard of Judicial Review

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. 16(e)(1).

In making that determination in accordance with the statute, the court is required to consider:

> (A) The competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
>
> (B) The impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. 16(e)(1)(A)–(B). In considering these statutory factors, the court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." United States v. Microsoft Corp., 56 F.3d 1448, 1461 (DC Cir. 1995); *see generally United States* v. *SBC Commc'ns, Inc.,* 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States* v. *InBev N.V./S.A.,* 2009–2 Trade Cas. (CCH) ¶76,736, No. 08–1965 (JR), 2009 U.S. Dist. LEXIS 84787, at *3 (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanisms to enforce the Final Judgment are clear and manageable").

As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA, a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See* Microsoft, 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States* v. *BNS, Inc.,* 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States* v. *Bechtel Corp.,* 648 F.2d 660, 666 (9th Cir. 1981)); *see also* Microsoft, 56 F.3d at 1460–62; United States v. Alcoa, Inc., 152 F. Supp. 2d 37, 40 (D.D.C. 2001); InBev, 2009 U.S. Dist. LEXIS 84787, at *3. Courts have held that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "within the reaches of the public interest." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[16] In determining whether a proposed settlement is in the public interest, the court "must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations." SBC Commc'ns, 489 F. Supp. 2d at 17; *see also* Microsoft, 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *United States* v. *Archer-Daniels-Midland Co.,* 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a

[10] *Id.* §§ IV.E., IV.K.

[11] *Id.* § IX.

[12] *Id.* § IX.A.1.

[13] *Id.* §§ IX.A.2, IX.A.3.

[14] *Id.* § IX.B.

[15] *Id.* § IX.C.

[16] *Cf. BNS,* 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *United States* vs. *Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"). *See generally Microsoft,* 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest' ".

litigated matter. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" United States v. Am. Tel. & Tel. Co., 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States* v. *Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975)), aff'd sub nom. *Maryland* v. *United States,* 460 U.S. 1001 (1983); *see also United States* v. *Alcan Aluminum Ltd.,* 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). As this Court has previously recognized, to meet this standard "[t]he government need not prove that the settlements will perfectly remedy the alleged antitrust harms, it need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *United States* v. *Abitibi-Consolidated Inc.,* 584 F. Supp. 2d 162, 165 (D.D.C. 2008) (citing SBC Commc'ns, 489 F. Supp. 2d at 17). Therefore, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." SBC Commc'ns, 489 F. Supp. 2d at 17.

Moreover, the Court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its complaint, rather than to "construct [its] own hypothetical case and then evaluate the decree against that case." Microsoft, 56 F.3d at 1459. Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. Id. at 1459–60. As this Court recently confirmed in SBC Communications, courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." SBC Commc'ns, 489 F. Supp. 2d at 15.

In its 2004 amendments to the Tunney Act,[17] Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, stating "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. 16(e)(2). The clause reflects what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney). Rather, the procedure for the public-interest determination is left to the discretion of the court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." SBC Commc'ns, 489 F. Supp. 2d at 11.

IV. Summary and Response to Public Comments

During the 60-day public comment period, the United States received comments from the following firms or individuals: It's My Party, Inc.,[18] Jam Productions, Ltd., Jack Orbin, Middle East Restaurant, Inc., LIVE–FI Technologies, Inc., Kenneth de Anda, Chris Cantz, Joe Carlson, Don Crepeau, Jason Keenan, Tom Kuhr, and Gary T. Johnson. Upon review, the United States believes that nothing in the comments demonstrates that the proposed Final Judgment is not in the public interest. What follows is a summary of the comments, and the United States' responses to the concerns raised in those comments.

A. It's My Party ("IMP")

IMP, through its leader, Seth Hurwitz, and various affiliated companies, is the operator of the 9:30 Club in Washington, DC and the promoter at Merriwether Post Pavilion, an amphitheater in Columbia, Maryland. IMP is a competitor of Live Nation Entertainment in both the concert promotion and venue operation businesses. IMP has also filed an antitrust lawsuit against Live Nation, Inc. alleging that Live Nation's pre-merger conduct harmed IMP.

IMP contends that the proposed Final Judgment will not effectively protect competition in the primary ticketing services market because the remedy does not address Live Nation Entertainment's "domination of the promotion of popular music concerts by major artists and control of venues capable of hosting concerts by major artists."[19] IMP argues that Live Nation's vertical integration, culminating in its merger with Ticketmaster, has resulted in a firm that controls all aspects of the relationship between artists and their fans.[20] IMP argues that to cement its competitive position, Live Nation has improperly expanded its promotion business by purchasing the rights to artists' entire tours (or even several tours) in one deal, shutting out regional promoters such as IMP from the opportunity to bid on individual dates.[21] IMP asserts that Live Nation's share of the promotion market for "popular music concerts by major artists" is actually 70% and that Live Nation Entertainment's dominance in promotions will therefore enable it to prevent effective competition in the primary ticketing services market, because ticketing competitors cannot promise to supply venues with the same breadth of concerts available to Live Nation Entertainment.[22] IMP also argues that primary ticketing competitors cannot succeed if they cannot provide ticketing services to venues owned by Live Nation Entertainment itself.[23] IMP argues that if the merger is to be allowed at all, additional remedies must be imposed to ameliorate the effect of Live Nation Entertainment's dominance of the concert business.[24]

IMP's allegations are not new. It articulated these concerns to the United States on several occasions during the investigation of the defendants' merger. The United States believes that the proposed Final Judgment will remedy any loss of competition in primary ticketing services that would result from the merger. The United States did not find that, based on the evidence uncovered in the Department's investigation, the merger would result in harm to any other relevant market, such as concert promotion, venue services, or venue management, and therefore does not believe that remedies in such markets are appropriate.

[17] The 2004 amendments substituted the word "shall" for "may" when directing the courts to consider the enumerated factors and amended the list of factors to focus on competitive considerations and address potentially ambiguous judgment terms. *Compare* 15 U.S.C. 16(e) (2004) *with* 15 U.S.C. 16(e)(1) (2006); *see also SBC Commc'ns,* 489 F. Supp. 2d at 11 (concluding that the 2004 amendments "effected minimal changes" to Tunney Act review).

[18] It's My Party, Inc.'s ("IMP") comment is attached as Exhibit A. The comment was filed on behalf of a number of firms, namely IMP, It's My Amphitheatre, Inc., Seth Hurwitz (both of which are affiliated with IMP), Frank Productions, Inc., Sue McLean and Associates, and Metropolitan Talent, Inc. The National Consumers League joined IMP's comment. *See* IMP Comment at 1 n.1.

[19] *Id.,* at 2.

[20] *See id.,* at 8–9.

[21] *See id.,* at 9.

[22] *See e.g., id.,* at 14, 19–20.

[23] *See id.,* at 24.

[24] *See id.,* at 26–27.

1. Effect of Vertical Integration on Primary Ticketing Services Market

Contrary to IMP's assertion, the United States is well aware of the potential competitive impact of vertical integration on the primary ticketing services market and designed its remedy with that potential effect in mind. It is well recognized that vertical integration can produce procompetitive benefits.[25] In the present case, vertical integration of complementary businesses in the live entertainment industry reduces the number of firms that must be compensated for a concert. This creates incentives for the vertically integrated entity to reduce primary ticketing services prices and service fees. The United States, however, was well aware of the concern that it may become more important for ticketing service companies to also provide live entertainment content in order to compete in primary ticketing for major concert venues. Accordingly, the proposed Final Judgment establishes AEG—Live Nation's largest competitor in the concert promotion business—as a credible, vertically integrated competitor in the primary ticketing services market.[26] Therefore, to the extent it becomes important over the next several years for ticketing companies to provide access to content in order to compete in primary ticketing, AEG's established concert promotion business will make it well-positioned to provide a viable competitive alternative to the merged firm. AEG will also benefit from its long-standing relationships with venues developed through its concert promotion business and through its venue management operations. Its venues and its concert promotion business will also provide scale to AEG's own ticketing business or to another ticketing rival to Live Nation Entertainment. The availability of AEG's concerts to its own primary ticketing business or to another primary ticketer undermines IMP's argument[27] that the merged firm will control so much content that venues will be forced to use Ticketmaster's ticketing services.

The United States was also well aware that there are other avenues venues may pursue for ticketing services. Venues may increasingly look to venue management companies to provide a range of services, including primary ticketing. The sale of the Paciolan ticketing business to Comcast-Spectacor creates significant additional competitive stimulus to the ticketing market that will, in combination with the AEG licensing agreement, ensure that the proposed Final Judgment restores the competition that may otherwise have been lost as a result of the merger. Comcast-Spectacor is well-placed to capitalize on the venue relationships it developed as an existing provider of venue management, concessions, and fan marketing services. Paciolan and New Era have historically pursued a differentiated ticketing strategy under which their venue customers control all ticketing fees. New Era plans to continue competing using this business model. With its vertically integrated operation and venue-friendly business model, Comcast-Spectacor is well-placed to compete against Live Nation Entertainment following the merger. Comcast-Spectacor already participates in many aspects of the live entertainment business. Its willingness to invest in the ticketing business by purchasing Paciolan, and its commitment to providing a competitive alternative to Ticketmaster, again suggests that IMP's analysis of the ticketing services market is flawed. If IMP were correct, Comcast-Spectacor as a venue owner and manager of venues for third parties, would have no choice but to acquire primary ticketing services from the merged entity, as it would risk the loss of all acts promoted by Live Nation by not selecting Live Nation Entertainment as its ticketer.[28] Like AEG, Comcast-Spectacor has fundamentally pursued a competitive strategy at odds with IMP's predictions of the future of the primary ticketing business.

As described above in Part II.B, the conduct provisions in the decree will bolster the structural relief that establishes Comcast-Spectacor and AEG as primary ticketing services competitors. In particular, Section IX.A of the proposed Final Judgment ensures that the merged firm cannot retaliate against or refuse to provide concerts to venues that choose an alternative to Ticketmaster for primary ticketing services. This and other provisions underscore the carefully constructed nature of the remedy contained in the proposed Final Judgment and further belie the argument presented by IMP[29] that the United States failed to account for the importance of content or vertical integration to the primary ticketing services market.

2. Effect of Vertical Integration on Concert Promotion

Much of IMP's concerns with Live Nation have nothing to do with the merger. Ticketmaster was not in the concert promotion business. As the United States discusses in more detail below in its response to Jam's comment,[30] the United States thoroughly investigated the effect of the vertical merger of Live Nation's promotion business with Ticketmaster's ticketing and artist management businesses. Based on the evidence uncovered in the Department's investigation, the United States did not find that the merger would significantly harm competition in the concert promotion business.

3. The Effect of Live Nation's Concert Promotion Business on Primary Ticketing

IMP contends that Live Nation dominates concert promotion (and thus can leverage that dominance into primary ticketing), based on the allegation that Live Nation has a 70% market share in the market for the promotion of "popular music concerts" by "major artists."[31] In the United States' investigation of this merger, the government looked into Live Nation's share of concert promotion. The United States used data from Pollstar, an aggregator of live entertainment data widely used by those in the industry. This data showed Live Nation with a 33% market share of concert revenue at major concert venues. The United States finds that IMP's market share calculation is not helpful because it is based on a market definition that is not well-suited to analyzing how the merger of Ticketmaster and Live Nation would affect the ticketing business.[32]

First, IMP argues that the market should be restricted to "popular music" as distinct from gospel, jazz, blues, and

[25] *See Fruehauf Corp.* v. *FTC,* 603 F.2d 345, 351–52 (2d Cir. 1979) ("A vertical merger * * * does not * * * automatically have an anticompetitive effect * * * or reduce competition * * * " and "may even operate to increase competition"); *see also,* Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law; An Analysis of Antitrust Principles and Their Application ¶ 1020 (3d ed. 2009) ("Antitrust Law") ("Most instances of vertical integration, including those that result from mergers, are economically beneficial.'')"; Michael Riordan & Steven C. Salop, *Evaluating Vertical Mergers; A Post-Chicago Approach,* 63 Antitrust L.J. 513, 522–27 (1995) (discussing a variety efficiency benefits from vertical mergers, and summarizing that "[a] variety of efficiency benefits that can reduce costs, improve product quality, and reduce prices may ensue from vertical mergers").

[26] IMP itself acknowledges that AEG is Live Nation's most significant competitor in the concert promotion business. *Id.* at 21.

[27] *See id.,* at 14–15, 17–26.

[28] *See id.,* at 24–25.

[29] *See id.,* at 14–15.

[30] *See infra* § IV.B.1.

[31] *Id.* at 17–21.

[32] The United States expresses no view on whether the provision of promotional services to "major artists" for "popular music concerts" could be considered a proper antitrust market in other contexts.

other musical and entertainment genres that are reported to Pollstar as "concert revenues." [33] To support this distinction, IMP refers to the cross-elasticity of demand for consumers of different types of concerts.[34] However, this is entirely the wrong approach for analyzing a merger in the market for the provision of primary tickets services to major concert venues. While consumers may have strong preferences for particular types of concerts—and for specific artists within a particular genre—venues purchase primary ticketing services for the distribution of tickets to concerts. From the perspective of a venue, the relevant consideration is how much revenue and profit it can earn from an event, not the genre of music the artist performs. A gospel show and rock show that earn the same revenues for a venue are in fact potential substitutes. For example, Merriweather Post Pavilion, IMP's own venue, hosted a jazz festival the weekend of June 4 and is hosting a rock festival on June 19. Therefore, it is entirely appropriate to look at the entire set of entertainment options for venues in assessing whether Live Nation so dominates concert promotion that it will restrain competition in the market for primary ticketing services.

Second, while Live Nation is clearly the largest promoter in the country, Pollstar figures include Live Nation promotions within its own venues. Live Nation is essentially the exclusive promoter within its own amphitheaters and clubs, which account for a substantial portion of the overall concert sales reported by Live Nation in Pollstar. The concerts Live Nation promotes internally have never been available to third party venues. Thus, the more relevant figures are likely to be Live Nation's share of concert promotion outside of its own venues, as that share is a better measure of Live Nation's significance as provider of content to independent venues, and thus of Live Nation's ability to "force" venues to use Ticketmaster after the merger. According to 2008 Pollstar data, Live Nation in fact only accounts for 23% of the concerts promoted at major concert venues it does not own, measured by revenue.[35] Live Nation's leading position in the promotion market is driven to a large degree by its ownership of a number of key venues. While the relationship between Live Nation's venues and its promotion business is relevant to a Live Nation competitor such as IMP, independent venues are not beholden to Live Nation for content to nearly the degree that IMP would suggest.[36]

Third, IMP contends that only tickets to "concerts by major artists (with an average attendance of between 8,000 to 30,000 fans)" should be counted in calculations of Live Nation's share of the promotions market.[37] According to IMP, it is appropriate to focus exclusively on these "major artists" because they are the ones most likely to appear in amphitheaters. This market share calculation, however, exacerbates the flaw identified in the previous paragraph by focusing in on a set of concerts where Live Nation's market share is exceptionally high due to its ownership of venues, rather than due to its significance as a promoter for independent venues. This calculation does not shed any light on the importance of Live Nation's promotion business to the market for providing ticketing services to non-Live Nation amphitheaters or to the many other types of concert venues such as clubs, theatres, arenas, and stadiums that also employ primary ticketing companies to sell concert tickets. Though IMP excludes tickets sold at those venues from its calculation of Live Nation's market share, that choice obscures the relationship between Live Nation's position as a leading concert promoter and the likely effects of its merger with Ticketmaster on buyers of primary ticketing services.

In the United States' view, IMP not only overstates the strength of Live Nation's promotion position, but may also overstate the significance of concert promotion to the overall market for primary ticketing services. IMP provides no evidence that decisions by venues in choosing a primary ticketing company will be driven solely or primarily or even significantly by the number of concerts promoted by the merged entity.

Before the merger, Live Nation based its entry strategy into the ticketing business on its ability to promise content to venues. The United States' Amended Complaint does not argue, however, that this was or is the only possible strategy for competing in the ticketing business. For example, the ticketing needs of a venue that hosts sporting events will be likely driven as much by the needs of the teams they host as they are by their interest in filling dates between sporting events with major concerts. A major arena with a professional basketball and/or hockey team will need its ticketer to handle season ticket sales of sports tickets and provide marketing support for sports ticketing sales. Indeed, this is a significant segment of the market, as sixty-six major concert venues host major league professional sports teams and many of the remaining major concert venues house other sports teams (such as minor league hockey franchises or college sports teams) which demand robust season ticketing abilities.

AEG and Comcast-Spectacor own, operate, and manage professional sports teams and venues in which professional sports teams play. Given that, as noted above, many of the major concert venues also host sports teams, both AEG and Comcast-Spectacor will be well-positioned to capitalize on their expertise in sports and venue management to compete for ticketing contracts in these venues. Paciolan's historical strength is also in providing ticketing for sports franchises; when combined with Comcast-Spectacor's strength in providing venue management, concession, and marketing services to arenas and other buildings, the United States believes the result is a viable competitor that, in combination with the entry of AEG into primary ticketing, will restore any competition in primary ticketing that may be lost as a result of the merger.

The United States respectfully suggests that IMP's analysis of the market is too focused on IMP's own issues in competing with Live Nation in the amphitheater business to inform analysis of the merger's likely effects. IMP exaggerates Live Nation's position in the concert promotion market by ignoring many venues that purchase primary ticketing services and many artists that play at those venues. A view of Live Nation's market position more tailored to assessing the competitive effects of the proposed merger reveals that AEG and Comcast-Spectacor can fully compete with Live Nation in the primary ticketing services market. IMP's comment therefore casts little light on competition in the actual product market alleged in the United States' complaint—the provision of primary ticketing services to major concert venues.

4. Ability To Provide Ticketing Services to Live Nation Venues

IMP contends that Ticketmaster's competitors, including AEG and Comcast-Spectacor, will be unable to compete in the primary ticketing market if they are unable to provide primary ticketing services to venues that are owned or operated by the merged

[33] IMP Comment at 19.

[34] *Id.* at 18–21.

[35] Measured by number of tickets sold, which IMP claims is the superior measure, Live Nation accounts for just 18% of the concerts promoted at major concert venues not owned or operated by Live Nation.

[36] *See* IMP Comment at 24–25.

[37] *Id.* at 20.

firm.[38] IMP provides no support for this statement other than a general assertion that without access to Live Nation's venues, competitors will be unable to penetrate the market and will not be able to prevent Live Nation from charging "supra competitive ticket service fees."[39] The United States concluded that ticketing companies do not need access to Live Nation's own ticketing volume in order to accumulate sufficient scale in the ticketing business to provide competitive pricing to venues. AEG's and Comcast-Spectacor's purchases of the divestiture assets supports this conclusion. Venues not owned or operated by Live Nation—including over 400 of the 500 major concert venues—account for a substantial majority of major concert venues and revenues and provide a substantial base of business for competing ticketing companies to target.

5. IMP's Own Choice of Primary Ticketing Service Provider

IMP's own choice of ticketing provider—and its ability to choose—underscores the degree to which IMP's concerns are overstated. Shortly after the Amended Complaint and proposed Final Judgment in this matter were filed, Seth Hurwitz, the main proprietor of IMP and its affiliates, announced that he was terminating Merriweather Post Pavilion's ticketing contract with the local Ticketmaster affiliate and entering a contract with TicketFly, a recent entrant into the primary ticketing services market.[40] At the same time that Mr. Hurwitz alleges that the merger eliminated competition for primary ticketing services, IMP left Ticketmaster for a competing ticket company: " 'Hopefully this move will demonstrate to people it's possible to have a choice,' he said. 'We wanted to make that choice' "[41] It is precisely this choice that the Final Judgment seeks to facilitate, whether that choice is exercised to select AEG, Comcast-Spectacor, another ticketing company such as TicketFly, or even Ticketmaster.

6. Need for Additional Remedial Measures

IMP asserts that additional remedial measures are required to protect competition in the primary ticketing market if the merger of Live Nation and Ticketmaster is permitted. IMP proposes that: (1) The merged firm be prevented from either offering any inducement to artists it manages or promotes to appear at venues it controls or punishing an artist who works with a competing promoter or venue; (2) the merged firm be prevented from insisting that rival promoters and venue owners share profits with Live Nation; and (3) the merged firm be prohibited from promoting or hosting more than 75% of any artist's tour.[42] None of these proposals relate to the primary ticketing services market. Rather, all of them are designed to dramatically alter competition in the concert promotion and venue operation businesses, markets where the proposed merger was not challenged by the Department in its Amended Complaint in this case. Moreover, some of these proposals, such as the limitations on exclusive promotion contracts, would likely inhibit efficient competition in the concert promotion and venue operation markets more than enhance competition. The proposals would prohibit Live Nation from engaging in potentially efficient vertical integration or bundling without analysis of whether such conduct has an adverse effect on competition either in general or in particular circumstances.

IMP also argues that the merged firm should be required "to return at the request of any promoter all data relating to concerts for which Ticketmaster provided the ticketing and to delete any such information from its electronically stored data and files."[43] The United States recognizes the value of information about the price and volume of past ticket sales for making decisions about future concerts, and took this into consideration in fashioning remedies in this matter. Section IX.C of the proposed Final Judgment requires that Ticketmaster provide a copy of ticketing data to ticketing clients if they choose to leave Ticketmaster, but does not require Ticketmaster to take the additional step suggested by IMP[44] and to purge the data from its files.[45] Aside from the affirmative obligation imposed by Section IX.C, each party's rights and obligations regarding the ticketing data will be governed by the contract between Ticketmaster and the venue. The United States does not believe that IMP's proposal[46] is necessary to ensure that venues are able to leave Ticketmaster for alternative ticketing providers. So long as venues have access to their data, they will be free to switch ticketing providers.

B. Jam Productions

Jam Productions ("Jam") is a concert promoter based in Chicago, Illinois, and a competitor of Live Nation. Jam's comment contends that the merger is "vertical integration on steroids" and will "suppress or eliminate competition in many segments of the music industry including rival concert promoters; primary and secondary ticketing companies; artist management firms; talent agencies; venue management companies; record companies; artist merchandise, apparel and licensing companies; artist fan clubs and sponsorship/marketing companies."

1. The Vertical Integration Concern

While Jam's comment provides more in the way of a list of alleged past Live Nation misconduct than a cogent analysis of the merger in light of the antitrust theory and precedent applicable to vertical mergers, the core argument advanced by Jam is nonetheless clear: instead of alleging a competitive problem from the combination of two competing ticketing companies (that is, challenging the deal as an unlawful horizontal merger), the Department should have brought a case alleging that competition in non-ticketing markets would be reduced by the combination of lines of business that do not compete, but where one line supplies an input for the other (that is, challenging the deal as an unlawful vertical merger).

This argument, however, is not a valid basis for rejecting a proposed remedy during Tunney Act review. As explained above, in a Tunney Act proceeding the Court must evaluate the adequacy of the remedy only for the antitrust violations alleged in the complaint. *See United States* v. *Microsoft Corp.*, 56 F.3d 1448, 1459 (DC Cir. 1995). The Tunney Act does not usurp the Department's prosecutorial discretion to choose what type of case to bring; courts "cannot look beyond the complaint * * * unless the complaint is drafted so narrowly as to make a mockery of judicial power." SBC Commc'ns, 489 F. Supp. 2d at 15. Jam, however, seeks to "construct [its] own hypothetical case and then evaluate the decree against that case"—precisely the approach specifically forbidden in Tunney Act proceedings by the DC Circuit. Microsoft, 56 F.3d at 1459.

During its investigation, however, the United States did carefully consider

[38] IMP Comment at 14, 24.

[39] *Id.* at 24.

[40] *See Merriweather drops Ticketmaster, signs with Ticketfly,* Feb. 18, 2010, available at *http://www.ticketfly.com/merriweather-post-pavilion-comes-to-ticketfly.*

[41] *Id.*

[42] IMP Comment at 26–27.

[43] *Id.* at 27.

[44] *Id.* at 27.

[45] Instead, Section IX.B of the proposed Final Judgment protects venue owners who are also independent promoters by prohibiting the sharing of competitively sensitive client ticketing data with Live Nation promoters and Front Line artist managers.

[46] IMP Comment at 27.

Jam's allegations[47] and determined that it could not prove that the vertical integration resulting from the merger would significantly harm competition in the concert promotion market or any market other than primary ticketing services. To be sure, vertical mergers can reduce competition under certain circumstances, for example by foreclosing rivals from access to an input critical to the ability to compete, raising the costs of rivals by preventing them from achieving efficient scale, or raising entry barriers. Vertical mergers can, however, also be procompetitive by bringing together complementary businesses and making the merged firm a more efficient competitor.[48]

The United States analyzed whether the addition of Ticketmaster's ticketing business and Front Line artist management business to Live Nation's concert promotion business would adversely effect competition in the concert promotion market. The United States concluded this was unlikely for two primary reasons.

First, although the merged firm will remain an important player in the artist management business, it will not have the ability to exclude promotion competitors from the market. Even if, in theory, all artists managed by Front Line refused to work with promoters other than Live Nation, a substantial majority of the artists are not affiliated with the merged firm and will be fully available for competing concert promoters to present.[49] Moreover, Front Line is unlikely to withhold all of the artists it manages from competing promoters. Front Line has no legal right to dictate to its artists which promoters they can use. In fact, Front Line has a fiduciary obligation to obtain the best deals for its artists, regardless of the interests of other Front Line-affiliated companies. In addition, artist management services are typically provided pursuant to agreements that can be terminated by the artist at will. If the merged firm acted or threatened to act contrary to the interests of its managed artists, the artists could simply sign with another artist manager. There are countless managers capable of handling acts of all sizes; indeed, some of the largest artist management firms represent only one artist. In light of these factors, the United States concluded it was unlikely that the combination of Front Line with Live Nation restrict competition in the concert promotion business.

Second, artists would have the ability and incentive to prevent the merged firm from exercising market power in concert promotion. There are two primary ways that the merged firm could attempt to exercise such market power: (1) Reducing compensation paid to artists (or otherwise adversely altering the terms on which promotional services are provided to artists); or (2) restricting output—*i.e.,* the number of concerts—in an effort to raise prices to consumers. In both cases, artists would have the incentive to prevent the merged firm from harming their own economic interests. Artists would also have the ability to turn to a large number of competing concert promoters, including AEG and many regional promoters, who would gladly seize on the opportunity to expand their promotion business at the expense of the merged firm.

In addition to considering the impact of the merger on the concert promotion market, the United States also analyzed the possibility that the merger would reduce competition in the market for operating venues. The United States did not rule out the possibility that Live Nation's ownership of many key venues throughout the country could give the merged firm some market power. However, Ticketmaster owned no venues and therefore the merger does not result in any increase in the number of venues owned or operated by Live Nation. In other words, whatever market power Live Nation had in concert promotion or venues before the merger would not be enhanced by its merger with Ticketmaster. Therefore, the addition of Front Line and the Ticketmaster ticketing business to Live Nation seems unlikely to alter the competitive dynamics in the venue market. As noted above, Front Line artists account for a fairly modest share of the concert business, and the merged firm does not "control" the Front Line artists to the degree that it can prevent them from performing at competing venues.

Contrary to Jam's contention, the Supreme Court's 1948 Paramount decision does not compel the United States to challenge this merger under stare decisis.[50] In Paramount, the Supreme Court was not determining the effects of a vertical merger. Rather it was fashioning a remedy for a long-running price fixing agreement among competing movie studios that had a vertical aspect in that the movie studies used their ownership of movie theaters to facilitate their price fix. In that context, the Supreme Court instructed that the court-ordered remedy should be tailored to the anticompetitive conduct at issue and, under the facts in that case, determined that the defendant studios had to divest themselves of their movie theaters in order to "uproot" the long-running price fixing agreement. In this case, consistent with Paramount, the United States fashioned a remedy that was tailored to the anticompetitive conduct alleged in the Amended Complaint.[51]

2. Adequacy of Consent Decree Provisions

Jam contends that the anti-retaliation provision of the proposed Final Judgment, Section IX.A, will be difficult to enforce.[52] The United States does not agree. Section XI of the proposed Final Judgment contains robust mechanisms enabling the United States to investigate any potential violations of the proposed Final Judgment's terms. The United States also has significant experience in enforcing a similar anti-retaliation provision in the Final Judgment in *United States* v. *Microsoft.*[53]

Jam contends that AEG and Comcast-Spectacor may not succeed due to Ticketmaster's "superior technology" and the vertical integration of Ticketmaster and Live Nation.[54] However, Ticketmaster's software will power the AEG-branded website in the first stage of the divestiture,[55] and AEG has the right to obtain a perpetual license to Ticketmaster's software in the second stage.[56] Consequently, AEG will

[47] *See id.* at 6 (acknowledging that during the investigation JAM raised the same issues with the United States that it provides in its comments).

[48] Jam may have been concerned that the merger would make LiveNation a more efficient competitor to it when it says: "The critical mass created by the complete vertical integration of the live music industry by Live Nation and Ticketmaster puts all its competitors at a distinct competitive disadvantage." *Id.* at 19. Of course, having companies become more efficient at providing their goods or services is generally procompetitive, not anticompetitive.

[49] According to Pollstar data, Front Line artists accounted for just under 25% of gross sales for the top 50 tours in 2008 in North America. Including artists subject to long-term "360-degree" promotional agreements with Live Nation raises the merged firms' share to approximately 30%.

[50] Jam Comment at 22 ("So the lawyers who work for the US government are consciously choosing the [sic] forget about the Stare Decisis doctrine they are all taught in law school.") (citing *United States* v. *Paramount Pictures, Inc.,* 334 U.S. 131 (1948)).

[51] Jam's citations to *Eastman Kodak* v. *Image Technical Servs.,* 504 U.S. 451 (1992) and Complaint, *United States* v. *MCA,* Civ. No. 62–942–WM (filed July 13, 1962) are similarly not instructive. *Eastman Kodak* is not a merger case and MCA was a consent decree designed to address a long-running anticompetitive conspiracy, only one part of which involved a vertical merger.

[52] Jam Comment at 20.

[53] Final Judgment, *United States* v. *Microsoft,* Civ. No. 1:98-cv-01232 (D.D.C.) (entered Nov. 12, 2002). The *Microsoft* Final Judgment prohibits the company from retaliating against any computer software or hardware company that works with a competitor to Microsoft's Windows operating system or its related platforms. *Id.* §§ III.A, III.F.1. The United States has effectively enforced these provisions of the *Microsoft* Final Judgment with minimal difficulty and controversy.

[54] Jam Comment at 21.

[55] Proposed Final Judgment § IV.A.2.

[56] *Id.* § IV.A.1.

be well-positioned to provide a technologically competitive alternative to Ticketmaster. AEG is also a competitor in the concert promotion business with access to content, as the United States explains above in response to IMP's comments. Comcast-Spectacor, which owns and operates a number of major concert venues, will also be a vertically integrated primary ticketing competitor. For these reasons, that the proposed Final Judgment will ensure that AEG and Comcast-Spectacor will be robust competitors in the ticketing business.

C. Jack Orbin

Jack Orbin is the founder and President of Stone City Attractions, a regional concert promoter in the Southwestern United States that competes with Live Nation. Orbin contends that the proposed Final Judgment will "drive independent concert promoters out of business" and will reduce competition in the "live entertainment industry." [57] Orbin argues the proposed Final Judgment suffers from three faults: (1) "It fails to secure relief for the consumer by eliminating competition of independent concert promoters"; (2) "The relief fails to ensure adequate competition for primary ticket sales and for concert promotion, and is insufficient to allow entry into these markets"; and (3) "It fails to adequately prevent [the merged firm] from acquiring customer data from independent concert promoters." [58] As noted above, these arguments are not a proper subject for Tunney Act review because they assert that the United States should have challenged the merger on different grounds than those alleged in the Amended Complaint.[59]

To the extent the comment relates to the market for primary ticketing services, it does not raise issues that suggest that entry of the proposed Final Judgment would not be in the public interest.[60] Orbin assumes, without support, that Comcast-Spectacor will be unable to expand the use by venues of the Paciolan platform beyond the venues in which it is currently used.[61] However, Paciolan is an existing successful ticketing platform that will now be independent of Ticketmaster and able to compete with Ticketmaster for primary ticketing services contracts. Paciolan has a large client base that includes major concert venues (and numerous other venues) and offers a completely different pricing model from Ticketmaster, enabling the venue to control all service fees, which will put it in a strong position to provide a competitive alternative to Ticketmaster.

Orbin is also "very skeptical" that AEG will be able to succeed as a primary ticketer.[62] Orbin contends that because the proposed Final Judgment requires Ticketmaster to license its Host platform to AEG, that AEG will be "fully beholden and dependent on Ticketmaster." [63] This is not accurate. AEG has the right to obtain a copy of the Ticketmaster Host Platform and run it on its own systems.[64] During the transition period when Ticketmaster operates a private label ticketing service on behalf of AEG, the proposed Final Judgment prohibits Ticketmaster from impeding AEG's ability to compete. Specifically, Section IV.A.2 requires Ticketmaster to provide an operational system within six months with a website that has an AEG-determined branding, look, and feel; compels Ticketmaster at the request of AEG to post links on its website to events sold on the private label ticketing service; and explicitly prohibits Ticketmaster from having any right or ability to set the ticketing fees charged by AEG. If Ticketmaster does not comply, the United States can and will move the Court to enforce the provisions of Section IX.A through civil and criminal contempt proceedings, as appropriate.

Orbin argues that the proposed Final Judgment itself facilitates additional vertical integration and will make it more difficult for non-vertically integrated firms to compete.[65] Vertical integration, however, is merely one strategy for successful competition in the primary ticketing business. The proposed Final Judgment ensures there will be two significant competitors to Ticketmaster that offer different value propositions through their respective areas of expertise. So long as competition is restored to the primary ticketing market, ticketing companies will be able to compete along a wide range of attributes. For example, some competitors may focus on the additional products they can offer in conjunction with primary ticketing, while others may specialize in innovative ticketing software that, standing alone, provides significant value to venues.

Finally, Orbin contends that the firewall established by Section IX.B is too limited to protect the data of independent concert promoters, especially in comparison to a firewall adopted in a recent FTC decree involving PepsiCo, Inc., and that it lacks "any mechanism [for] policing the firewall." [66] As an initial matter, the firewall set forth in Section IX.B prohibits the sharing of information between Live Nation Entertainment's ticketing business and its promotions and artist management businesses. Live Nation has technical safeguards in place to prevent the disclosure of sensitive information to those not appropriately authorized to access it. Live Nation also has created a corporate policy governing access to this information, disseminated that policy to all employees, and instituted a training program to ensure that those with access to sensitive data understand and uphold their obligations. Since the entry of the temporary order requiring the merged entity to comply with the proposed Final Judgment, the Department has been closely monitoring the merged entity and its ongoing efforts to develop methods to audit compliance and to submit to the Department detailed annual reports about such compliance.

Orbin wrongly contends that the proposed Final Judgment lacks "any mechanism of policing the firewall." Section XI of the proposed Final Judgment provides the United States with a full panoply of tools to ensure compliance with the firewall, including the ability to demand documents and interview or depose any employee. The United States may also require the merged firm to provide written reports, including an independent audit or analysis, on any matters relating to the proposed Final Judgment. As discussed above, the United States has already engaged with the parties on the exact mechanisms in place to ensure compliance with the firewall, and the United States is confident that the proposed Final Judgment provides it with all the tools it needs to enforce the firewall provision.

A comparison of the firewall in this settlement to that in the FTC PepsiCo case is not particularly instructive. Unlike in PepsiCo, the firewall in this case is not the central relief contained in the proposed Final Judgment. The two divestitures are the core relief and the behavioral remedies are designed to supplement that relief in the proposed Final Judgment. This is a result of the fact that, unlike in PepsiCo, the United States did not allege as a theory of harm in its Amended Complaint that a

[57] Orbin Comment at 3 (attached as Exhibit C).

[58] *Id.* at 4.

[59] *See United States* v. *Microsoft Corp.,* 56 F.3d 1448, 1459 (DC Cir. 1995).

[60] Orbin Comment at 5–6.

[61] *Id.*

[62] *Id.* at 6.

[63] *Id.* at 6.

[64] Proposed Final Judgment § IV.A.1.

[65] Orbin Comment at 6.

[66] *Id.* at 7 (citing *In the Matter of PepsiCo., Inc.,* FTC File No. 091 0133 (Feb. 26, 2010) (attached to Orbin Comment)).

vertical merger would result in an anti-competitive information exchange. The Department instead alleged that the merger would eliminate direct, horizontal competition between Ticketmaster and Live Nation in the provision of primary ticketing services to major concert venues.

D. Middle East Restaurant, Inc.

Middle East Restaurant, Inc. ("Middle East Restaurant") operates a restaurant and night club in Cambridge, Massachusetts, and competes against Live Nation in the Boston area.[67] Ticketmaster provides primary ticketing services to the company.[68] Middle East Restaurant requests that the proposed Final Judgment be modified to allow Ticketmaster's existing ticketing clients to terminate their contract and sign with a competing ticketing company.[69] Middle East Restaurant is concerned that it will be at a competitive disadvantage with its promotions/venue competitor in the concert business providing its ticketing services and therefore profiting from its concerts and potentially having access to its data.[70]

Middle East Restaurant does not allege that its proposal is related to competition in the ticketing market. Moreover, it is not necessary to allow existing Ticketmaster clients to terminate their contracts in order to restore competition in the primary ticketing market. Since the average ticketing contract is three to five years in length, every year there is a substantial volume of contracts up for bid and available to be pursued by AEG, Comcast-Spectacor, and other ticketing competitors. Finally, while Middle East Restaurant contends there are "no systems or penalties in place to protect The Middle East's customer's data,"[71] the firewall provision set forth in Section IX.B will prevent its ticketing data from being shared with promotions personnel within the merged entity.

E. Additional Comments

Finally, the United States received comments from LIVE–FI Technologies, Inc. and the following individuals: Kenneth de Anda, Chris Cantz, Joe Carlson, Don Crepeau, Jason Keenan, Tom Kuhr, and Gary T. Johnson (collectively "citizen complainants").[72] LIVE–FI's comment argues that the proposed Final Judgment: (1) "Omit[s] all discussion of the negative anticompetitive impact the merger will have upon live event and recording distribution particularly electronic broadcasts and transmissions;"[73] (2) hurts small companies because the divestiture assets were divested to large companies;[74] and (3) that through it this Court has "failed to adopt explicit protocols and safeguards to ensure that private litigants and smaller entities maintain equal and fair access to the Courts to protect their rights and remedies against the individual defendants and the merged entity."[75] The citizen complainants generally argue that they paid high service fees, paid hidden service fees, that the merged entity does not make all seats at concerts available for purchase, that the merged entity is a monopoly, and/or that the Department of Justice generally failed to protect consumers. None of these comments raise any substantive issues regarding the efficacy of the relief contained in the proposed Final Judgment to remedy the competitive harm to the primary ticketing services market alleged in the Amended Complaint.

V. Conclusion

After careful consideration of the public comments, the United States concludes that entry of the proposed Final Judgment will provide an effective and appropriate remedy for the antitrust violations alleged in the Amended Complaint and is therefore in the public interest. Accordingly, after the comments and this Response are published, the United States will move this Court to enter the proposed Final Judgment.

Dated: June 21, 2010.

Respectfully submitted for plaintiff United States.

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In the United States District Court for the District of Columbia

United States of America, et al., Plaintiffs v. *Ticketmaster Entertainment, Inc. and Live Nation, Inc., Defendants.*

Case: 1:10–cv–00139.

Assigned to: Collyer, Rosemary M.

John R. Read, Esquire,
Chief, Litigation III Section, Antitrust Division, United States Department of Justice, 450 Fifth Street, NW., Suite 2000, Washington, DC 20530.

It's My Party, Inc. ("I.M.P."), It's My Amphitheatre, Inc. ("I.M.A."), Seth Hurwitz, Frank Productions, Inc., Sue McLean and Associates, Metropolitan Talent, Inc., each of which promotes, and/or operates or books venues for, popular music concerts, and the National Consumers League[1] (collectively, the "Objectors") herewith object to the Proposed Consent Judgment between the plaintiffs in the above-captioned action and Live Nation, Inc. ("Live Nation") and Ticketmaster Entertainment, Inc. ("Ticketmaster").

Preliminary Statement

The Department of Justice ("DOJ") and several state Attorneys General (collectively, the "Government") have challenged the merger of Live Nation and Ticketmaster to form Live Nation Entertainment, Inc. ("LNE") on the grounds that this merger would substantially lessen competition in the market for the provision of primary, remote ticketing services in the United States. The Government has resolved this challenge by agreeing to a Proposed Consent Judgment (the "Consent Judgment") whose principal terms require Ticketmaster to grant a perpetual license to its ticketing software and divest its entire Paciolan

[67] Middle East Restaurant Comment at 1 (attached as Exhibit D).

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] These comments are attached Exhibits E through L.

[73] LIVE–FI Comment at 1.

[74] *Id.* at 2.

[75] *Id.*

[1] The National Consumers League (NCL) is part of the coalition of consumer groups, independent promoters, ticket sellers and 50 members of Congress opposing the merger between Ticketmaster and Live Nation. Despite our coalition's efforts, the Department of Justice went forward in approving the merger. While it joins in these objections, the NCL also notes that, as a consumer organization, it believes the merger should not have been approved and that further concentration of the live performance ticketing industry will ultimately prove harmful to consumers, who will see a steady rise in the cost of concerts and other live events, an increase in vaguely defined fees and charges, which have dramatically pushed up the price of tickets over the past decade. Indeed, the average price of a ticket to one of the top 100 tours soared to $62.57 in 2009 from $25.81 in 1996, according to Pollstar, far outpacing inflation. (David Segal, *Calling Almost Everyone's Tune,* N.Y. Times, April 23, 2010.)

Indeed, since the merger's approval in late January of 2010, Live Nation Entertainment, Inc. flexed its dominance. It bid on virtually every artist touring in 2010 and the booking agents for popular artists, such as Rascal Flatts, Brad Paisley, Iron Maiden, 311 and Jimmy Buffett, did not even solicit competitive offers for this 2010 summer concern season. This conduct has already impacted ticket prices and ticket servicing fees. For instance, the top ticket price for the Lady Gaga tour has increased by approximately 133% in the last three months.

NCL supports efforts to stop this merger because of its contribution to the increased concentration of the live event industry in the hands of a few powerful forces and the resulting decrease in customer services and increase in prices to consumers.

business to independent companies. The stated purpose of these divestitures is to create two independent firms capable of competing with LNE, particularly in the market for the remote, primary sale of tickets to what the Government characterizes as major concert venues.

The Objectors challenge the Consent Judgment because the proposed remedial relief will not achieve the stated goal of facilitating effective competition with LNE in the primary, remote sale of tickets to popular music concerts at major concert venues. The Consent Judgment does not take into account LNE's domination of the promotion of popular music concerts by major artists and control of venues capable of hosting concerts by major artists. The vast majority of all popular music concerts by major artists will be promoted by LNE and held at LNE controlled venues at which its remote, primary ticketing services will be utilized without violating the Consent Judgment. The companies to which Ticketmaster's ticketing software and Paciolan business are divested will be unable to compete effectively to provide remote, primary ticketing services for popular music concerts and LNE will remain the dominant competitor in the market. LNE is already exercising this market domination to eviscerate the remedial relief imposed under the Consent Judgment. The continuation of the merged company's dominant position in the market will have significant anticompetitive consequences, including continued supra-competitive ticketing services fees and charges.

If the Government remains unwilling to challenge the merger, additional remedial measures are necessary. To create meaningful competition in the market for remote, primary sales of tickets to popular music concerts, LNE should be precluded from: (i) Promoting more than seventy-five percent (75%) of major popular music artists' tours; (ii) tying or bundling its promotional services and venue services; (iii) tying or bundling the appearance of major popular music artists at one LNE controlled venue to the artist's appearance in LNE controlled venues in different geographic markets; and (iv) retaliating against or penalizing any artist who elects to utilize a rival promoter or venue during the course of a LNE sponsored national or multi-appearance tour. LNE should also be required to return at the request of any promoter or venue any customer or other competitive information Ticketmaster maintained from concerts for which it provided ticketing services for the promoter or venue. These remedial measures will facilitate the ability of independently owned and operated venues, which will likely utilize rival ticketing companies, to compete for the artists who drive the live music industry.

Supplemental Market Analysis

A. The Popular Music Concert Industry

While the Government's Complaint and Competitive Impact Statement analyze the live entertainment industry, they focus upon the specific market for the remote, primary sale of tickets to music concerts. However, the implementation of effective remedial action for the anticompetitive effects the Government has recognized will result from the Live Nation—Ticketmaster merger requires a deeper analysis of the promotional and venue services markets. This analysis establishes that Live Nation had far greater pre-merger power in those markets than the Government recognizes and that the merger has enhanced LNE's dominance in these markets. This market domination will strangle nascent competition in the market for remote primary ticketing services.

The popular music concert industry has its roots in the technical innovations that led to the growth of the radio and television industry and a consumer mass market for quality recorded music. To drive record sales, record companies sponsored concert tours across the country. Radio airplay, exposure on nationally broadcast television shows, such as *American Bandstand* and *The Ed Sullivan Show,* and record sales led to nationwide notoriety for highly talented artists performing the genre of music in vogue at the time. As artists' popularity grew, they began to attract substantial audiences for their live performances.

The style of music in vogue has evolved over time. In the 1950s, popular music was evolving into "rock n' roll" (or just "rock"), a blend of rhythm and blues and country music. This musical genre became widely popular among teens and young adults in the 1950s. Rock artists became so popular that they attracted substantial audiences for their live performances and touring provided them with a significant source of revenue. As a result, artists began to tour independently of their recording companies. For several decades, only rock or folk (as this style of music gained wide popularity in the 1960s) qualified as popular music when measured by record sales, concert attendance or the amount and breath of radio play. Recently, rock music has splintered into different genres, including classic (of the style from the 1960s through 1970s), "hard" (less melodic) and alternative rock, and into a general category of "pop" (electric guitar and organ and drum dominated music). Additionally, country music has spread from its roots in the south and southwest of the United States to gain mainstream acceptance throughout the country (*see,* CNNMoney.com, *Cashville USA* [2] (Ex. "A" hereto)), and the hip-hop and rap styles of music developed and became popular among teens and preteens. Other styles or genres of music, including jazz, blues and gospel, while capable of drawing significant numbers of fans, are popular only in one region of the country or among a segment of the population, so that they draw mass audiences, at most, only in limited areas or for only a few performances a year. Similarly, symphony orchestra performances and opera appeal to a small segment of the population, require unique venues,[3] and promoters are not usually involved with these events.

As the Government recognizes (Complaint, ¶¶ 15–19), a separate defined market developed for what are referred to hereinafter as "popular music concerts by major artists" with "popular music" defined as that genre of music of broad popularity and "major artists" defined as those artists performing in a popular music genre with sufficient talent to generate a mass audience. Local entrepreneurs began to promote concerts, which entailed advertising and marketing the concert in their region or city and often assuming the financial risk of the concert. As the industry developed, artists engaged a booking agent to schedule and route a tour. Booking agents would contact local promoters in each city or region in which the artist was considering appearing and solicit bids to promote the concert in their area. Initially, concerts were held in theatres utilized for plays or other such facilities and, as rock and folk artists grew in popularity, expanded to indoor sports arenas with seating for up to 30,000 fans and, in some instances, in outdoor sports stadiums with seating capacities in excess of 60,000 fans. Independent

[2] Found at *http://money.cnn.com/magazines/fortune/fortune_archive/2007/01/22/8397980/index.htm.*

[3] As symphonies are generally performed with no or minimal amplification, they are generally only conducted at concert halls with highly tuned acoustics. Symphony orchestras may perform summer concerts at general music venues, usually amphitheatres, but do not have a sufficient breath of appeal to draw mass audiences to multiple performances and do not appeal to most popular music fans.

companies were formed to provide remote (at locations other than the venue hosting the concert) ticket sales.

As the popular music concert market developed, facilities designed and intended for use solely as venues for live popular music concerts were constructed throughout the country, primarily in large urban areas. The most prevalent type of venue constructed for live popular music concerts are outdoor amphitheatres, with a seating capacity generally between 8,000 and 25,000 fans spread over designated seating areas (usually under cover) and large lawn areas. These facilities have become the dominant venues for popular music concerts because, as they are constructed to host music concerts, they have good sight lines, acoustics (although not to the level of a symphony hall) and staging. Conversely, arenas and stadiums are primarily constructed for sporting events and are generally not desirable venues in which to view a concert.[4] Amphitheatres also enjoy the advantages that: (a) Fans enjoy attending concerts outdoors and mingling in the lawn section before and during the concert; (ii) they are more flexible than arenas and certainly stadiums in the size of the shows they can handle because they are less costly to operate, lawn seating allows amphitheatres to approach the seating capacity of indoor sports arenas while fans at less popular shows spread out in the lawn areas making the show seem to have a larger attendance; and (iii) attendance at amphitheatres tends to be higher because fans of limited means can purchase a lawn ticket at a reduced price and still obtain a good vantage by arriving early and are not locked into undesirable seats.

The artist is the bedrock of the popular music concert industry as it is the artist that draws the fans. It is commonly recognized that there are less than one hundred artists who can attract an average of 8,000 to 30,000 fans during a national concert tour. In its World Industry Report, *Promoters of Performing Arts, Sports and Similar Events with Facilities in the U.S.,* IBISWorld states that, in 2005, the top 100 tours comprised 67% of the total domestic concert revenues. LNE recognizes the limited number of major artists and has centered its entire business model around controlling them. As its Brad Wavra, Senior Vice-President of Live Nation's Touring Division, stated: "[t]here are only a handful of great artists out there that can do 10,000; 12,000; 15,000 tickets in 40 cities across the country. Everybody knows who they are, they're historic artists, legendary artists. So, when they're on a touring cycle, you know, we all want to get them to come play for us." (Transcript of Artist House Music's Interview of Brad Wavra, Ex. "B" hereto.)

B. Live Nation Conquerors Popular Music Concerts By Major Artists

In approximately 1997, SFX Entertainment, Inc. ("SFX") began acquiring local concert promoters to develop a promotional company of national scope. For example, SFX acquired Bill Graham Presents, Electric Factory Concerts, Fey Concerts, Pace Concerts, Cellar Door and the promotional companies of Jules Belkin and Don Law. As it expanded nationally, SFX introduced a fundamental change in the market for concert promotion by promoting multi-appearance concert tours. Local promoters struggled to compete against SFX because it submitted offers for the entire tour, which promoters operating in only one city or region found difficult to match. At a competitive disadvantage, local promoters were unable to survive and became ripe for acquisition.

In 2000, Clear Channel Communications, Inc. acquired SFX and changed the name of the Company to Clear Channel Entertainment. Clear Channel Entertainment continued to acquire promoters on the way to building a promotional company of national scale and expanded to the point that it could promote artists' entire national tours. Clear Channel Entertainment also acquired control of concert venues either by purchasing them, entering into long term lease relationships or executing management and/or exclusive booking agreements. Clear Channel Entertainment directed artists that it promoted to appear at venues it owned, leased, managed or exclusively booked.

This business practice placed promoters at an ever increasing competitive disadvantage because it was impossible for local promoters to bid against national tour offers. As Clear Channel Entertainment generally would not allow artists promoted by its competitors to appear at its venues, promoters were also denied access to venues at which to produce concerts. Independent venue owners and operators were placed at a competitive disadvantage as well because they were denied the ability to compete to provide venue services to artists Clear Channel Entertainment promoted. Facing an insurmountable competitive disadvantage, many more promoters and venue owners became ripe for acquisition by Clear Channel Entertainment.

Several antitrust actions were filed against Clear Channel Communications and Clear Channel Entertainment claiming that they had unlawfully acquired monopoly power in the market for the promotion of popular music concerts and engaged in numerous anticompetitive actions to maintain and exploit this power. *Nobody In Particular Presents Inc* v. *Clear Channel Communications Inc.,* 311 F. Supp. 2d 1048 (D. Colo. 2004); *In Re Live Concert Litigation,* 247 F.R.D. 98 (C.D. Cal. 2007); *JamSports & Entm't, LLC* v. *Paradama Prods.,* 382 F. Supp. 2d 1056 (N.D. Ill. 2005). In *Nobody in Particular Presents,* the Court held that plaintiffs had established a genuine issue of material fact in support of their claims that Clear Channel had used its monopoly power in the market for the broadcast of rock music to force artists to utilize Clear Channel Entertainment's promotional services. The Court found that plaintiffs had established, at least, a *prima facie* case that Clear Channel refused to advertise concerts promoted by anyone other than Clear Channel Entertainment and to provide crucial radio play to artists who utilized rival promoters.

In the wake of these claims, Clear Channel spun Live Nation off into a separate, publicly traded company in 2005. At that time, Live Nation was the largest promoter of live popular music concerts in the United States. Recognizing the central importance of control of the artist, Live Nation soon developed a business plan of controlling the entire interface between popular music artists and their fans by integrating concert promotion, the operation of music concert venues, merchandising, sponsorships and ancillary rights. This plan is openly discussed in Live Nation internal documents, such as the attached flow chart in which Live Nation touts its "model transformation" as "Branded Vertically Integrated Live." (Ex. "C" hereto.) In a separate document, Live Nation refers to its vertical integration of the concert industry as "Creating the Artist-to-Fan Platform." (Ex. "D" hereto.)

In furtherance of this business plan, Live Nation expanded the number of national tours it promotes, offering national tour deals to all or substantially all of the highest grossing artists touring in any one year. To induce artist participation in these tours, Live Nation offered supra competitive shares of the

[4] An artist might prefer an indoor venue if the performance includes a light show or has special stage requirements. This may occur only a few times a year.

concert revenues, at times paying artists more than 100% of the ticket sales. It insisted on control of the entire tour and that the artist appear only in venues that Live Nation controlled through ownership, lease, management or exclusive booking contracts. It was crucial for the artists to appear at Live Nation controlled venues not only to implement its plan to control the "artist-to-fan" platform, but also because Live Nation profits only upon concession sales, parking fees and merchandising fees. Live Nation's Chief Executive Officer admitted while testifying before the Antitrust Sub-Committee of the Senate Judiciary Committee that Live Nation loses money on concert promotion and profits only through sales at its venues. *House Judiciary Subcommittee on Courts and Competition Policy Holds Hearing on the Proposed Merger Between Ticketmaster and Live Nation,* Cong. p. 60 (Feb. 26, 2009) (statement of Michael Rapino, President and CEO of Live Nation Worldwide).[5]

To obtain further control over major artists, Live Nation has entered into multi-year agreements to manage every aspect of an artist's career, capture all revenue streams associated therewith and control every market comprising or ancillary to the live music concert industry. Acknowledging this strategy, Live Nation Chief Executive Officer Michael Rapino stated that Live Nation was "acquiring more rights for a longer time period with locked-in pricing, cross-collateralized for risk reduction." (Live Nation Q1 2008 Earnings Call Transcript.) Live Nation has entered into these "360° degree management contracts" with Madonna, U2, Jay-Z, Nickelback and Shakira. As part of these agreements, Live Nation assumes the management of artists' careers and controls whatever revenues they generate, locking up the artist for a number of years.

Live Nation continued Clear Channel's acquisition spree, acquiring promoters and venues and entering into management and exclusive booking arrangements with venues. Notably, when HOB Entertainment, Inc. threatened Live Nation's primacy by expanding its *House of Blues* themed dinner and music clubs nationwide and purchasing amphitheatres, Live Nation acquired it. It was reported that this acquisition closed many of the gaps in Live Nation's national tour routing. Live Nation also acquired, entered into long term leases and executed management or exclusive booking agreements at numerous amphitheatres, concert halls, music theatres and other such venues. (*See,* MSN.com, PR Newswire, *Live Nation Continues Top 20 Market Expansion with Agreement to Operate Bayfront Amphitheater in Miami, Florida—16th Largest Market in United States* (Ex. "E" hereto).)[6] LNE presently owns, leases, manages or exclusively books 111 venues in the United States, including some of the most prestigious, such as *The Fillmore* in San Francisco and the *Hollywood Palladium.* (*See* Live Nation 2009 10K.)

Live Nation also expanded its reach internationally by acquiring promoters and venues in Europe. On August 21, 2008, Live Nation formed a partnership with Corporación Interamericana de Entretenimiento SAB de C.V. ("CIE"), the largest concert promoter in Latin America. CIE owns nearly all the major concert halls and arenas in Mexico, and a large percentage of those in Brazil and other large South American markets. The *Wall Street Journal Online* reported that this partnership gives Live Nation the exclusive right to book world tours into CIE venues. *See* Ethan Smith, *Live Nation Reaches Deal with Big Concert Promoter,* Wall St. J., Aug. 21, 2008, available at *http://online.wsj.com.* Live Nation's international expansion, particularly its relationship with CIE, enhanced its control by affording it the ability to promote artists' world tours or using the ability to play CIE venues as leverage in negotiating national tours or appearances at Live Nation venues in the United States.

Live Nation now dominates the markets for promoting and providing venue services for popular music concerts by major artists. Based upon data from Pollstar, which the Government recognizes as a "leading source of concert industry information" (Competitive Impact Statement, p. 4 n.2), Live Nation promoted at least 70% of the live popular music concert tickets sold by major artists in the United States in 2008.[7] Based on Live Nation's public disclosures and an analysis of Pollstar data, Live Nation controls 40 of the 48 in excess of 15,000 fan capacity amphitheatres and has a monopoly of or the only amphitheatre in 18 of the largest 25 designated market areas[8] in the United States. There are several areas of the country in which there are no popular music promoters other than Live Nation or appropriately sized venues other than those controlled by Live Nation.

As the Government recognizes, in approximately 2007, Live Nation licensed technology to enable it to conduct the remote sale of concert and other event tickets. This action threatened Ticketmaster's existing dominance in the market for the remote sale of event tickets because, as the Government also recognizes, Live Nation had a captive market for its remote ticketing services (the venues it controlled) and was better positioned to overcome the significant existing barriers to entry into this market. Realizing that Live Nation would compete against it in the remote sale of event tickets, Ticketmaster laid the foundation to compete against Live Nation in the market for the promotion of concerts. The obvious plan was to put Ticketmaster in position to protect its remote ticketing business by offering integrated services (at least artists, historical concert information and ticketing services) to artists and venues.

A significant step in developing this capability was Ticketmaster's acquisition of majority control of Front Line Management ("Front Line"), one of the largest artist management companies in the country, which boasts a staple of marquee artists, ranging in age from Miley Cyrus to Willie Nelson. Front Line managed artists also include Van Halen, Neil Diamond, Christina Aguilera, Kid Rock, Maroon 5, the Kings of Leon, Jimmy Buffett, Aerosmith and Guns-n-Roses. (David Siegel, *Calling Almost Everyone's Tune,* N.Y. Times Reprints, April 23, 2010.) Front Line's Chief Executive Officer is Irving Azoff, who is recognized as one of the most influential recording artist managers in the world. (*Id.*) Ticketmaster's control of Front Line's artists threatened Live Nation because it could deny Live Nation access to a substantial number of the less than a hundred artists who could command an audience large enough to sell out or fill its amphitheatres and other larger capacity venues.

Within just a few months of this acquisition, Live Nation and Ticketmaster agreed to merge. While the Government characterizes this merger as a move by Ticketmaster "to eliminate Live Nation entirely as a competitor"

[5] "We [Live Nation] do 1,000 concerts at our 50 amphitheaters. We will lose $70 million at the door. That means the price of the talent versus the ticket price. That's 10 million tickets being sold. So in theory, if I had any control on those ticket prices, you would assume I would charge seven more dollars a ticket to cover my $70 million loss. The artist takes the door and we end up making the money on the peanut, popcorn, parking and ticket rebates."

[6] Available at *http://news.moneycentral.msn.com/printarticle.aspx?feed=PR&date=2008-812&id=9017679*).

[7] This analysis is based upon current information and represents Live Nation's minimum share of this market.

[8] A designated market area, or DMA, as designated by Nielsen Media Research, Inc.

(Competitive Impact Statement, p. 11), Live Nation, in fact, was the dominant party in the merger and it acted to eliminate Ticketmaster (as it has eliminated so many previous competitors) as a threat to its control of the interface between popular music artists and their fans. At the very least, while the merger eliminated a competitor in the market for remote ticketing services, it also eliminated a competitor in the market for promoting popular music concerts and a potential competitor in the market for providing venue services.

Proposed Final Judgment

On January 25, 2010, the Government filed a civil antitrust Complaint seeking to enjoin the proposed merger between Live Nation and Ticketmaster because its primary effect would be to "lessen competition substantially for primary ticketing services to major concert venues located in the United States." (Competitive Impact Statement, pp. 1–2.) In support of this claim for relief, the Government alleged that Ticketmaster "dominated primary ticketing, including primary ticketing for major concert venues, for over two decades." (Amended Complaint, ¶ 21.) The Government contended that, as a result of this dominance, Ticketmaster was able to charge consumers supra competitive ticketing fees which did not decrease even though Ticketmaster's costs were declining as a result of the introduction of selling tickets over the Internet. (*Id.,* ¶ 22.)

The Government defined the market as the "provision of primary ticketing services to major concert venues" even though Ticketmaster provided remote ticketing services to events other than music concerts because the "set of customers most likely to be affected by the merger of Ticketmaster and Live Nation are major concert venues." (Amended Complaint, ¶ 37.) It noted that the "merged firm's promotion and artist management businesses provide an additional challenge that small ticketing companies will now have to overcome. The ability to use its content as an inducement was the point that Live Nation touted as the basis on which Live Nation could challenge Ticketmaster in ticketing." (*Id.,* ¶ 43.)

The Government simultaneously filed the Consent Judgment which would preclude Live Nation and Ticketmaster from completing their merger until they complied with the remedial action specified therein. As a general matter, Ticketmaster was required to license the Ticketmaster operational software to Anschutz Entertainment Group, Inc. ("AEG") (or another acceptable licensee) and divest Ticketmaster's entire Paciolan business to Comcast Spectacor, LP (or another acceptable acquirer). The stated purpose of this remedial action is to create viable competitors to LNE in the market for providing primary remote ticketing services, particularly in providing these services to major music venues. The Proposed Consent Judgment also imposes remedial measures intended to assist these entities in competing against the merged entity. These measures include prohibiting the merged entity from retaliating against any venue, such as by refusing to host concerts at any venue, that selects another primary remote ticketing service.

However, the Consent Judgment does not address Live Nation's ability, as recognized in the Amended Complaint, to drive the use of its primary, remote ticketing business through the control of other markets. The prohibition of LNE retaliating against concert venues utilizing other ticketing services provides no meaningful protection because, with the exception of stadiums and arenas that are not primarily used as concert venues, Live Nation already directs the artists it promotes, and now manages, to the music venues it owns, leases, manages or exclusively books. LNE does not have to retaliate against anyone to induce those venues to utilize its (Ticketmaster's) primary, remote ticketing service. It either controls or already has substantial influence over this decision. As Live Nation dominated, and LNE has even greater control over, the promotion of popular music concerts and venues used for popular music concerts by major artists, LNE will dominate the primary remote ticketing services market as well. LNE will have no reason to reduce the excessive service fees Ticketmaster charged. Indeed, it would appear that LNE will use supra competitive ticketing service fees as another source to off-set the supra competitive payments it makes to artists.

The Proposed Consent Judgment does nothing to prohibit this conduct. To the contrary, it facilitates this action by expressly permitting LNE to bundle its services. For this reason, the remedial action the Government has negotiated will not prevent the competitive harm it sought to address. In fact, the merged entity has continued to direct artists to the venues it controls for the upcoming 2010 season. For these reasons, if the Live Nation/Ticketmaster merger is to be permitted, additional remedial action must be required.

Argument

A. A Consent Order That Provides for Ineffective Remedial Action Should Not Be Approved

The determination of whether the Consent Judgment should be approved will be based on whether it is in the "public interest." 15 U.S.C. 16(e)(1). In making this assessment, a court may not substitute its judgment for the Government's as to the nature or scope of the claims brought in the first instance. *United States* v. *Microsoft Corp.,* 56 F.3d 1448 (DC Cir. 1995). For this reason, while the Objectors believe that the Live Nation and Ticketmaster merger will substantially reduce competition in the market for providing promotional and venue services to popular music artists, and contend that Live Nation's conduct is independently actionable,[9] they have not addressed these issues.

Conversely, the court is not merely a "judicial rubber stamp[ ]"; it is required to make "an independent determination as to whether or not entry of a proposed consent decree is in the public interest." *Id.,* at 1458 (quoting H.R.REP. NO. 1463, 93d Cong., 2d Sess. 8 (1974), and S.REP. NO. 298, 93d Cong. 1st Sess. 5 (1974), reprinted in 1974 U.S.C.C.A.N. 6535, 6538, 6539.) The independent nature of judicial review of a consent judgment is further evidenced in the Senate debate of the Tunney Act: "[The Act] will make our courts an independent force rather than a *rubber stamp* in reviewing consent decrees, and it will assure that the courtroom rather than the backroom becomes the final arbiter in antitrust enforcement." (The Antitrust Procedures and Penalties Act of 1974: Hearings on S. 782 and S. 1088 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 93d Cong. 1 (1973) (opening remarks of Senator Tunney).) *See also, United States* v. *GTE,* 603 F. Supp. 730, 740 n.42 (D. D.C. 1984) ("([I]n light of the history and purpose of the Tunney Act, it is abundantly clear that the courts were not to be mere rubber stamps, accepting whatever the parties might present").

In making this determination, the Tunney Act provides that the Court "may consider," *inter alia:*

"(1) The competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration

[9] I.M.P. and I.M.A. have filed a Complaint against Live Nation asserting antitrust and State law unfair competition claims. *It's My Party, Inc.* v. *Live Nation, Inc.,* United States District Court for the District of Maryland, Northern Division, Civil Action No. 1:09 Civ. 00547 JFM.

or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment * * * ”

15 U.S.C. 16(e). A court should “hesitate” in the face of specific objections from directly affected third parties before concluding that a proposed final judgment is in the public interest. *United States* v. *Microsoft Corp., supra,* 56 F.3d at 1462. Additionally,

“The court should pay “special attention” to the clarity of the proposed consent decree and to the adequacy of its compliance mechanisms in order to assure that the decree is sufficiently precise and the compliance mechanisms sufficiently effective to enable the court to manage the implementation of the consent decree and resolve any subsequent disputes.”

United States v. *Thompson Corp.,* 949 F.Supp. 907, 914 (D. D.C. 1996).

In *Thompson,* in response to objections by competitors, the Court refused to approve a consent judgment permitting the merger of Thompson Corporation and West Publishing unless additional remedial action was implemented with respect to West’s claim of copyright protection for its star pagination system. In so ruling, the Court held the remedial actions specified in the proposed consent judgment did not adequately address the anticompetitive concerns the government raised in its complaint with West’s assertion of copyright protection for the star pagination system.

The Court should give serious consideration to the position of the Objectors—competitors of Live Nation in both concert promotion and venue operation—that the government plaintiffs’ proposed remedial relief will not address the substantial reduction in competition in the market for providing primary ticketing services they have concluded will result from the merger of Live Nation and Ticketmaster. Indeed, as the Government is still permitted to demand additional remedial action, it should give serious consideration to Objections filed by entities with substantial knowledge of the relevant markets and in unique positions to assess whether anyone will be able to compete effectively against Live Nation in the primary remote ticketing market before finalizing the Proposed Consent Judgment. A consent judgment that is ineffective in remediating the competitive harm the Government sought to address is not in the public interest.

B. LNE’s Dominance over the Market for Concert Promotion and Venue Services Will Strangle Competition in the Market for Primary Remote Ticket Sales at Major Music Venues

Even though it affirmatively alleges that the customers most directly affected by the merger are major concert venues, and that LNE’s promotion and artist management business poses an additional challenge that rival ticketing companies will have to overcome, the Government provides an, at best, perfunctory analysis of Live Nation’s pre-merger share of the market for concert promotion and venue services. It claims that Live Nation owns or operates 70 major concert facilities throughout the United States (Competitive Impact Statement, p. 5) and does not examine the extent to which Live Nation’s controls the available venues in the geographic markets in which it competes. It further claims that Live Nation promoted shows represent 33% of the concert revenues at major concert venues in 2008.

However, Live Nation’s public disclosures establish that it owns, leases, manages or exclusively books at least [10] 111 music concert venues. As is set forth previously, prior to the merger, Live Nation had monopoly control of amphitheatres with a more than 15,000 seating capacity in the United States and controls the only venue or a monopoly of the music venues in 18 of the largest 25 designated market areas. Given this dominance of the market, as is recognized by Trent Reznor, the lead singer for Nine Inch Nails, artists must deal with Live Nation on concert tours:

“NIN [Nine Inch Nails] decides to tour this summer. We arrive at the conclusion outdoor amphitheaters are the right venue for this outing, for a variety of reasons we’ve throughly [sic] considered. In the past, NIN would sell the shows in each market to local promoters, who then ‘buy’ the show from us to sell to you. Live Nation happens to own all the amphitheaters and bought most of the local promoters—so if you want to play those venues, you’re being promoted by Live Nation.”

The footnote provides:

“I fully realize by playing those venues we are getting into bed with all these guys. I’ve learned to choose my fights and at this point in time it would be logistically too difficult to attempt to circumvent the venues/promoter/ticketing infrastructure already in place for this type of tour.”

Moreover, measuring Live Nation’s market power in concert promotion based on revenue generated from ticket sales from what the Government terms major concert venues is inherently flawed as market power should be measured in the number of tickets sold. Promoters are typically ranked in the industry, as is reflected in Pollstar’s rankings, based on the number of tickets sold for concerts they promote. Furthermore, as with many service providers in this industry, ticketing companies are not paid by the entity that engages them (in this case, venues owners or operators), but rather they charge concert goers service fees per ticket. It accordingly was the consumer that bore the burden of Ticketmaster’s dominance of the primary remote sale of concert tickets through the payment of supra competitive service fees per ticket. As the competitive harm is reflected in service fees per ticket, the measure of Live Nation’s market power should be the percentage of the total number of tickets sold.

Even if the calculation of market power were based on revenues, the Government’s analysis substantially minimizes Live Nation’s pre-merger share of the market. Live Nation is in the business of promoting music concerts and, once again, the Government recognized that the merger will most acutely affect major concert venues. Nevertheless, the Government appears to have calculated Live Nation’s share of the promotional market by comparing the revenues it earned promoting concerts to the total revenues of the top 500 highest grossing venues. (Competitive Impact Statement, p. 4, n.2.) While the Government does not list what it considered to be the top 500 grossing venues, Pollstar data establishes that facilities clearly within the top 500 grossing venues have reported significant revenue for events that were not music concerts. Those events include circuses (both traditional [Ringling Brothers and Barnum & Bailey] and Cirque de Soleil style performances), plays, ice shows, ballet, opera and performances by comedians, magicians, symphony orchestras and the Blue Man Group. (A list of some of the events reported in Pollstar is attached hereto and marked Ex. “F”.) These events are plainly not music concerts and are not substitutes for fans of major popular music artists.

The events included within the Pollstar data also include performances by gospel, jazz, blues and other musicians, which are not fairly characterized as popular music and are also not adequate substitutes for fans of major popular music artists. The vast majority of fans only enjoy specific genres of music as is evidenced, for instance, by the segregation of radio stations among music genres. Further,

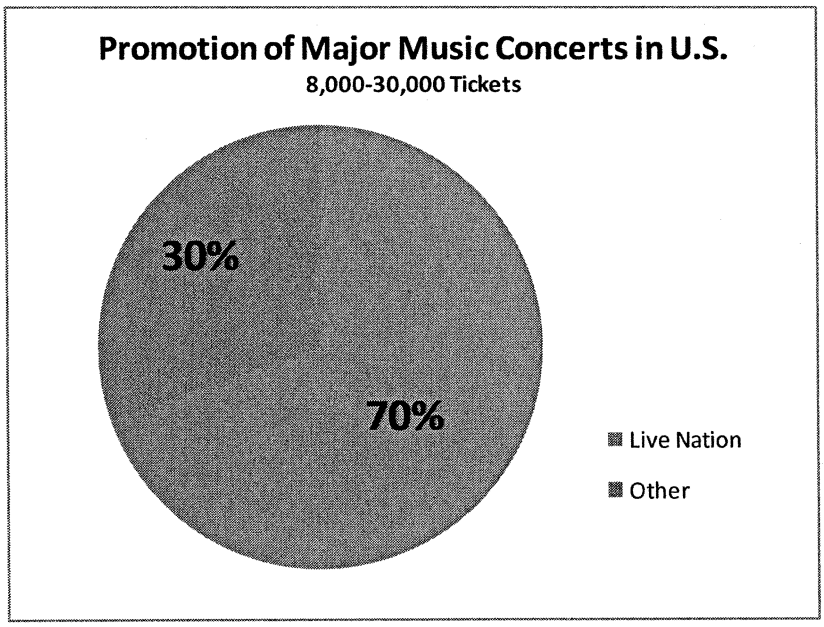
[10] It is unknown whether Live Nation’s public disclosures identify all venues it exclusively books.

Billboard magazine ranks songs according to their genre. (*See,* Ex. "G" hereto.) Fans will generally not attend a concert featuring a genre they do not enjoy. For this reason, in *Nobody in Particular Presents, supra,* the court held that the plaintiffs had established a triable issue of fact as to whether there was a distinct market for rock music and concerts. 311 F.Supp.2d at 1082–83. There is not a cross-elasticity of demand between popular music and jazz, blues and particularly gospel (that are usually attended only by fans with strong religious beliefs), and the option of attending these types of concerts will not impede LNE's ability to maintain supra competitive ticketing service fees in popular music concerts.

Moreover, as the Government recognizes (Competitive Impact Statement, p. 4 n.2), the top 500 grossing venues include clubs and music theatres. These facilities have limited seating capacities. In its Annual Report on Form 10K for the year ending December 31, 2008, Live Nation recognizes that music theatres typically have a seating capacity of between 1,000 and 6,500 and clubs have a seating capacity of less than 1,000 fans. With rare exceptions, artists appear at these kinds of venues because they do not have sufficient popularity, due either to their being a developing act or the genre of music they perform, to draw an audience for a larger amphitheatre, arena or stadium. Fans not only focus on the style or genre of music, but they also have favorite artists within a genre, and will generally not attend a concert by an artist they do not enjoy. By definition, artists appearing at music theatres and clubs do not have sufficient popularity to compete effectively against the substantially more popular artists appearing at amphitheatres, arenas and stadiums.

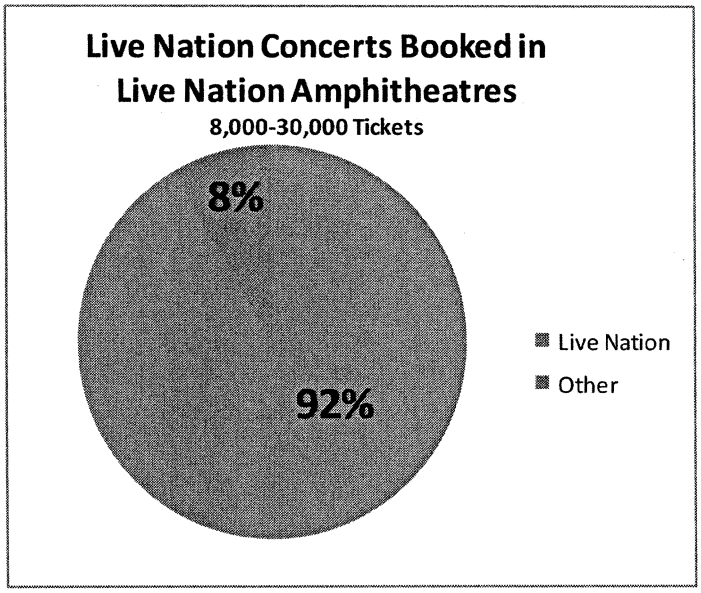
On the other end of the spectrum, owners of modern arenas and stadiums prefer artists whose fan base is sufficiently affluent to pay for the expensive tickets to luxury suites. There are only a few select performers with sufficient popularity among affluent fans to draw an audience large enough for a 25,000 seating capacity arena, let alone a 60,000 seating capacity stadium, and most well recognized popular music artists appear at amphitheatres and other venues specifically designed for music concerts with seating capacities of between 8,000 and 30,000 fans. Based on Pollstar data, there were only five artists that appeared in an amphitheatre or other venue used primarily for music concerts who also appeared at a typical sports arena during the same tour (other than in a festival or multi-artist concert) in 2008.

Based on this analysis, the proper measure of Live Nation's market power in the promotion of music concerts is determined by calculating its percentage share of the tickets sold for promoting popular music concerts by major artists (with an average attendance of between 8,000 to 30,000 fans). Based upon Pollstar data, Live Nation was the promoter for 70% of the tickets sold within this market in 2008:



Additionally, Live Nation dwarfs other promoters. Its most significant competitor is AEG Live, which promoted only 43% of the total amount of tickets to the events tracked by Pollstar worldwide that Live Nation promoted in 2008 and focuses primarily on arena shows. Live Nation's next largest competitor is MSG Entertainment which promoted just 7% of the tickets for events tracked by Pollstar worldwide that Live Nation promoted in 2008 and is believed to promote only at New York's Madison Square Gardens. Simply stated, Live Nation dominates the promotion of popular music concerts by major acts, particularly those appearing in amphitheatres.

The evidence is overwhelming that Live Nation funnels the acts it promotes to the venues it controls. As set forth previously, Live Nation's business model is to control the entire interface between the artist and their fans. Live Nation pays artists more than the entire amount of the ticket sales, loses money on concert promotion and profits only on concession, parking and merchandise sales and, therefore, requires artists it promotes to appear at its venues. Once again based upon Pollstar data and Live Nation's publicly disclosed information, 92% of the concerts it promoted at amphitheatres were held at venues owned, leased or managed by Live Nation or at which it has exclusive booking arrangements:



In defending Live Nation's then exclusive booking arrangement with the New York State Fair, James Koplik, Chairman of Live Nation's Northeast Region, stated that artists on Live Nation promoted national tours, who appeared at the New York State Fair, would not have done so if Live Nation did not have exclusive booking rights there. (*See* Jim Koplik, *Live Nation is Committed to Successful State Fair,* available at *http://blog.syracuse.com* (posted August 26, 2008).)

There are numerous examples of this conduct. In discussing whether No Doubt would play Merriweather Post Pavillion during its 2009 Summer tour, the act's agent, Mitch Okmin, of M.O.B. Agency, stated that No Doubt could not play Merriweather because "if [it is a] L[ive] N[ation] deal, it will be at the bad traffic place." (later identified as Nissan Pavilion, a Live Nation venue). (Ex. "H".) He similarly said in discussing the 2010 summer tour that No Doubt cannot play any other venue where there is a Live Nation amphitheatre, stating "if [there is a] LN shed we play it." (Ex. "I".) Marty Diamond of Paradigm, expressed similar sentiment, responding that to the extent Coldplay enters into a Live Nation tour for the summer of 2009, there was no chance "whatsoever" that they would be able to play Merriweather. (Ex. "J".) Rob Beckham, from the William Morris Agency, represents Rascal Flatts and Brad Paisley, and similarly advised that with respect to "any hard ticket date, [Live Nation] has the right of first refusal. They have never not taken a date." As to whether he was permitted to book in non-Live Nation venues, Mr. Beckham stated that the Live Nation contract is "exclusive" and he is only permitted to book non-Live Nation venues in "non competitive markets." (Ex. "K".) Mitch Okmin echoed this response, stating that, as a result of Live Nation tours, his "involvement now is markets where there are no Live nation sheds." (Ex. "L".) Even though artists would often prefer to appear at independent venues, Live Nation makes it next to impossible for them to do so. Indeed, Steve Kaul, of the Agency Group, who promotes Nickelback, stated that, although he wanted to book the band at Merriweather, he was precluded from doing so by the terms of Nickelback's 360 deal with Live Nation. (Ex. "M".) Mr. Kaul went on to acknowledge that Live Nation behaves like this in order to "cross [collateralize] the dates and protect their profits against some weak markets." (Ex. "N".)

Live Nation also utilizes its control of the market for venue services in one geographic region to compel artists to appear at a Live Nation controlled venue in an area where it faces competition. For instance, in response to solicitations for 311 to appear at Merriweather Post Pavilion during the 2008 concert season, the band's booking agent advised that refusing to play Nissan would put the band's Virginia Beach appearance at a Live Nation venue at risk. (Ex. "O".)

In those few instances in which an artist nevertheless insists upon playing a competing venue, Live Nation requires the competing promoter and/or venue operator to pay a tribute in terms of sharing a percentage of the profits from this concert with Live Nation. I.M.P. was required to pay Live Nation 25% of the entire concert gross in order to promote the Warped Tour from 2006 through 2009, Iron Maiden in 2008 and John Mayer in 2008. (Exs. "P" and "Q".) In order for The Fray to play Merriweather in 2009, I.M.P. was required to pay Live Nation $3 per ticket, because 25% of the concert proceeds were no longer deemed sufficient. (Ex. "R".) Live Nation also imposes a penalty upon artists for playing another venue.

It cannot reasonably be contended that Live Nation will utilize any ticketing service other than its own at the 111 music concert venues it controls. This does not violate the Consent Judgment as drafted because Live Nation is controlling or has influence over this decision at the venues it controls. It does not have to retaliate in order to implement its ticketing services for the venues it controls.

Without access to Live Nation controlled venues, rival ticketing companies will not be able to penetrate the market for remote, primary ticket sales to music concert venues. As LNE controls the only or a monopoly of the venues in numerous markets, including 18 of the 25 largest designated marketing areas in the country, rival ticketing companies will not have access to venues in those markets. Whatever minimal market penetration rival ticketing companies achieve will not inhibit Live Nation's ability to charge supra competitive ticketing service fees. Even where there is a comparable music venue in a geographic region in which Live Nation controls a venue, LNE's control of the artists will deny a competing facility access to artists of sufficient popularity

to provide a meaningful alternative to artists appearing at the Live Nation venue. Fans have a limited amount to spend on concerts, generally wish to purchase tickets only to concerts featuring their favorite artists and will not usually purchase tickets for concerts by artists whose music they do not enjoy. Unless a rival venue can offer a slate of concerts by artists of sufficient popularity that fans wish to attend as much as the artists appearing at a Live Nation venue, the rival cannot provide meaningful competition.

The impact of Live Nation's market dominance on rival venues' ability to attract artists is illustrated by comparing the difference in the nature of artists appearing at the Mann Music Center ("Mann") in Philadelphia before and after Live Nation obtained exclusive booking rights at the Susquehanna Bank Center, a competing venue located in Camden, New Jersey. As illustrated by the attached concert schedule (Ex. "S"), the Mann went from booking highly popular artists, such as James Taylor, who generally sold out the facility, to booking acts of limited or niche popularity. Further, Metropolitan Talent abandoned its booking arrangement at the Marvin Sands-Constellation Brands Performing Arts Center ("CMAC") in upstate New York because it could not attract artists in competition with the Darien Lake Performing Arts Center that is booked exclusively by Live Nation.

LNE will be even more dominant than Live Nation. Control of Front Line's stable of artists gives LNE the ability to feed those artists to its promotional business. As LNE will continue to insist that the artists it promotes appear at the venues it controls, uniting Live Nation's promotional and Front Line's artist management businesses will deny rival venues a meaningful opportunity to compete for an even greater percentage of popular artists, and consequently further limit rival ticketing services' ability to inhibit the merged entity's ability to charge supra competitive service fees. Additionally, Ticketmaster has long maintained an extensive customer database that is effectively utilized to solicit fans for concerts at venues to which it provides ticketing services. As no other ticketing service has such an extensive database, the promise of access to it will be a powerful inducement for rival venues to utilize the merged entity's ticketing services.

As soon as the Proposed Consent Judgment was filed, LNE flexed its muscle. It bid on virtually every artist touring in 2010 and the booking agents for popular artists, such as Rascal Flatts, Brad Paisley, Iron Maiden, 311 and Jimmy Buffett, did not even solicit competitive offers for the upcoming 2010 summer concert season. This conduct has already impacted ticket prices and ticket servicing fees. For instance, the top ticket price for the Lady Gaga tour has increased by approximately 133% in the last three months.

C. The Consent Judgment Should Not Be Adopted without Further Remedial Relief

Competition in the market for the primary remote ticketing of music concerts will not be restored to levels where LNE will be unable to charge supra competitive service fees unless Live Nation's ability to funnel the concerts it promotes to the venues it controls is curtailed. While the Objectors believe that Live Nation's tying promotional services to artists appearing at Live Nation's venues constitute independent violations of the antitrust laws, it is well-established that antitrust remedies may prohibit conduct beyond what would necessarily violate the antitrust law. *United States* v. *Loew's,* 371 U.S. 38, 53 (1962); X Areeda, Elhauge & Hovenkamp, Antitrust Law 1758, at 349 (1996). All that is necessary is that the relief ordered be reasonably necessary "to cure the ill effects of the illegal conduct, and assure the public freedom from its continuance, and it necessarily must fit the exigencies of the particular case." *Ford Motor Co.* v. *United States,* 405 U.S. 562, 575 (1972).

The DOJ's Policy Guide to Merger Remedies provides that conduct remedies are appropriate where the merged firm must modify its behavior for any structural relief that has been ordered to be effective. (*Antitrust Division Policy Guide to Merger Remedies,* p. 18, U.S. Department of Justice, Antitrust Division, October 2004.) To render the divestiture remedies required by the Consent Order effective, LNE should be enjoined from in any manner requiring or inducing artists it manages or promotes to appear at venues it controls, insisting (other than in circumstances where the merged entity has entered into a legitimate co-promotional arrangement) that rival promoters or venue owners share any part of the revenue or profits they earn on concerts with LNE and/or from in any manner penalizing an artist for using a rival promoter or appearing at a competing venue. This remedy will assist those remaining venues still competing with LNE to obtain artists of the same level of popularity as the artists appearing at Live Nation venues, giving consumers in those areas a meaningful choice between concert venues—a choice that will limit LNE's ability to charge supra competitive service charges because fans will have the ability to attend equally desirable concerts in competing venues with lower service charges.

The additional remedial measure of prohibiting the merged entity from promoting or hosting more than seventy-five percent of an artist's tour should be adopted. This additional remedy is necessary because of the subtle, often undetectable, efforts LNE may utilize to persuade or pressure Front Line's artists and other artists it promotes to appear at the venues it controls. This is a particular concern given Irving Azoff's power in the concert industry. Conversely, an objective standard is easily policed.

LNE should also be required to return at the request of any promoter or venue owner all data relating to concerts for which Ticketmaster provided the ticketing and to delete any such information from its electronically stored data and files. This remedy will reduce the competitive advantage LNE would otherwise enjoy over rival ticketing service companies as a result of its possession of an extensive customer database. It will also deny LNE access to information provided in confidence to Ticketmaster and with the reasonable expectation that a direct competitor would not be given access to this information.

Conclusion

In sum, establishing additional ticketing services capabilities is meaningless unless there is someone to whom these services can be provided. This will not occur unless LNE's control over the management and promotion of major popular music artists, and where they appear, is addressed. Otherwise, the vast majority of major popular music artists will be promoted by LNE and appear at LNE controlled venues and rival remote ticketing providers, much less, rival promoters and venue owners or operators, will not be able to compete. Fans will have to pay supra competitive ticket prices, service fees, concessions prices, parking charges and merchandising fees to attend concerts by their favorite artists at LNE venues. A wholly ineffective consent judgment is simply not in the public interest. To that end, we suggest the aforementioned remedies in order to render the consent judgment effective in the manner in which it was intended.

Dated: May 3, 2010.

Cozen O'Connor,
Robert W. Hayes,
Rachel H. Robbins,

Abby L. Sacunas,
Attorneys for It's My Amphitheatre, Inc., d/b/a Merriweather Post Pavilion and on behalf of Frank Productions, Inc., Sue McLean and Associates, Metropolitan Talent, Inc. and the National Consumers League.

Note: The attachments to this comment are available on the Antitrust Division's Web site at *http://www.justice.gov/atr/cases/ticket.htm.*

BILLING CODE C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *et al.*, *Plaintiffs*, v. TICKETMASTER ENTERTAINMENT, INC. and LIVE NATION, INC., *Defendants*.	Case: 1-10-cv-00139 Date Filed: January 25, 2010

OPPOSITION TO THE [PROPOSED] FINAL JUDGMENT

Jam Productions, Ltd., a rival independent concert promoter based in Chicago, opposes this Proposed Final Judgment on the basis that it does not remedy the loss of competition in the live entertainment industry but rather sustains and strengthens the injury and harm to the consumer and competition. The merger of these two companies is vertical integration on steroids. There is no other company in any industry (other than public utilities and professional sports) in the United States who will have the dominance and power of this new merged entity of Live Nation and Ticketmaster.

This merger creates an incredibly powerful company by combining the leading global concert ticket selling company with the leading global live artist management company with the leading global concert promoter with the owner of most of the contemporary outdoor amphitheatres in the US. If this merger is allowed to proceed the combined entity will have the ability to suppress or eliminate competition in many segments of the music industry including rival concert promoters; primary and secondary ticketing companies; artist management firms; talent agencies; venue management companies; record companies; artist merchandise, apparel and licensing companies; artist fan clubs and sponsorship/marketing companies.

Live Nation Entertainment is the largest live entertainment company in the world, consisting of five businesses: concert promotion and venue operations, artist management, sponsorship, ticketing solution and e-commerce that includes Live Nation, Ticketmaster and Frontline Management Group. Live Nation is the largest producer of live concerts in the world, annually producing more than 22,000 concerts on behalf of 1,500 artists in 57 countries. In 2009 Live Nation sold 140 million tickets, promoted 21,000 concerts, partnered with 850 sponsors and averaged 25 million unique monthly users of its e-commerce sites. Ticketmaster serves more than 10,000 clients worldwide in multiple event categories and sold more than 141 million tickets valued at over $8.8 billion on behalf of its clients in 2008. Frontline Management is the world's largest artist management firm representing 200+ of the most popular performers in the music industry.

I. NATURE AND PURPOSE OF THE PROCEEDING

Defendant Ticketmaster Entertainment, Inc. ("Ticketmaster") and Defendant Live Nation, Inc. ("Live Nation") entered into an agreement, dated February 10, 2009, pursuant to which they would merge into a new entity to be known as Live Nation Entertainment. The United States, and the States of Arizona, Arkansas, California, Florida, Illinois, Iowa, Louisiana, Nebraska, Nevada, Ohio, Oregon, Rhode Island, Tennessee, Texas, and Wisconsin, and the Commonwealths of Massachusetts and Pennsylvania filed a civil antitrust Complaint on January 25, 2010, seeking to enjoin the proposed transaction because its likely effect would be to lessen competition substantially for primary ticketing services to major concert venues located in the United States in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. This loss of competition likely would result in higher prices for and less innovation in primary ticketing services.

At the same time the Complaint was filed, the United States also filed a Hold Separate Stipulation and Order ("Hold Separate") and proposed Final Judgment, which are designed to eliminate the anticompetitive effects of the acquisition. Under the proposed Final Judgment, which is explained more fully below, Defendants are required to grant a perpetual license to their Host platform and to divest their entire Paciolan business in order to establish two independent ticketing companies capable of competing effectively with the merged entity. The Final Judgment also prohibits Defendants from engaging in certain conduct that would prevent equally efficient firms from competing effectively. Under the terms of the Hold Separate, Ticketmaster will take certain steps to ensure that the Paciolan business is operated as a competitively independent, economically viable and ongoing business concern that will remain independent and uninfluenced by the consummation of the transaction and to ensure that competition is maintained during the pendency of the ordered divestiture.

The United States and Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish and remedy violations thereof.

II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. THE CONCERT INDUSTRY

Staging concerts traditionally has required the participation of several parties. ***Artists,*** who provide the entertainment that makes the concert possible hire ***Managers*** to represent them in negotiating the commercial terms of their recording contracts, publishing royalties, live concert tours, merchandise and sponsorship arrangements. A***gents*** are hired by the Managers to represent artists in negotiations to establish the commercial terms on which artists will perform. ***Promoters*** contract with artists to perform at particular concerts, assume the financial risk of staging the concerts, make the arrangements for the concerts to occur at certain times and places, and market the concerts. ***Venues*** are the physical locations where concerts occur, and venues' owners, operators, or managers usually arrange for the sale of tickets to concerts at their venues. ***Primary ticketing companies*** provide services

such as websites, call centers, and retail networks from which tickets may be purchased.

B. THE DEFENDANTS AND THE PROPOSED TRANSACTION

Ticketmaster is the largest primary ticketing company in the United States. In 2008, Ticketmaster earned gross revenues of about $800 million from its U.S. primary ticketing business. Ticketmaster offers two principal primary ticketing products to venues: (1) Host, a Ticketmaster-managed platform for selling tickets through Ticketmaster's website and other sales channels; and (2) Paciolan, a venue-managed platform for selling tickets through the venue's own website and other sales channels. In 2008, Ticketmaster provided primary ticketing services to venues representing more than 80% of major concert venues.

In addition to its primary ticketing operations, Ticketmaster expanded into the artist management business in 2008 by acquiring a controlling interest in Front Line Management Group Inc. ("Front Line"), an important artist management firm with clients such as the Eagles, Neil Diamond, Jimmy Buffett, Aerosmith, Van Halen, Christina Aguilera, John Mayer plus hundreds of others.

Live Nation is comprised of the following 24 promoters from across the country whose businesses were purchased beginning in 1996; Contemporary Productions, Sunshine Promotions, Cellar Door, Pace, Nederlander, Delsener/Slater, the Don Law Company, Oakdale Concerts, A. H. Enterprises, Bill Graham Presents, Avalon, DiCesare-Engler, Evening Star, Universal Concerts/House of Blues, Belkin Productions, Electric Factory Concerts, Magicworks, Fantasma, Concert Productions International, Concerts/Southern Promotions, the Entertainment Group, New Era Promotions, Feyline Concerts and Cardenas Fernandez Associates.

Through their acquisitions of the above mentioned companies, Live Nation controls the best and most of the contemporary outdoor amphitheatres (47) across the country where performances by the top artists in the world are staged. Live Nation currently owns 46 clubs and theatres and 11 House of Blues and continues obtain more.

Live Nation is the largest concert promoter in the United States, earning more than $1.3 billion in revenue from its U.S. promotions business in 2008 and promoting shows representing 46% of the concert tickets sold at major concert venues in 2009. Live Nation has entered long-term partnerships with several popular artists including but not limited to Madonna, U2, Rolling Stones, Nickelback and Jay-Z to exclusively promote their concerts, sell recordings of their music, and market artist-branded merchandise such as T-shirts. Live Nation also owns or operates about 70 major concert venues throughout the United States. Live Nation entered the market for primary ticketing services in late December 2008.

As per Pollstar, the publication that tracks concert ticket sales, in 2009 Live Nation sold 25,007,416 tickets (46.06% of the total tickets sold) in the United States while their second largest competitor sold 10,742,104 tickets (19.78% of the total tickets sold). The third largest concert promoter was C3 Presents with 1,386,106 tickets, MSG Entertainment was fourth with 1,332,266 tickets and Jam was fifth with 1,291,556 tickets. Excluding Live Nation and AEG, the other 48 of the top 50 concert promoters produced the remaining 34.16% of the US concerts.

2009 Top 50 U.S. Concert Promoters

1	25,007,416	Live Nation *
2	10,742,104	AEG Live **
3	1,386,106	C3 Presents
4	1,332,266	MSG Entertainment
5	1,291,556	Jam Productions
6	1,078,703	Palace Sports & Entertainment
7	863,854	Outback Concerts
8	819,007	The Bowery Presents
9	817,659	Magic Arts & Ent'ment / NewSpace Ent'ment
10	739,451	Nederlander Concerts
11	691,388	I.M.P. / Seth Hurwitz
12	616,874	Premier Productions
13	571,962	Another Planet Entertainment
14	539,706	Tate Entertainment
15	510,353	Knitting Factory Entertainment
16	504,962	Frank Productions
17	487,566	Icon Entertainment Group
18	401,082	Rush Concerts
19	395,661	Red Mountain Entertainment
20	297,004	A.C. Entertainment
21	293,370	Beaver Productions
22	273,843	Metropolitan Talent Presents
23	270,229	Blue Deuce Entertainment
24	252,300	The Andrew Hewitt Company
25	246,619	Harrah's Entertainment
26	214,208	Lucky Man Concerts
27	211,813	Bill Silva Presents
28	208,979	True West / Mark Adler
29	201,309	Mike Thrasher Presents
30	181,090	Jade Presents
31	178,247	PromoWest Productions
32	176,838	Mammoth Live
33	174,374	Seattle Theatre Group
34	164,150	Rams Head Promotions
35	156,614	Fox Associates
36	154,553	Olympia Entertainment
37	153,477	Monqui Presents
38	148,573	Stan Levinstone Presents
39	146,983	First Avenue Productions
40	144,879	Atlanta Symphony Orchestra
41	137,898	Higher Ground Productions
42	131,681	Bill Blumenreich Presents
43	130,819	Hennepin Theatre Trust
44	130,603	PFM
45	126,296	Cardenas Marketing Network
46	125,860	NAC Entertainment
47	123,565	DCF Concerts
48	120,846	Stone City Attractions
49	111,726	Hauser Entertainment
50	110,572	Vincent Longo

* represents the combined totals of Live Nation, House of Blues and Live Nation Global Touring
** represents the combined totals of AEG Live, Concerts West, TMG, Goldenvoice and Moore Entertainment
All figures are for tickets sold in the U.S. as reported to POLLSTAR for shows played in 2009.

2009 US Top Promoters

COMPANY	TICKETS SOLD	% AGE OF TICKETS SOLD
Live Nation *	25,007,416	46.06%
AEG Live **	10,742,104	19.78%
C3 Presents	1,386,106	2.55%
MSG Entertainment	1,332,266	2.45%
Jam Productions	1,291,556	2.38%
Palace Sports & Entertainment	1,078,703	1.99%
Outback Concerts	863,854	1.59%
The Bowery Presents	819,007	1.51%
Magic Arts & Ent'ment / NewSpace Ent'ment	817,659	1.51%
Nederlander Concerts	739,451	1.36%
I.M.P. / Seth Hurwitz	691,388	1.27%
Premier Productions	616,874	1.14%
Another Planet Entertainment	571,962	1.05%
Tate Entertainment	539,706	0.99%
Knitting Factory Entertainment	510,353	0.94%
Frank Productions	504,962	0.93%
Icon Entertainment Group	487,566	0.90%
Rush Concerts	401,082	0.74%
Red Mountain Entertainment	395,661	0.73%
A.C. Entertainment	297,004	0.55%
Beaver Productions	293,370	0.54%
Metropolitan Talent Presents	273,843	0.50%
Blue Deuce Entertainment	270,229	0.50%
The Andrew Hewitt Company	252,300	0.46%
Harrah's Entertainment	246,619	0.45%
Lucky Man Concerts	214,208	0.39%
Bill Silva Presents	211,813	0.39%
True West / Mark Adler	208,979	0.38%
Mike Thrasher Presents	201,309	0.37%
Jade Presents	181,090	0.33%
PromoWest Productions	178,247	0.33%
Mammoth Live	176,838	0.33%
Seattle Theatre Group	174,374	0.32%
Rams Head Promotions	164,150	0.30%
Fox Associates	156,614	0.29%
Olympia Entertainment	154,553	0.28%
Monqui Presents	153,477	0.28%
Stan Levinstone Presents	148,573	0.27%
First Avenue Productions	146,983	0.27%
Atlanta Symphony Orchestra	144,879	0.27%
Higher Ground Productions	137,898	0.25%
Bill Blumenreich Presents	131,681	0.24%
Hennepin Theatre Trust	130,819	0.24%
PFM	130,603	0.24%
Cardenas Marketing Network	126,296	0.23%
NAC Entertainment	125,860	0.23%
DCF Concerts	123,565	0.23%
Stone City Attractions	120,846	0.22%
Hauser Entertainment	111,726	0.21%
Vincent Longo	110,572	0.20%
TOTAL TICKETS SOLD	**54,296,994**	

* represents the combined totals of Live Nation, House of Blues and Live Nation Global Touring

** represents the combined totals of AEG Live, Concerts West, TMG, Goldenvoice and Moore Entertainment

All figures are for tickets sold in the U.S. as reported to POLLSTAR for shows played in 2009.

On February 10, 2009, less than two months after its entry into primary ticketing, Live Nation agreed to merge with Ticketmaster. That proposed transaction would substantially lessen competition and is the subject of the Complaint and proposed Final Judgment filed by the United States in this matter.

III. STATEMENT OF OPPOSITION

With no disrespect to the Department of Justice, the Proposed Final Judgment only concerns itself with the least important aspect of this merger, namely ticketing, while completely avoiding and ignoring the unreasonable restraint of trade and commerce violations in the presentation of live concerts and the attempt to monopolize such trade and commerce. It should be noted that the topics I raise in this opposition statement are not new to the DOJ since they have been raised from the very beginning of their investigation. This merger if allowed to happen will affect the entire live music entertainment industry.

Live Nation and Ticketmaster are both Goliaths, so their unification will create a business with extraordinary market power, leverage and clout. With the merger of Live Nation and Ticketmaster you have a company that: (1) sells most of the concert tickets in this county through its contracts with venues (11,000 venue clients across 20 countries); (2) manages or controls the tours of the largest, most popular top performers in the world (Madonna, U2, Rolling Stones, Jay-Z, Shakira, Nickelback, Eagles, Christina Aguilera, Aerosmth, Jimmy Buffett, Guns 'n Roses, Alan Jackson, Steely Dan, Stevie Nicks, Chicago, Journey and 200 + others ; (3) owns most of the amphitheatres in the US and also owns more club venues (11 HOBs) as well as controlling, thru owning/leasing a large amount of other clubs and theatres; (4) purchases tours for its own amphitheatres and venues as well as other buildings they don't own or control; (5) owns touring, recording, merchandise, fan clubs, etc. rights to many relevant performers; (6) owns a merchandise company that sells the performers' shirts, hats, etc.; (7) owns a company that provides 'fan club' services to performers; (8) owns all the data to track ticket sales to provides a huge competitive advantage; (9) owns the data to all competing promoters fan bases; (10) and owns all data through the sale of tickets to provide their company the best and largest Internet ability to offer their fan base more services and products beyond live performances such as the bundling performers' products for sale on-line as well as sponsorship opportunities.

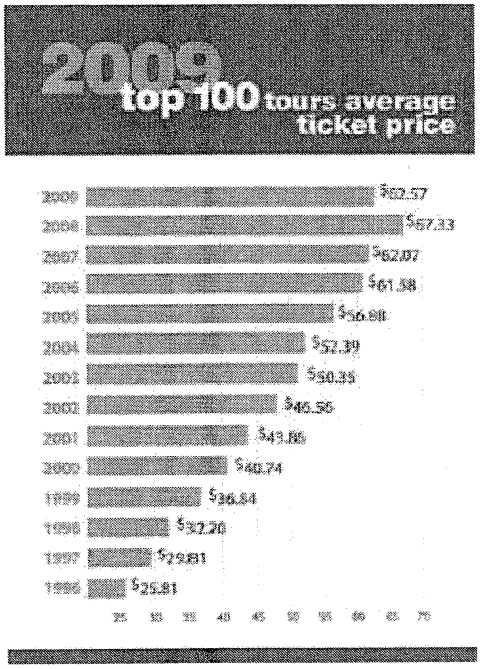
IV. HARM TO THE CONSUMER

This merger will affect first and foremost the fan. The business model of Live Nation has not been beneficial to the consumer but rather harmed them by increasing the cost of attending a concert.

A. INCREASE IN TICKET PRICES

As history shows, this new company was the beginning of an unprecedented increase in concert ticket prices. Their new business model entailed buying entire tours across the country rather than individual shows on a market by market basis. This meant that in order to promote every concert for a particular artist SFX/Clear Channel/Live Nation had to substantially escalate the typical guaranteed payment to that artist so they could obtain control of the tour. And as you will see below, this increase was passed along to the public.

- Between 1996, the year SFX began, and 2000, the year SFX was sold to Clear Channel, the average ticket price for the country's top 100 musical tours went from $25.81 to $40.74, a 58% increase over those five years.
- Between 2000 and 2005, the year Clear Channel spun off Live Nation into its own publicly traded company, the average ticket price for the country's top 100 musical tours went from $40.74 to $56.88, a 39% increase.
- In 2008 the average ticket price for the top 100 tours jumped to $67.35. Since the consolidation of the concert industry began some 12 years ago the average ticket price has increased 160%.
- Due to the recession the average ticket price for the top 100 tours dropped to $62.57 in 2009 which still represents a 142% increase since 1996.
- The increase in ticket prices can be attributed to the block booking of an entire national tour of a performer where it is in Live Nation's best interest to keep the ticket prices high.



LADY GAGA

Below is a list of Lady GaGa performances produced by various promoters with ticket prices before the tour was sold to Live Nation:

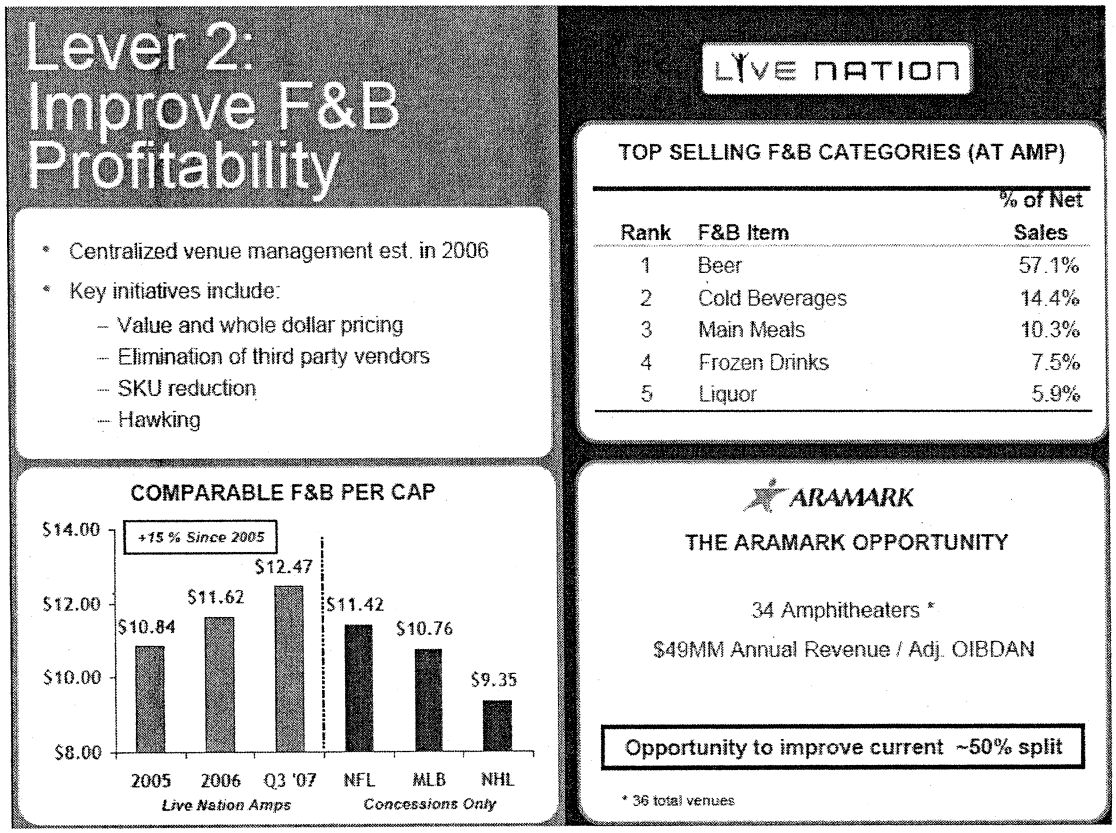
DATE	VENUE	CITY	ST	TICKET PRICES
03/12/09	House of Blues	San Diego	CA	$18.5/20
03/13/09	The Wiltern	Los Angeles	CA	$23
03/14/09	Mezzanine	San Franciso	CA	$21
03/16/09	Showbox at The Market	Seattle	WA	$22/24
03/17/09	Wonder Ballroom	Portland	OR	$18/20
03/21/09	Gothic Theatre	Englewood	CA	$20
03/24/09	House of Blues	Chicago	IL	$24/26
03/28/09	Royal Oak Music Theatre	Royal Oak	MI	$20
04/06/09	House of Blues	Lake Buena Vista	FL	$20/23
04/07/09	The Ritz	Tampa	FL	$20.99/25
04/08/09	Revolution	Fort Launderdale	FL	$19/21
04/09/09	Center Stage	Atlanta	GA	$20
05/01/09	Electric Factory	Philadelphia	PA	$15/20
05/02/09	Terminal 5	New York	NY	$20/25
12/01/09	Wang Theatre	Boston	MA	$43/63
12/01/09	DAR Constitution Hall	Washington	DC	$23.5/43.5
12/02/09	Wang Theatre	Boston	MA	$43/63
12/03/09	Susquehanna Bank Center	Camden	NJ	$35/45
12/13/09	Bill Graham Civic Auditorium	San Franciso	CA	$48/50
12/14/09	Bill Graham Civic Auditorium	San Franciso	CA	$48/50
12/19/09	Sports Arena	San Diego	CA	$45
12/21/09	Nokia Theatre	Los Angeles	CA	$59.75/79.75
12/22/09	Nokia Theatre	Los Angeles	CA	$59.75/79.75
12/23/09	Nokia Theatre	Los Angeles	CA	$59.75/79.75
12/27/09	Lakefront Arena	New Orleans	LA	$35/45
12/28/09	Fox Theatre	Atlanta	GA	$36.5/75
12/29/09	Fox Theatre	Atlanta	GA	$36.5/75
12/31/09	James L Knight Center	Miami	FL	$23/63
01/02/10	James L Knight Center	Miami	FL	$23/63
01/03/10	UCF Arena	Orlando	FL	$43
01/08/10	Rosemont Theatre	Rosemont	IL	$35.5/73
01/09/10	Rosemont Theatre	Rosemont	IL	$35.5/73
01/10/10	Rosemont Theatre	Rosemont	IL	$35.5/73
01/12/10	Joe Louis Arena	Detroit	MI	$35/45
01/13/10	Joe Louis Arena	Detroit	MI	$35/45
01/20/10	Radio City Music Hall	New York	NY	$45/65
01/21/10	Radio City Music Hall	New York	NY	$45/65
01/22/10	Radio City Music Hall	New York	NY	$45/65
01/24/10	Radio City Music Hall	New York	NY	$45/65
01/26/10	Elliott Hall of Music	W. Lafayette, IN	IN	$34.5

The chart below is a list of Lady GaGa performances for her upcoming summer tour in 2010 that indicates a substantial increase in ticket prices when Live Nation purchased the tour. ***The top ticket price of $75 from just three months ago has increased to $175, a jump of 133%.***

07/01/10	TD Garden	Boston	MA	$175/85/49.5
07/02/10	TD Garden	Boston	MA	$175/85/49.5
07/04/10	Boardwalk Hall	Atlantic City	NJ	$192.5/93.5/54.5
07/06/10	Madison Square Garden Arena	New York	NY	$179.5/89.5/79.5/54
07/07/10	Madison Square Garden Arena	New York	NY	$179.5/89.5/79.5/54
07/09/10	Madison Square Garden Arena	New York	NY	$179.5/89.5/79.5/54
07/14/10	Quicken Loans Arena	Cleveland	OH	$175/85/49.5
07/15/10	Conseco Fieldhouse	Indianapolis	IN	$175/85/49.5
07/17/10	Scottrade Center	St. Louis	MO	$175/49.5
07/20/10	Ford Center	Oklahoma City	OK	$175/85/49.5
07/22/10	American Airlines Center	Dallas	TX	$175/49.5
07/23/10	American Airlines Center	Dallas	TX	$175/49.5
07/25/10	Toyota Center	Houston	TX	$175/85/49.5
07/26/10	Toyota Center	Houston	TX	$175/85/49.5
07/28/10	Pepsi Center	Denver	CA	$175/85/49.5
07/31/10	US Airways Center	Phoenix	AZ	$175/85/49.5
08/03/10	Sprint Center	St. Louis	MO	$175/85/49.5
08/11/10	Staples Center	Los Angeles	CA	$181.5/88.25/51.25
08/12/10	Staples Center	Los Angeles	CA	$181.5/88.25/51.25
08/13/10	MGM Grand Hotel	Las Vegas	NV	$183.75/89.25/52
08/16/10	HP Pavilion	San Jose	CA	$175/85/49.5
08/17/10	HP Pavilion	San Jose	CA	$175/85/49.5
08/19/10	Rose Quarter	Portland	OR	$175/85/49.5
08/21/10	Tacoma Dome	Tacoma	WA	$175-49.50
08/30/10	Xcel Energy Center	St. Paul	MN	$175/85/49.5
08/31/10	Xcel Energy Center	St. Paul	MN	$175/85/49.5
09/02/10	Bradley Center	Milwaukee	WI	190.35/61.95
09/04/10	The Palace of Auburn Halls	Auburn Hills	MI	$191.6/99.55/63.2
09/05/10	Consol Energy center	Pittsburgh	PA	$175/85/49.5
09/07/10	Verizon Center	Washington	DC	$178/88/52.5
09/08/10	John Paul Jones Arena	Charlottesville	VA'	$175/85/49.5
09/14/10	Wachovia Center	Philadelphia	PA	$175/85/49.5
09/15/10	Wachovia Center	Philadelphia	PA	$175/85/49.5
09/16/10	XL Center	Hartford	CT	$175/85/49.5
09/18/10	Time Warner Cable Arena	Charlotte	NC	$177/87/51.5
09/19/10	RBC Center	Raleigh	VA	$175/85/49.5

B. HIGHEST FOOD & BEVERAGE PRICES

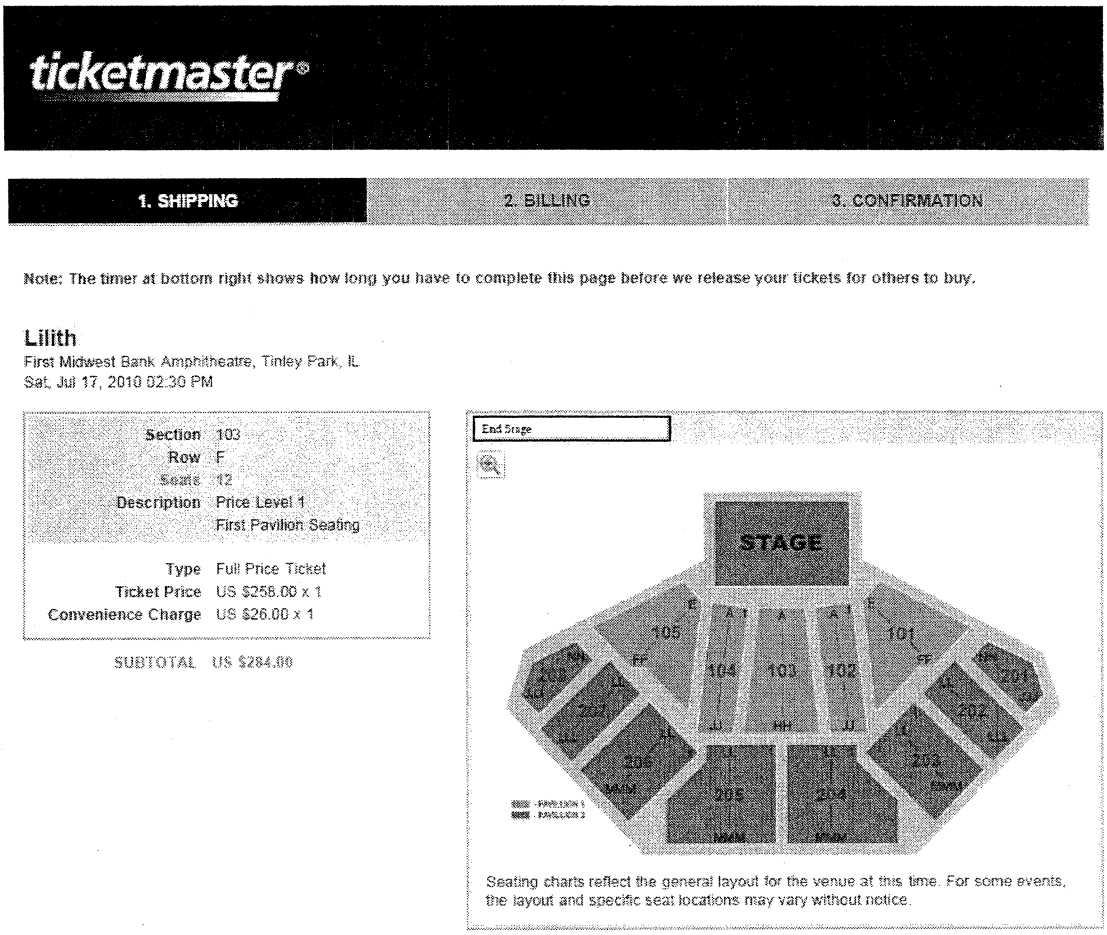
At Live Nation amphitheatres in 2007 the food & beverage per cap was $12.47, higher than the National Football League ($11.42), Major League Baseball ($10.76) and the National Hockey League (9.35). See the chart below from a Live Nation presentation dated 11/15/07.



C. HIGH FEES CHARGED TO THE CONSUMER

SFX/Clear Channel/Live Nation created new fees and increased old ones to raise the price of box office service charges, facility fees, convenience charges, etc. which has made it even more expensive for concert fans across our nation. Some examples include the following:

- The Lilith tour is stopping in the Chicagoland area on July 17th at the First Midwest Bank Amphitheatre. Please note the following highlighted fees:
    1. The ticket price of $258 per ticket with a $26 Convenience Charge.
    2. The VIP Upgrade charge of $50 per ticket.
    3. The VIP Fast Lane to gain access to the venue for $10 in addition to the ticket price.
    4. VIP Parking fee of $30 per car.
    5. VIP Plus Parking fee of $40 per car.
    6. Oversized vehicles & RVs fee of $75 per vehicle.
    7. Limousine parking charge of $50 per limo.



Add To My Order

Additional fees, when applicable, will appear on subsequent pages. You may remove any optional items before completing your order.

Item	Price	Quantity
VIP PARTY BOX: LILITH		
VIP Party Box	US $277.00	0
FIRST MIDWEST BANK AMPHITHEATRE VIP UPGRADE - LILITH		
VIP Upgrade: 1 per person	US $50.00	0
VIP FAST LANE: LILITH FAIR		
VIP Fast Lane Pass: 1 per person	US $10.00	0
FIRST MIDWEST BANK AMPITHEATRE VIP CLUB: LILITH FAIR		
VIP Club Pass: 1 per person	US $30.00	0
FIRST MIDWEST BANK AMPITHEATRE VIP PARKING: LILITH FAIR		
VIP Parking: 1 per Car	US $30.00	0
Oversized Vehicles & RV's: 1 per Vehicle	US $75.00	0
VIP Plus Parking: 1 per Car	US $40.00	0
Limo Parking: 1 per Limo	US $50.00	0

- Rush is performing in Chicago on July 5th at the Charter One Pavilion. Please note:
    1. The $9.50 per ticket Facility Fee
    2. The $18.50 Convenience Charge.
    3. VIP Parking of $30 per car.
    4. VIP Fast Lane to gain access to the venue for $10 in addition to the ticket price.

ticketmaster®

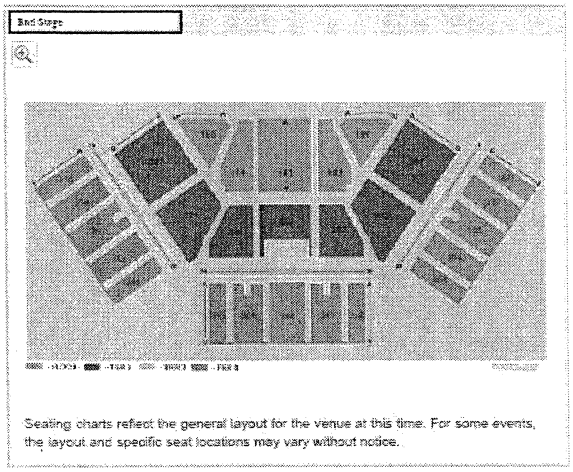
1. SHIPPING | 2. BILLING | 3. CONFIRMATION

Note: The timer at bottom right shows how long you have to complete this page before we release your tickets for others to buy.

RUSH Time Machine Tour 2010
Charter One Pavilion at Northerly Island, Chicago, IL
Mon, Jul 5, 2010 07:30 PM

Section	309
Row	R
Seats	4
Description	PRICE LEVEL 1 300 LEVEL - GRAND STAND RESERVED SEATING CENTER SECTION $9.50 PRK PD/RAIN OR SHINE
Type	Full Price Ticket
Ticket Price	US $125.00 x 1
Facility Charge	US $9.50 x 1
Convenience Charge	US $18.50 x 1
Additional Taxes	US $0.93 x 1

SUBTOTAL US $153.93



Seating charts reflect the general layout for the venue at this time. For some events, the layout and specific seat locations may vary without notice.

Add To My Order

Additional fees, when applicable, will appear on subsequent pages. You may remove any optional items before completing your order.

Item	Price	Quantity
CHARTER ONE PAVILION VIP PARKING - RUSH		
Parking at Adler Planetarium	US $30.00	0
CHARTER ONE PAVILION VIP CLUB PASS - RUSH		
VIP Club Pass: 1 per person	US $30.00	0
CHARTER ONE PAVILION VIP UPGRADE - RUSH		
VIP Upgrade: 1 per person	US $50.00	0
CHARTER ONE PAVILION VIP FAST LANE - RUSH		
VIP Fast Lane Pass: 1 per person	US $10.00	0

- Live Nation Concert Club

Not only does the consumer have to pay for their tickets, convenience charges, facility fees, access fees and so on and so forth, Live Nation charges the consumer an additional fee to "move to the front of the line for tickets" to "avoid the hassles of the public on-sale frenzy."

As per the Live Nation website:

> You'll be first to know – and first in line – for the tickets you want to the concerts you most want to see. Starting at $295, Concert Club membership allows you to move to the front of the line for tickets to events in your city before they go on sale to the public. Live Nation's Concert Club is like having a friend in the business. Us.

Concert Club Benefits:

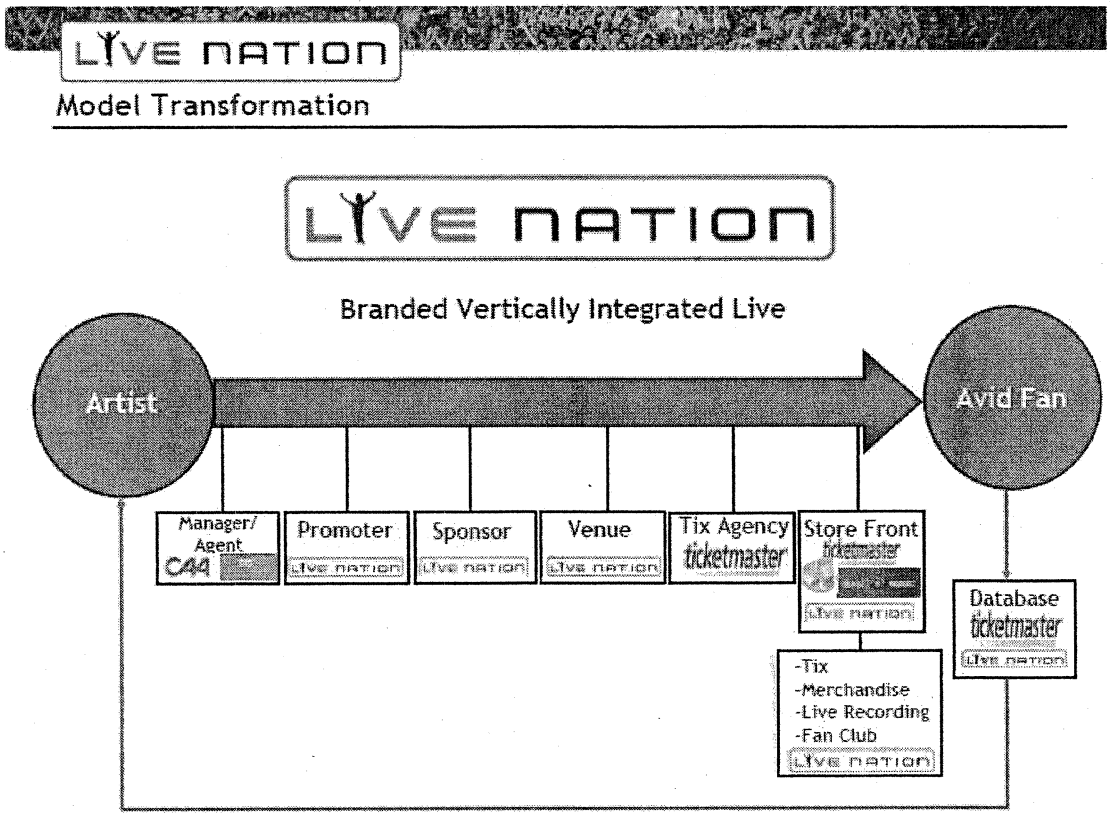
1. You'll get the tickets you want – first
2. You'll avoid the hassles of the public on-sale frenzy
3. You'll be among the first to know about upcoming shows

Jam, along with other independent promoters, do not charge the consumer to be "among the first to know about upcoming shows."
Our information is provided for free.

V. HARM TO COMPETITORS

This merger will negatively affect every facet of the live music industry and harm competition from rival promoters, venues, managers, merchandise companies, ticketing companies, secondary ticketing companies, fan club companies, record companies and even companies that provide sponsorship opportunities. Live Nation/Ticketmaster will have a competitive advantage that already yields monopoly power over major portions of the live music entertainment industry.

In a Live Nation presentation dated September 26, 2006 they set out the plan to transform their business model to vertically integrate the entire live music industry from the artists to the fans. In just a few short years Live Nation has succeeded in their efforts.



A. HARM TO COMPETING PROMOTERS

- ***Live Nation engages in block booking***, in other words buying an entire tour, a system which prevents competitors from bidding for single performers on their individual merits by entering into an exclusive master agreement with one promoter for all the performances across the country or around the world.
- ***Master agreements with performers allows Live Nation to allocate the guarantee payment to the performers as it sees fit which unreasonably restrains trade.***
- ***Live Nation uses the monopoly power gained from owning 47 outdoor of the most important outdoor amphitheatres to purchase summer tours of artists performing outdoors and leverages these 'sheds' into purchasing the entire indoor tour of many of those same performers.*** Some of the performers include Aerosmith, Tim McGraw, Fleetwood Mac, Nickelback, Maroon Five and many others. Two examples this year include the following:
  - In the upcoming summer of 2010 Tom Petty and the Heartbreakers are performing exclusively for Live Nation in most of their outdoor amphitheatres except in Chicago the band is playing indoors at the United Center. Tom Petty's manager intended for Jam Productions to be the promoter for the indoor show in Chicago and he also attempted to include other non Live Nation promoters in a couple of other cities. Jam, along with the other promoters, were excluded from promoting Tom Petty's indoor shows because Live Nation used their monopoly and market power by threatening to lower their monetary offer to Tom Petty if he did not perform all his concerts exclusively for Live Nation.
  - Jam was excluded from producing John Mayer's indoor concert this past April at the United Center in Chicago even though the manager wanted to have Jam co-promote this concert due to the leverage Live Nation used with their amphitheatres. John Mayer is coming back to the Chicagoland area for another Live Nation concert in August.
- Live Nation's artist agreements at times contain various provisions by which contract discriminations against small independent promoters and in favor of Live Nation were accomplished. The competitive advantages of these provisions are so great that their inclusion in contracts with Live Nation constitutes unreasonable discrimination against small independent competitors. Some of these advantages include:
  - Large upfront 'loan' for the tour.
  - Stock options in the company.
  - If Live Nation does not produce all the performers' concerts the payment to the performer decreases.
  - Artist VIP packages included in the gross ticket sales.
- ***Live Nations pays certain performers such as Jimmy Buffett more than 100 percent of the gross ticket sales.***
- ***Live Nation submits offers to artists where Live Nation loses money even when selling every ticket to that venue in order to prevent various performers from contracting with competing promoters and venues.***
  - See Live Nation offer with certain redacted information on the next page where at sell out Live Nation loses $2,387.48.

LIVE NATION

[redacted]

233 North Michigan Ave., Suite 2700 Chicago,IL 60601

Phone: 312-540-2120

Fax: 312-938-2154

[redacted]

Phone: [redacted]

Fax: [redacted]

	Show Day	Show Date	Show Time	Door Time	Curfew Time	On Sale Date	On Sale Time
Event Name: [redacted] **Venue:House of Blues (Chicago)** **City:Chicago, Illinois** Number of Shows: 1	[redacted]		[redacted]	[redacted]			

Offer Wording

Guarantee versus 85.00 % of the gross box office receipts after deduction of approved fees, taxes (NBOR) ,expenses and Support.

Offer contingent on:

1) **Approval of Concert Series & Venue Sponsor inclusion in event advertising (print and electronic), including participation in the CITI Card Pre-Sale Program**
2) **Approval of Secondary Market Ticketing to be included in Show Gross**
3) **Approval of 4-Pack with price point included in Advertising**
4) **Approval of venue notes on offer sheet**
5) **In the event that each show does not sell 75% of the stated capacity, the following shall apply:**
   i. **Dressing Room Hospitality capped at $75 per artist**
   ii. **50% of lift from Artist VIP Packages to be included in Show Gross**

Ticket Scale	# of Seats	Price	Gross
Day of Show		$18.00	$0.00
General Admission	1,260	$16.00	$20,160.00
4 pack general admission	40	$12.00	$480.00
Comps	100	$0.00	$0.00
Gross Potential (1)	**1,400**		**$20,640.00**
City Tax		5.00%	$982.86
County Tax		1.00%	$194.63
Adjusted Gross Potential			**$19,462.52**
Facility Maintenance Fee		$2.00/tkt	$2,600.00
Net Gross Potential			**$16,862.52**

Talent	
Cornmeal	$7,500.00
TBA Support	$250.00
Total Talent	**$7,750.00**

Expenses	Rate	Total	Notes
Advertising		$2,000.00	print+radio+jambase
House Costs		$9,500.00	
Total Expenses		**$11,500.00**	

Summary		Earnings Potential	
Net Gross Potential	$16,862.52	Artist Earnings	$7,500.00
		Promoter Earnings	($2,387.48)
Total Fixed Expenses	$11,500.00		
Total Variable Expenses @ sellout	$0.00		
Total Talent and Artist Supplied S & L	$7,750.00		
To Be Shared	$5,112.52		
		Artist Earning Potential BreakOut	
		[redacted]	$7,500.00
		TBA Support	$250.00

- ***Live Nation annually purchases many indoor arena tours which has substantially eroded what used to be a core part of independent promoters income.***
  - ***For example, in 1996 Jam produced 130 arena concerts but in 2009 we only produced 33. The single most profitable part of our business has been dramatically impacted and continues to decrease each year.***
- ***Live Nation produces most of today's stadium tours that has eliminated another important segment of independent promoters income.***
  - ***From 1990 to 2003 Jam produced 25 stadium concerts (in excess of 35,000 capacity) but has not produced one since 2003.***
- ***Jam's contract with Ticketmaster expires on December 11, 2011 but contains language with the intent to terminate the agreement in the event Ticketmaster becomes a company that is engaged in the day-to-day business of promoting live entertainment events or engaged in the day-to-day business of artist management.***
  - ***The financial terms contained in this agreement puts Jam at a competitive disadvantage to Live Nation.***
  - ***Jam recently informally requested to terminate their Ticketmaster agreement but was denied by Michael Rapino and Irving Azoff, Jam's rival competitor.***
- If the downward trend of diminishing returns continues as it has there might not be enough competing promoters able to remain in business.
  - Our major competitor will have access to our ticket sales information, customer data bases and the financial terms of our ticketing agreements.
  - Live Nation/Ticketmaster might decrease the financial terms of our ticketing agreement when they come up for renewal and/or increase their overall share.
  - Live Nation/Ticketmaster will be receiving income from every ticket sold to our concerts which could be used to compete against us.
  - Live Nation/Ticketmaster will have additional revenue streams we do not currently share in, such as revenues from the sale of tickets at every venue or on Ticketsnow, which means they will be able to pay an artist more money to perform.
  - Fans who want to see Jam shows will have to go to our main competitor's website to purchase tickets.

B. HARM TO RIVAL MANAGERS, MERCHANDISE COMPANIES, TICKETING COMPANIES, SECONDARY TICKETING COMPANIES, RECORD COMPANIES, FAN CLUBS AND SPONSORSHIP COMPANIES.

The critical mass created by the complete vertical integration of the live music industry by Live Nation and Ticketmaster puts all its competitors at a distinct competitive disadvantage. Live Nation serves more than 1,000 artists through its array of services including; global touring (Madonna, U2, Jay-Z, Lady GaGa, etc.); merchandise and licensing (Signatures Network, Anthill, TRUNK Ltd.); sponsorship and strategic alliances; recorded music; studios; media rights; digital rights; fan club/websites (UltraStar, Music Today); marketing and creative services (Tour Design).

All of these services combined together in one company could unreasonably restrain trade and commerce across the entire spectrum of the music industry.

An excerpt from the 1992 U.S. Supreme Court decision in the Eastman Kodak case states ***The Court has held many times that power gained through some natural and legal advantage such as a patent, copyright, or business acumen can give rise to liability if "a seller exploits his dominant position in one market to expand his empire into the next."*** Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 611 (1953), see, e.g., Northern Pacific R. Co. v. United States, 356 U.S. 1 (1958); ***United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948);*** Leitch Mfg. Co. v. Barber Co., 302 U.S. 458, 463 (1938).

One example of the power this new merged entity wields is in the fan club business where Live Nation and Ticketmaster are exploiting their dominant position to expand their empire. There are bands who are not managed by Front Line, who do not work with a Ticketmaster owned fan club company and do not sell their fan club tickets through Ticketmaster. If that band wants to do a presale for their fan club at a Ticketmaster controlled venue then the band is allowed to put as many tickets towards that presale as the band wants only if those fan club tickets are sold through Ticketmaster. However if the band wants to sell their fan club tickets through a different or competing ticketing company outside of the venue's primary ticketing agreement with Ticketmaster then Ticketmaster will limit the amount of tickets to 8% of the sellable capacity. But if the band uses Ticketmaster then they have the ability to sell more tickets directly to their fans through their fan club.

VI. RAISING THE BARRIERS TO ENTRY

Today, before the merger of Live Nation and Ticketmaster is approved, a start up concert promoter still has a chance to succeed. But this new merged company will raise the barrier to entry to an almost unobtainable height for all the reasons cited above.

Prior to the merger all of the following components of the live music industry have a chance to succeed; artists' managers, venue owners and operators, merchandising and licensing, recorded music, fan clubs/websites, fan clubs, marketing and creative services, sponsorship and creative alliances. But if this merger is allowed all of these businesses will face enormously high barriers to entry making it exceedingly difficult to compete.

VII. ANTI-RETALIATION PROVISION AND OTHER PROVISIONS DESIGNED TO PROMOTE COMPETITION MIGHT NOT WORK

A. PROPOSED FINAL JUDGMENT

The Proposed Final Judgment contains an anti-retaliation provision and other provisions designed to promote competition but they will be extremely difficult and virtually impossible to enforce in order to maintain compliance. In addition, these provisions might not produce the intended results of promoting competition.

The Proposed Final Judgment states Ticketmaster and Live Nation shall not:

- retaliate against a venue owner because that venue is contemplating contracting with another ticketing company
- condition or threaten to condition the provision of live entertainment events to a venue owner if that venue owner signs a contract with Ticketmaster
- condition or threaten to condition the provision of ticketing services to a venue owner based on that venue owner refraining from contracting with another ticketing company for the provision of live entertainment events
- disclose to any employee any ticketing data from any competing promoters, venues or artist managers except to an exempted employee who requires the information as part of their job function.

Every venue owner or manager knows the leverage that Live Nation and Ticketmaster has in regards to providing content/talent to their buildings. None of them can afford to miss their budgets so there will be very few that sign with another ticketing company. ***The implied threat of leaving Ticketmaster is clear to every person who owns or operates a venue since they all know the possible consequences with the reality that any violations of these provisions will be extremely difficult to prove and enforce.***

B. CAN THE AEG LICENSE WITH TICKETMASTER AND DIVESTITURE OF PACIOLAN TO COMCAST-SPECTACOR SUCCEED?

AEG

The Proposed Final Judgment assumes that it will enable Anschutz Entertainment Group, Inc. ("AEG") to become a new, independent, economically viable, and vertically integrated competitor in the market for primary ticketing services to major concert venues. AEG is the second largest promoter in the United States (behind Live Nation), promoting shows representing about 20% of all the concert tickets sold at major concert venues in 2009. No company other than AEG or Live Nation promotes concerts representing more than 3% of the concert tickets of major concert performers. AEG also owns, operates, or manages more than 30 major concert venues, representing about 8% of the capacity at major U.S. concert venues, and it can select (or influence the selection of) the primary ticketing company for those venues. In addition, AEG owns one-half of an important artist management firm with several popular clients, including Justin Timberlake and the Jonas Brothers. The Department of Justice believes that due to its significant presence in promotions, venues, and artist management, AEG is the company best positioned to achieve the necessary scale, overcome the other entry barriers discussed above, and compete successfully with the merged firm in the market for primary ticketing services to major concert venues.

COMCAST-SPECTACOR

The Proposed Final Judgment requires that Defendants divest Ticketmaster's entire Paciolan business that will establish another independent and economically viable competitor in the market for primary ticketing services to major concert venues. Ticketmaster currently licenses its Paciolan platform both directly to venues representing 3% of major U.S. concert venue capacity and to other primary ticketing companies that sublicense the Paciolan platform to venues representing an additional 4% of the relevant market. Before consummating the proposed transaction, Defendants must enter a letter of intent to divest to Comcast-Spectacor, L.P. ("Comcast-Spectacor") the entire Paciolan business, including all intellectual property in the Paciolan platform and all contracts with venue and primary ticketing company licensees of that platform. Through its New Era Tickets ("New Era") subsidiary, which currently licenses the Paciolan platform from Ticketmaster, Comcast-Spectacor already provides primary ticketing services to venues representing 2% of major concert venue capacity. In addition to its interest in New Era, Comcast-Spectacor owns 2 major U.S. concert venues and manages 15 others. When combined with New Era's ticketing business and Comcast-Spectacor's venue presence, the Department of Justice believes the Paciolan business that the Final Judgment requires Defendants to divest would provide Comcast-Spectacor sufficient scale to compete effectively and independently with the merged firm in the market for primary ticketing services to major concert venues. Comcast-Spectacor and others have contended that the movement in primary ticketing services will be towards "self-enablement" models, such as Paciolan, which allow a venue to manage its own ticketing platform.

It should be noted that the Paciolan system has been inferior to the Ticketmaster system that has, in the past, had problems which might not have been eliminated.

C. WHAT IF AEG AND COMCAST-SPECTACOR DO NOT SUCCEED?

Nothing in this Proposed Final Judgment prevents Live Nation and Ticketmaster from bundling their services and products in any combination or from exercising their own business judgment in whether and how to pursue, develop, expand, or compete for any ticketing, venue, promotions, artist management, or any other business, so long as they do so in a manner that is not inconsistent with the provisions of the Judgment.

The bottom line is that Ticketmaster's ticketing system is vastly superior to any system on the market. Their superior technology along with their software and hardware is going to make it exceedingly difficult for any other company to increase their market share. Combine that with the merged company's ability to provide content from Live Nation's concerts and Front Line's management roster and you can understand why major arenas are signing on with Ticketmaster.

That being said, the Proposed Final Judgment does not address nor contemplate what happens to the consumers and industry if Ticketmaster retains their enormous market share due to the critical mass and sheer market power they have obtained. To rely on just the ticketing segment of the industry to challenge the monopoly power of Live Nation and Ticketmaster gets to the essence of the shortcomings of this Proposed Final Order.

VIII. STARE DECISIS

The Department of Justice has chosen to ignore the precedent set by the United States v. Paramount saying it is 'old' law. The DOJ has also ignored Eastman Kodak v. Image Technical Services as well as United States v. MCA. So the lawyers who work for the US government are consciously choosing the forget about the Stare Decisis doctrine they are all taught in law school

Stare Decisis is Latin for "to stand by that which is decided." It is the principal that the precedent decisions are to be followed by the courts.

Although the doctrine of stare decisis does not prevent reexamining and, if need be, overruling prior decisions, "It is.....a fundamental jurisprudential policy that prior applicable precedent usually must be followed even though the case, if considered anew, might be decided differently by the current justices. This policy....."is based on the assumption that certainty, predictability and stability in the law are the major objectives of the legal system; i.e., that parties should be able to regulate their conduct and enter into relationships with reasonable assurance of the governing rules of law." (Moradi-Shalal v. Fireman's Fund Ins. Companies (1988) 46 Cal.3d 287, 296.)

A. UNITED STATES V. PARAMOUNT PICTURES, INC. et al

It was ordered, adjudged and decreed as follows:

From granting any licenses in which minimum process for admission to a theatre are fixed by the parties, either in writing through a committee, or through arbitration, or upon the happening of any event or in any manner or by any means.

From making or further performing any formula deal or master agreement to which it is a party. The term 'formula deal' as used herein means a licensing agreement with a circuit of theatres in which the license fee of a given feature is measured for the theatres covered by the agreement by a specified percentage of the feature's national gross. The term 'master agreement' means a licensing agreement, also know as a 'blanket deal' covering the exhibition of features in a number of theatres usually comprising a circuit.

From licensing in the future any feature for exhibition in any theatre, not its own, in any manner except the following:

- A license to exhibit each feature released for public exhibition in any competitive area shall be offered to the operator of each theatre in such area who desires to exhibit it on some run selected by such operator and upon uniform terms.
- Each license shall be granted solely upon the merits and without discrimination in favor of affiliates, old customers or others
- Each license shall be offered and taken theatre by theatre and picture by picture rather than block booking each feature. In other words, block booking, a system which prevents competitors from bidding for single performers on their individual merits by entering into an exclusive maser agreement with one promoter for all the performances across the country or around the world, was no longer permissible.

From continuing to own or acquire any beneficial interest in any theatre, whether in fee or shares of stock or otherwise, in conjunction with another defendant, and from continuing to own or acquire such an interest in conjunction with an independent where such interest shall be greater than 5% unless such interest shall be 95% or more. The existing relationships which violate this provision shall be terminated within two years.

From expanding its present theatre holdings in any manner whatsoever except as permitted in the preceding paragraph.

From operating, booking, or buying features for any of its theatres through any agent who is know by it to be also acting in such manner for any other exhibitor, independent or affiliate.

B. EASTMAN KODAK V. IMAGE TECHINCAL SERVICES

The DOJ has also chosen to ignore the 1992 Supreme Court decision in Eastman Kodak v. Image Technical Services that cites the US vs. Paramount decision. An excerpt of this cases states that *e**ven assuming, despite the absence of any proof from the dissent, that all manufacturers possess some inherent market power in the parts market, it is not clear why that should immunize them from the antitrust laws in another market. The Court has held many times that power gained through some natural and legal advantage such as a patent, copyright, or business acumen can give rise to liability if "a seller exploits his dominant position in one market to expand his empire into the next."*** Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 611 (1953), see, e.g., Northern Pacific R. Co. v. United States, 356 U.S. 1 (1958*);* ***United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948);*** Leitch Mfg. Co. v. Barber Co., 302 U.S. 458, 463 (1938). Moreover, on the occasions when the Court has considered tying in derivative aftermarkets by manufacturers, it has not adopted any exception to the usual antitrust analysis, treating derivative aftermarkets as it has every other separate market. See International Salt Co. v. United States, 332 U.S. 392 (1947); International Business Machines Corp. v. United States, 298 U.S. 131 (1936); United Shoe Machinery Corp. v. United States, 258 U.S. 451 (1922). Our past decisions are reason enough to reject the dissent's proposal. See Patterson v. McLean Credit Union, 491 U.S. 164, 172 -173 (1989) ("Considerations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done").

It is interesting to note that in 1992, just 18 years ago, the Supreme Court did not believe the United States v. Paramount was old law since it was cited in this decision.

C. UNITED STATES V. MCA INC.

The Department of Justice has seemingly not given any consideration to the United States v. MCA Inc., filed in the US District Court for the Southern California District of California, Central Division. The merits of this decision should be applicable to the merger at hand.

In 1962 the Court entered a final consent judgment in the United States' action against MCA, which alleged violations of the Clayton Act and the Sherman Act. The Court restrained MCA from vertically integrating certain types of entertainment businesses and from making any acquisitions or mergers with any major television production companies, theatrical motion picture production companies or major phonograph record companies.

IX. CLOSING

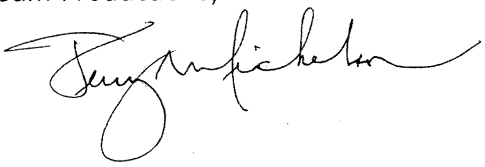
The merger of Live Nation and Ticketmaster harms the consumer and every competitor in the live entertainment industry. This merger is not about the benefits to the consumer but rather the pursuit of obtaining monopoly power. The people who are rewarded include one high level executive who received over $30,000,000 for putting this deal together while other executives are receiving extremely large annual salaries and stock options. I think that says a lot about the motivation in seeking to marry Live Nation and Ticketmaster.

This merger is the poster child of why there are anti-trust laws in this country. The Department of Justice seems to be taking the position that if 24 separate promoters were operating the way Live Nation does today then they would be in violation of the anti-trust laws. But when put under one roof these 24 promoters are not in violation of these same laws. This makes no sense and runs contrary to protecting the consumer, regardless of whether it is 1 company or 24.

The fact is that movie studios still believe that US vs. Paramount is the law of the land since none of them have violated that decision. It's interesting to note that since the inception of SFX/Clear Channel/Live Nation in 1996 concert ticket prices for the Top 100 tours have risen 142% through 2009 (from $25.81 to $62.57) but movie prices during the same time span have only risen 70% (from $4.42 to $7.50). The fact that movies are reasonably priced is a major factor in the success of the movie industry since it is still affordable to the consumer.

If this merger is allowed it sets a disastrous precedent for large companies to leverage their dominant power in other industries to the detriment of the consumer and competition. The bottom line is that content providers (management of artists/buying a tour/360 deals) must be separate and not part of the same company that also has the distributors (promoters and ticketing) and owns the venues.

Jam Productions, Ltd.



Jerry Mickelson, Chairman and Exec. V.P.

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In the United States District Court for the District of Columbia

United States of America et al, Plaintiff v. *Ticketmaster Entertainment, Inc. 8800 West Sunset Boulevard, West Hollywood, CA 90069 and Live Nation, Inc., 9348 Civic Center Drive, Beverly Hills, CA 90210, Defendants.*
Case: 1:10–cv–00139.
Assigned to: Collyer, Rosemary M.
Assign. Date: 1/25/2010.
Description: Antitrust.
Date filed: 1/28/2010.

Tunney Act Comments of Jack Orbin, President, Stone City Attractions, Inc. on the Proposed Final Judgment in the Ticketmaster/Live Nation Merger Matter

On January 24, 2010 the Antitrust Division of the Department of Justice ("DOJ") filed a complaint and proposed final judgment ("PFJ") with the United States District Court for the District of Columbia regarding the merger of Ticketmaster Entertainment, Inc. ("Ticketmaster") and Live Nation, Inc. ("Live Nation"), to create the merged company Live Nation Entertainment, Inc. ("LNE"). Without a reasonable doubt, the merger of Ticketmaster, the nation's largest ticketing company, and Live Nation, by far the nation's largest concert promoter, will further damage an already fragile live concert industry and should be disallowed. We are submitting these comments on behalf of Jack Orbin, founder and president of Stone City Attractions, one of the largest and innovative independent concert promoters in the country, to document how the PFJ fails to adequately protect competition in the live entertainment industry, specifically in the primary ticketing market for major concert venues, and to suggest more significant remedies that can be used to strengthen the PFJ.[11]

Any assessment of whether the PFJ adequately restores competition must begin with these simple facts:

• This proposed merger faced unprecedented opposition from consumer groups, Members of the United States Congress, ticket sellers, artists, managers, independent concert promoters, and actual consumers of live entertainment. The DOJ received over 25,000 direct consumer complaints urging the DOJ to block the merger.[12]

• Attached to these comments is a letter from 50 members of Congress to AAG Varney opposing the merger. The letter expresses concerns that the merger will eliminate the minimal competition in the ticketing market, leading to higher prices and less service. "Permitting Ticketmaster to merge with its most significant competitor effectively abandons any hope for the development of competition in the foreseeable future, and it would subject consumers to any exploitation, including higher ticket prices and fees, that the newly merged firm might wish to make of its monopoly power." [13]

• Congressman Bill Pascrell framed concerns of the merger in a December 16, 2009 press conference launching the merger opposition Web site, Ticketdisaster.org, that featured four members of Congress and a coalition of consumer groups, ticket sellers and concert promoters: "This merger represents the greatest and most urgent threat to music fans across the country, and if approved will have far-reaching, long-lasting negative consequences for concert goers and nearly everyone involved in the live music business." [14]

• The Justice Department decision to accept the PFJ was roundly criticized by the leading newspapers. The editorial board of the New York Times declared that "this kind of consolidation embodied by Live Nation Entertainment is tremendously worrisome." The Times raised significant concerns over the vertical aspects of the merger noting this merger has created "Live Nation Entertainment, a juggernaut that has it all. It will be tough for a band to tour without doing business with the new firm." [15]

• The Washington Post called the PFJ "a terrible precedent" observing that "the gradual retreat from antitrust enforcement over the past 30 years has led corporate executives and their lawyers to believe that there is no merger that cannot win approval if you're willing to make some relatively minor fixes." Permitting the vertical integration of the two dominant live entertainment companies leaves no doubt that "a ticket monopolist seeking to buy the dominant concert promoter and venue operator * * * [will certainly] bundle its services and force more focused competitors out of the market.[16]

• Further, the DOJ's own Competitive Impact Statement ("CIS") provides that "[t]he proposed transaction would extinguish competition between Ticketmaster and Live Nation and thereby eliminate the financial benefits* * *enjoyed during the brief period when Live Nation was poised to challenge Ticketmaster's dominance;" diminish innovation in primary ticketing services; and "result in even higher barriers to entry and expansion in the market for primary ticketing services." [17]

The theory that the PFJ here, by allowing the largest concert promoter (who operates at a major financial loss, to the tune of $800 million at the announcement of this merger) to combine with what is commonly known as the most despised of corporations by the ticket buying public, will restore competition in the primary ticket sales and concert promotion markets is nonsensical. The reality is that this merger further enforces the monopolistic hold of Ticketmaster on the live entertainment industry; and this merger will continue to increase ticket prices to consumers and continue to drive independent concert promoters out of business. AAG Varney stated, after the filing of the Complaint, that "we were prepared to litigate the case, and I told the parties that." [18] Yet, the DOJ did not litigate, and instead chose to identify a very limited set of competitive concerns in ticketing and proposed a limited set of remedies. The prohibitions proposed by the DOJ "will prove difficult to enforce. And there is nothing to stop anticompetitive bundling of tour management, concert promotions and venues." [19]

This merger results in LNE dominating the live entertainment

[11] Jack Orbin is the founder and President of Stone City Attractions, Inc., a well-respected, family-owned independent regional concert promoter. Jack Orbin has promoted and produced events in the Southwest for the past 38 years. Over the past 38 years, Stone City Attractions has promoted nearly every major concert act, from pop and rock-n-roll to country and jazz in venues of all sizes.

Jack prides himself in the extent of his community involvement. Jack was named one of San Antonio's "Most Influential Top 100 Leaders" in Arts & Entertainment. Additionally, Jack is an active member of the San Antonio Alamodome Advisory Sub-Committee, and has been awarded their prestigious Humanitarian Award multiple times.

[12] Jason Schreurs, *25,000 Concertgoers Urge U.S. Justice Department to Block Ticketmaster/Live Nation Merger,* Exclaim News (January 20, 2010), available at *http://www.exclaim.ca/articles/generalarticlesynopsfullart.aspx?csid2=844&fid1=43772.*

[13] Letter to Assistant Attorney General Christine Varney from 50 members of the U.S. House of Representatives (July 27, 2009). Attached hereto as "Attachment A."

[14] Remarks of Congressman Bill Pascrell, Press Conference on Ticketmaster and Live Nation merger (December 16, 2009).

[15] Editorial, Music Gets Bigger, N.Y. Times (February 9, 2010). Attached hereto as "Attachment B."

[16] Steven Pearlstein, *Ticketmaster and Live Nation Merger is a Raw Deal,* The Washington Post (January 29, 2010), available at *http://www.washingtonpost.com/wp-dyn/content/article/2010/01/28/AR2010012803710.html.*

[17] CIS at 11.

[18] Aruna Viswanatha, *Justice OKs Ticketmaster Live Nation—With Conditions,* Main Justice (January 25, 2010).

[19] Editorial, Music Gets Bigger, N.Y. Times (February 9, 2010).

industry with over an 80% market share for primary ticketing among major concert venues, and controlling 127 major concert venues in the United States, including amphitheaters and clubs. In spite of the substantial level of concentration resulting from this merger, the DOJ chose not to challenge the merger to remedy the impact on the independent concert promoters whose businesses will undoubtedly suffer as a result, nor to consider the impact to skyrocketing costs to consumers. The DOJ's enforcement action is inadequate in several respects:

- It fails to secure relief for the consumer by eliminating competition of independent concert promoters;
- The relief fails to ensure adequate competition for primary ticket sales and for concert promotion, and is insufficient to allow entry into these markets;
- It fails to adequately prevent LNE from acquiring customer data from independent concert promoters.

As described herein, the DOJ enforcement action is insufficient to address the competitive concerns of the live entertainment industry highlighted by the widespread opposition. Because of the enormous effects on consumers and competitors that this merger will have, combined with the inadequate relief proposed in the PFJ, the DOJ should reconsider their position, amend the PFJ as suggested below, reopen the matter to fully address the competitive concerns raised by this merger, and ultimately block the merger.

No Relief in for Consumers due to the Elimination of Independent Concert Promoters

The fact here is simple: ticket prices have skyrocketed since the roll up of concert promoters into Live Nation's predecessors and ultimately Live Nation, and the ticketing monopoly created currently by Ticketmaster. The consumer has been taken advantage of by these two conglomerates. To believe for a moment that the combination of the two huge corporations will benefit consumers in better services or lower prices is fantasy, at best. Both Ticketmaster and Live Nation are beholden to their stockholders and those stockholders demand profits. It is safe to assume any savings from the actual integration will be swiftly swallowed by the drive for profit by these mega-conglomerates, leaving the consumer helpless. The PFJ provides no form of relief in terms of lower costs to consumers. In fact, AAG, Christine Varney, has said that the hope of the DOJ here is to provide competitive choice for venues, but "whether that'll mean lower prices for fans, we'll see." [20]

The promoter principally sets ticket prices and costs have not increased relative to the ticket price increases.[21] This is substantially a result of Live Nation overpaying for Artists to ensure that other promoters do not have a chance to compete with those Artists. Live Nation has "reinvented" itself numerous times to try to compensate for their disastrous financials. None of these reincarnations have been profitable, leading to this desperate act. Live Nation is currently being sued in various courtrooms, most of which allege anti-competitive practices and/or the inflation of ticket prices. Concerts have been used as loss leaders, not only to keep other promoters from competing, but requiring Live Nation then to try to make up some of those losses through other ancillary revenue streams, resulting in falsely inflating prices of merchandise, concessions, and parking. This merger then becomes simply Ticketmaster and Live Nation trying to complete their respective monopolies, vertically as well as horizontally. The rollup of Artist management, ticketing, venues, and concert promotion into a powerful monopoly precludes the consumer choices, as well as terminating permanently the potential of any significant entries, desperately needed, into the live concert industry.

As has been commonplace for decades, the strongest protection the consumer has had has been the power to say "no" to a ticket purchase. The only other protective force has been the fact that a handful of independent promoters could provide an alternative—ensuring ticket prices and service charges be competitive and reasonable. However, this merger, by combining the vertical powers of the industry predominantly into the hands of this combined mega-conglomerate, destroys any sense of competitive balance provided by the existence of independent promoters. The majority of independent promoters will be squeezed from being able to compete with the already predatory practices commonplace by these two dominant corporations, who post-merger will have even greater powers—anticompetitive bundling of Artists, fan clubs, venues, ticketing, *etc.*—incumbent in this merger. Thus, relatively soon after the completion of this merger, if permitted, the protection of the consumer by the independent promoters will disappear. It is small businesses that create the real alternative to the consumer through diversity and innovation and this merger dooms that option. Unfortunately, the PFJ does little here to protect the important role of the independent promoters. The DOJ must consider additional remedies to the PFJ to ensure competitive, non predatory pricing, designed to protect the consumer.

The PFJ Fails To Ensure Adequate Competition and Actually Enhances Barriers to Entry

The PFJ provides for extremely limited relief that supposedly will provide competition to the primary ticket sale and concert promotion markets. The limited relief here is insufficient to overcome the significant barriers to entry into both primary ticketing sales and concert promotion markets. LNE will control over 80% of the primary ticketing sales in the United States, yet the PFJ provides only for the divestment of Paciolan, a small ticketing platform that has been sublicensed to other primary ticket sellers barely representing 4% of the market; and for a 5-year ticket technology license to Anchutz Entertainment Group, Inc. ("AEG"), who represents about 8% of the capacity of U.S. concert venues. As the Washington Post observed troublesome here is that "in order to provide sufficient competition to a bigger and more vertically integrated Ticketmaster, the government has put itself in the position of playing midwife to two other vertical mergers—one involving Anschutz, the other Comcast—making it even more difficult for small venues and independent promoters to survive." [22] While Comcast may theoretically provide for broader competition and the DOJ believes that AEG may be the "company best positioned" to compete for the sale of primary ticketing,[23] these remedies are wholly inadequate.

First, the divestment of Paciolan to Comcast fails to secure any relief in the primary ticket sales market. Paciolan now is only sub-licensed by Ticketmaster to roughly 4% of the market for primary ticketing. Assuming that the 4% benchmark is maintained under Comcast ownership, Paciolan will only be used in another 2% of concert

[20] David Segal, *Calling Almost Everyone's Tune,* N.Y. Times (April 23, 2010).

[21] The average price of a ticket to one of the top 100 tours jumped to $62.57 in 2009 from $25.81 in 1996, far outpacing inflation. *Id.*

[22] Steven Pearlstein, *Ticketmaster and Live Nation Merger is a Raw Deal,* The Washington Post (January 29, 2010), available at *http://www.washingtonpost.com/wp-dyn/content/article/2010/01/28/AR2010012803710.html.*

[23] CIS at 13.

venues which Comcast provides ticketing to.

Second, the merger and the PFJ transform the structure of the ticketing and promotion marketplace to effectively require vertical integration in order for any firm to effectively participate in the market in the future. The merger combines the largest ticketing firm with the largest concert promoter. Although the parties may assert that vertical integration is efficient, the DOJ appropriately rejected those claims.[24] Yet the DOJ then relied on AEG to attempt to restore competition, significantly increasing the level of vertical integration in the market. Post-merger if any firm would seek to enter the ticketing market in the future, it now will effectively be forced to simultaneously enter into concert promotion. Typically the antitrust enforcement agencies challenge vertical mergers because they may require two-level entry for future entrants; [25] in this case the PFJ causes the anticompetitive effect the DOJ is supposed to try to prevent. In this case the PFJ enhances barriers to entry rather than reducing them.

Third, we are very skeptical that AEG can fully restore competition through the complex limited licensing arrangement with Ticketmaster. AEG will be fully beholden and dependent on Ticketmaster. Licensing of Ticketmaster's ticketing platform to AEG would be insufficient to prevent the destruction of any remaining consumer protections, and any competitors, in its wake as well. AEG with 30 concert venues, trails far behind with the control of LNE's 127 venues. Moreover, the licensing of the ticketing platform still provides LNE with royalties based on each ticket sold by AEG, meaning Ticketmaster will have its hand in AEG's pot.

Fourth, even with the relief offered by the PFJ, LNE will still control over 80% of the primary ticketing and control most of the major concert venues in the United States, resulting in significant barriers to entry into these markets. Independent promoters will have to compete to book shows in LNE owned venues. And Independent promoters will most likely be forced to continue to utilize Ticketmaster for the majority of their shows (allowing Ticketmaster to keep its hands inside the promoters' pockets.) Moreover, with LNE possessing majority control of venues, coupled with Ticketmaster's ownership of Front Line Management, the barriers to entry are significant, and will become more significant post-merger. Moreover, the fact that the next largest competitors to Ticketmaster and Live Nation only represent roughly 4% of primary ticket sales and 8% of major concert venues is telling of the dominance LNE will have, and of the considerable barriers that will exist post-merger.

This merger dooms any real diversity in the live concert industry. As the Editorial Board of the New York Times warned: "Live Nation could easily shut out independent promoters—who don't have their own venues and ticket services. This could reduce diversity in the music market. The cost savings that are supposed to flow from these mergers never seem to accrue to consumers because the mergers leave so little competition." [26] That is why the PFJ should be rejected.

D. The PFJ Fails To Provide an Adequate Firewall

The PFJ attempts to limit the anticompetitive effects of the merger by imposing certain behavioral restrictions on LNE. Even though both Ticketmaster and LiveNation have been the subject of several antitrust and consumer protection lawsuits, the PFJ imposes extremely modest restrictions at best. Ticketmaster, after all, is no model corporate citizen—during the pendency of this merger it settled Federal Trade Commission charges that it engaged in fraud and deception in the sales of tickets for Bruce Springsteen concerts.[27] If Ticketmaster would engage in such brazen law violations during the pendency of a government merger investigation, certainly the most significant and iron-clad behavioral restrictions must be imposed to prevent any violations of the PFJ.

Yet the PFJ does not do that. It recognizes the importance of the confidential information of independent concert promoters, but imposes an extremely limited two-paragraph firewall—one far less significant than that used by the other federal antitrust enforcer—the Federal Trade Commission.

Customer data is the lifeblood of the concert promotion business. Concert promoters attract customers by producing more innovative and creative shows, promoting new artists, offering reasonable ticket prices, and knowing the tastes and interests of their community. Each independent concert promoter's list of customers is one of its most crucial assets. When an independent concert promoter puts on a show, he is able to collect customer information, including e-mail addresses, through ticket sales. This information is important for the purposes of advertising and gaining repeat customers.

By permitting this merger, the independent promoters are forced to contract for primary ticketing services via its largest concert promotion rival, LNE. LNE will have the incentive and ability to quickly exploit the information to dampen competition in both promotion and ticketing. LiveNation has used information in this fashion in the past. Vertical mergers of this sort often raise the concerns that by the merging parties having access to competitors' data, there is the potential for discrimination against competitors, or worse, exclusion of competitors from the market.

The PFJ attempts to create a firewall provision to prevent LNE from obtaining the ticketing data of its competitors and using this data in its non-ticketing businesses (concert promotion and ancillary services). As the Competitive Impact Statement notes, the PFJ seeks to protect competition among promoters and artist managers "by requiring that Defendants either refrain from using certain ticketing data in their non-ticketing businesses or provide that data to other promoters and artist managers." [28] Yet, the PFJ seeks to limit misuse through a bare bones, two-paragraph firewall provision. To the detriment of independent concert promoters, this PFJ provision still permits a broad sharing of information among higher-level employees, including "any senior corporate officer, director or manager." [29] Additionally, the provision seems to lack any mechanism of policing this firewall. Moreover, the firewall does not adequately protect the independent concert promoters. These firewall provisions will not work as planned, especially for a firm like Ticketmaster that has such overwhelming vertical control and such a poor record of corporate compliance.

[24] In the Competitive Impact Statement the DOJ noted that a "vertically integrated monopoly is less likely to spur innovation and efficiency than competition between vertically integrated firms, and a vertically integrated monopoly is unlikely to pass the benefits of innovation and efficiency onto consumers." CIS at 12. We respectfully suggest that a vertically integrated duopoly is far less likely to spur innovation than several nonintegrated firms.

[25] Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 1011, at 196 (rev. ed. 1998) (citing the 1984 Merger Guidelines, § 4.211).

[26] Editorial, Music Gets Bigger, N.Y. Times (February 9, 2010).

[27] *See* Stipulated Final Judgment and Order for Permanent Injunction and Other Equitable Relief, *Federal Trade Comm'n* v. *Ticketmaster et al,* Case No. 1:10-cv-01093 (N.D. Ill. February 18, 2010).

[28] CIS at 17.

[29] Proposed Final Judgment at 4, 20.

The inadequacy of the PFJ is clear when it is compared to the approach of the Federal Trade Commission ("FTC") in implementing a much stronger firewall in a vertical merger (*see* In the Matter of PepsiCo, Inc. (FTC File No. 091 0133, February 26, 2010)).[30] Pepsi acquired its two largest bottlers Pepsi Bottling Group and Pepsi Americas. Pepsi bottlers also distribute for PepsiCo's competitor, Dr. Pepper and Snapple Group (DPSG). This is a merger with similar vertical concerns to the Ticketmaster/Live Nation merger, in which the sharing of competitive information could be detrimental to competition. In a 14-page Consent Order the FTC lays out specific firewall provisions designed to prevent acquisition and misuse of confidential information and monitor, when necessary, the use of competitive information by the merged firm.

- The FTC Order imposes a Monitor Trustee to monitor compliance with the order and the order is explicit that the Trustee is a fiduciary of the Commission.
- Additionally, The Monitor has full audit rights and is paid for by Pepsi. The Monitor is effectively an employee of the FTC.
- The Order designates a very limited set of Pepsi employees (the parent company) who can have access to the bottling information.
- The Order narrowly defines the type of information that Pepsi (the parent company) can have access to and narrowly defines the permissible use of the information it is allowed access to.
- The Order requires reorganization of personnel in both Pepsi and the bottling companies to comply with the Order.
- The Order requires Pepsi, within a certain time frame, to develop internal procedures to comply with the Order.

Of course, anyone can recognize that Dr. Pepper and Snapple Group has far more power and resources to protect itself from anticompetitive conduct than the small independent concert promoters or venue owners the PFJ seeks to protect.

The DOJ should reconsider the PFJ, and short of blocking the merger, should adopt additional mechanisms to strengthen the firewall provisions, similar to the FTC. For example, a Monitor Trustee, being a neutral third-party or a fiduciary of the Division, should be required to monitor compliance with the order; and to ensure compliance, provide the Monitor Trustee with full audit rights. Additionally, the DOJ should narrowly define the type of information that the non-ticketing businesses of LNE can have access to, and narrowly define the permissible use of the information. Finally, the DOJ should require LNE to develop internal procedures to comply with the order. The addition of such enforcement mechanisms will help strengthen what is an otherwise inadequate PFJ.

1. Conclusion

After an 11-month investigation of a merger which creates a dominant firm in the broken ticketing market, posing an unprecedented level of concern by consumers and competitors, the DOJ chose insufficient remedies to protect consumers and independent concert promoters. The remedies are inadequate to resolve the competitive concerns and the PFJ actually enhances barriers to entry. Moreover, the PFJ fails to adequately provide an effective firewall provision, which is the only provision to protect independent concert promoters and their customer base from the predatory practices of Ticketmaster and Live Nation.

It is a favorite phrasing of Live Nation and Ticketmaster executives to say the music industry is "broke." There is no doubt about that; however, it is these companies that have broken it. To solidify their market power makes no sense. As Congressman Pascrell declared "[t]here is little doubt that the result of this merger will be higher ticket prices, higher fees and chilling effects on consumers, business managers, artists, music fans, promoters in every state around the country."[31]

The PFJ should be rejected and the merger blocked. In the alternative, we strongly urge the DOJ to amend the PFJ with additional remedies to address these competitive concerns.

Date: May 3, 2010.

Respectfully submitted.

David A. Balto, Law Offices of David A. Balto, 1350 I Street, NW., Suite 850, Washington, DC 20005. *Tel:* 202–789–5424. *Fax:* 202–589–1819.

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[30] FTC Consent Order attached hereto as "Attachment C."

[31] Remarks of Congressman Bill Pascrell, Press Conference on Ticketmaster and Live Nation merger (December 16, 2009).

March 5, 2010

John R. Read
Chief, Litigation III Section
Antitrust Division
United States Department of Justice
450 Fifth Street, NW, Suite 4000
Washington, DC 20530

RECEIVED
MAR 1 0 2010
LITIGATION III, ANTITRUST DIV.
U.S. DEPT. OF JUSTICE

RE: Middle East Restaurant, Inc. – Ticketmaster/Live Nation Merger

Dear Mr. Read:

I represent the Middle East Restaurant, Inc. ("The Middle East") which operates a restaurant and entertainment venue at 472-480 Massachusetts Avenue, Cambridge, Massachusetts. The Middle East entered into a Licensed User Agreement with Ticketmaster, LLC in January, 1999. Ticketmaster provides ticketing services for attractions at The Middle East.

Under the Licensed User Agreement, as amended there is a two (2) year term that automatically renews unless either party gives written notice of termination at least 90 days before the renewal date. Prior to the merger the Licensed User Agreement renewed again. It should be noted that due to the Ticketmaster monopoly (80% of the market) The Middle East had no alternative but to renew its Agreement. What The Middle East is requesting the Justice Department to do as part of the settlement of the merger is to allow small venues like The Middle East early termination of its ticketing agreement with Ticketmaster. The reasons in support of this request are as follows.

Live Nation has indicated that The Middle East is one of their competitors for live music in the greater Boston Market. The merger puts The Middle East in the position of helping to fund its major competitor.

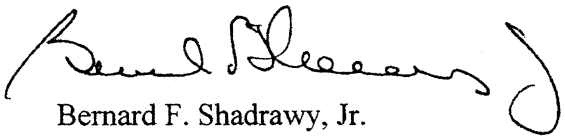
Although Ticketmaster has assured The Middle East of the protection of its data post-merger, there are no systems or penalties in place to protect The Middle East's customer's data. Furthermore, while this data may not be shared with Live Nation, Ticketmaster may certainly use the data to promote Live Nation shows, some of which may end up in direct competition with shows at The Middle East. It is not a far reach to

imagine that when the merger is completed, Live Nation Entertainment shows will be the emphasis for promotions and marketing.

The proposed Final Judgment lists a number of anti-retaliatory provisions as well as provisions to promote competition. We are requesting that the Justice Department interpret these anti-retaliatory provisions (or add a new provision as necessary) that allows smaller venues, including The Middle East, to terminate existing ticketing services contracts early in accordance with the provisions about not retaliating against venues that seek alternate ticketing arrangements.

If you have any questions regarding this matter or require additional documentation please contact me.

Very truly yours,
Middle East Restaurant, Inc.
By its attorney,



Bernard F. Shadrawy, Jr.

BFSJR/bc
cc: Joseph Sater
Kevin Hoskins

March 18, 2010

FEDERAL EXPRESS
Hon. Rosemary M. Collyer
US District Court
District of Columbia
333 Constitution Avenue, NW
Washington, DC 20001

cc: John R. Read, Chief
US Dept. of Justice
Litigation III Section
450 Fifth Street, NW Suite 4000
Washington, DC 20540

cc: Cong. Rick Baucher
Chair, Telecommunications Committee
US House of Representatives

cc: Steve Waldman, FCC Deputy Commissioner

cc: Cong. Ed Markey
Former Chair, Telecommunications Committee

Re: Comments to Competitive Impact Statement of January 25, 2010
Ticketmaster and Live Nation, Inc. Merger USDC Dist. of Col. No. 1:10-CV-00139

Dear Judge Collyer:

In accordance with the Justice Dept.'s January 25, 2010 Competitive Impact Statement ("CIS") inviting comments within sixty (60) days to the Court's revised order re the prospective merger between defendants Ticketmaster and Live Nation, Inc., as Inventor and President of an early stage live event digital distribution company, LIVE-FI™ Technologies, LLC with its first US patents issued on October 13, 2009 (US Patent No. 7,603, 321) (**Exhibit 1**), I respectfully submit on behalf of LIVE-FI™, the public and other entities similarly situated, "inadequacy" and material omission objections to the order. It is contended that if the CIS is adopted in its present form without further revision, it will have a significant anti-competitive impact on the future of all live industries including music, sports, gaming and education contrary to the public interest in violation of the Tunney Act, 15 USC §§ 16(b)-(h).

Most respectfully, LIVE-FI™ has three primary concerns with the CIS as published:

(1) The Court has omitted all discussion of the negative anticompetitive impact the merger will have upon live event and recording distribution particularly electronic broadcasts and transmissions that are the future of the converging TV and mobile markets. As *admitted* in Live Nation's own papers and press releases, monopolization of the domestic and international concert market has been one of the company's primary objectives since it was formed in 2005. (See **Exhibit 2** and pp. 3 *infra*). There exists an inherent danger from a merged entity that will be, all at the same time, a promoter, majority venue owner for concerts and sports, label for performing artists, and the owner of ticketing and mobile ticketing systems, venue contracts and

ticketholder lists from 80% of US venues going back 25 years. As this Court correctly found, Live Nation already owns some 80-100 US venues and 30 in foreign territories. Ticketmaster's lists will now give the merged entity the added unfair advantage to promote and fulfill consumer electronic requests for live concerts and sports merchandise throughout the world even for artists and celebrities not represented by Live Nation but who are appearing at venues that deploy Ticketmaster systems;

(2) The Court wrongly assumes at pp. 7 that the merged entity will have no significant impact on small companies. As such, it speaks only to the ticket pricing interests of large promoters and venues such as AEG and Comcast Spectator. This is contended prejudicial error. The Court's most recent revised solution that mandates giving AEG access to Ticketmaster's systems and divests Ticketmaster of its Paciolan venue software in favor of Comcast-Spectator, presents a source of even greater concern for small entities. This is because the result will be a larger number of public concert and sports venues with access to the same basic ticketing, mobile ticketing operating systems including interfaces without equal access given to small companies, making the field even harder for smaller technology firms to penetrate; and

(3) The Court has failed to adopt explicit protocols and safeguards to ensure that private litigants and smaller entities maintain equal and fair access to the Courts to protect their rights and remedies against the individual defendants and the merged entity. This is the Court's stated objective in Section IV.

In fact, Live Nation and its former parent Clear Channel Entertainment, Inc., a division of Clear Channel Communications, Inc. have a long history of defrauding private litigants before the Courts that must not be overlooked and most respectfully, should be investigated by this Court prior to adoption of a final plan. Live Nation's practice for years has been to *falsely deny under oath all contacts with individual States* to avoid jurisdiction to answer for anticompetitive misconduct.

In particular, I draw this Court's attention to the appended untruthful papers sworn to under oath in 2006 and 2008 by defendant Live Nation and their Baker Botts attorneys in an antitrust case before Southern District of New York [Case No. 06-CV-1202 (BSJ) (SDNY)]. Live Nation, Clear Channel, and their attorneys falsely *deny under oath all contacts with New York State* (**Exhibit 3**).

As this Court correctly found and contrary to these sworn papers, Live Nation owns many New York venues including House of Blues, Jones Beach Amphitheatre, Blue Note, and at times relevant, 24 major radio stations in the tri-state area including WLTW-Lite 106.7 FM. Live Nation filed similar untruthful papers before other tribunals in lawsuits brought by private litigants. (**Exhibit 4**)

In addition, just prior to Live Nation's acquisition of Clear Channel's new affiliate Instant Live Concerts in 2005, Live Nation, *admittedly* sought to monopolize live concert distribution. In 2004, Live Nation acquired a third party inventor's patent called "Griner" (US Patent No. 6,614,729). Griner discloses only a single operating system that affixes tracks on a master

recording as individual selections are being performed during a concert as but one method to expedite distribution of onsite concert CD's.

Yet, immediately after acquiring Griner, Live Nation issued a series of false press releases throughout the US and the world that it owned a *monopoly* on distributing live concert recordings. (**Exhibit 5**). Live Nation's clear intent and ensuing practice was to prevent smaller recording companies from accompanying artists into its venues to achieve unfair market penetration of its recording distribution systems even at venues owned by others. This is, in part, how Live Nation attracted major artists such as Madonna, Jay-Z, Bono and Shakira, to leave their respective labels and sign with Live Nation in all fields during a time that the recording industry was vulnerable and experiencing plummeting CD sales from digital piracy of shared MP3 files over the Internet.

In 2005, LIVE-FI™ was itself denied access to Live Nation's venues. This was after LIVE-FI™'s USPTO unpublished provisional patent applications were believed to have been misappropriated to Live Nation through a New York intellectual property law firm representing LIVE-FI™ and Clear Channel simultaneously without disclosure. The misappropriation resulted in the formation Clear Channel's affiliate, Instant Live Concerts, LLC in 2003 by principals of Clear Channel Entertainment ("CCE"). Instant Live Concerts was subsequently acquired by Live Nation in 2005 after it was spun off from CCE and both remain headquartered at 9348 Civic Center Drive, Beverly Hills, CA.

Relevant here is that the New York Times article of May 5, 2003 that introduced Instant Live Concerts (**Exhibit 6**), also included sound bites from Irving Azoff, President of Front Line Management and now CEO of defendant Ticketmaster.

Now that live recording distribution has evolved into a digital rather than a hand-out business, Live Nation has continued to preclude LIVE-FI™ and other recording companies from its venues. If defendants' merger is approved without further revision, penetration of other company's technologies will be significantly impeded. This is because Ticketmaster's lists will afford Live Nation the ultimate advantages of controlling all of live concert promotion, venue entry access and event content distribution to the detriment of the public and all other entertainment companies.

In 2006, the press confirmed LIVE-FI™'s premise when it reported that Live Nation was in fact precluding smaller recording companies from accompanying artists to record concerts at its venues. <u>At that time, Live Nation did not represent any artists or their recording rights</u>.

In response, certain recording companies including DiscLive and Hyburn filed complaints against Live Nation and Clear Channel with the Electronic Frontier Foundation in San Francisco and were found to have meritorious claims. (**Exhibit 7**) Shortly thereafter, EFF invalided the Griner patent before the USPTO on other grounds, <u>leaving Live Nation without a patent</u>. This paved the way, as this Court correctly found, for Live Nation's 2006 alliance with German technology giant CTS Eventim and Clear Channel's other new subsidiary, Next Ticketing (**Exhibit 8**). This venture failed leading to Live Nation's more recent partnership with Ticketmaster (**Exhibit 9**).

Live Nation's history of unfair and anticompetitive practices should now raise a red flag to this Court on *the* most pressing antitrust issues potentially affecting the future of the entire music and sports industries.

Without speaking directly to the issues of live event and recording distribution, the Court, most respectfully, is doing the public a disservice.

The CIS as it stands does nothing to protect the interests of small recording and technology firms that have invested huge monies in development and may be able to compete with Live Nation and online subdistributors such as iTunes and Google to reverse the last ten years of industry losses emanating from digital piracy of MP3 files.

In summary, unless the Court mandates further revisions and sharing of assets with small companies, the pooling of the portfolio of powerful assets already controlled by Ticketmaster and Live Nation will enable the merged entity to unduly monopolize all of public access to concerts and events, majority lists of ticketholders and in turn, live recording distribution to those most likely to buy event recordings and podcasts. The end result will make it virtually impossible for new technology companies that have no equal access to Ticketmaster's operating systems to have a fair chance to compete.

Respectfully submitted,

Amy R. Gurvey
Inventor and President
LIVE-FI™ Technologies

Note: The attachments to this comment are available on the Antitrust Division's website at http://www.justice.gov/atr/cases/ticket.htm.

<FNP>

From: Gary T.

To: ATR–Antitrust—Internet

Cc:

Subject: For Ms. Christine Varney

Sent: Tue 4/13/2010 12:52 PM

Ms. Varney:

As you are quoted in the below article—"Generally when you see robust competition, you see prices coming down," Varney told reporters. "This is the right result.", I am writing you.

On April 1st, 2010 I drive 40 miles to downtown Houston, TX where the box office of Houston's House of Blues is located in order to purchase tickets for a concert. While I had business in downtown Houston, I specifically drove to the aforementioned House of Blues to purchase the tickets so that I would NOT have to pay all the surcharges that Ticketmaster/Live Nation charge.

Since the Justice Department allowed the Ticketmaster and Live Nation merger to occur, as it pertains to House of Blues venues (and about another 120 venues): they own the venue, produce the concert and ARE THE ONLY WAY to purchase tickets directly (*I.E.* Not having to go through a ticket reseller [which is just another name for legalized scalping]).

What occurred:

The tickets were purchased at the box office. To my surprise, and AFTER my credit card was charged, I saw that I was charged a $3 "convenience charge" for EACH $18 ticket (and NOT told there was such a charge until AFTER the tickets were purchased). The $3 per

ticket convenience charge was approximately an additional 17% charge to the cost of the ticket. I was then advised that since the tickets had already been charged to my credit card and printed, there was nothing that the sales person could do at the box office and that I was stuck with the tickets. Had I known in ADVANCE OF MY CREDIT CARD BEING CHARGED that I was going to get charged a convenience charge for each ticket, I never would have made the purchase.

I contacted Ticketmaster about the charges and their response was—(and the entire email is at the bottom of this email)

From: Ticketmaster Customer Support <*customer_support@ticketmaster.com*>

Reply-To: Ticketmaster Customer Support <*ticketmasterus@mailca.custhelp.com*>

Date: Sat, 10 Apr 2010 08:31:32–0400 (EDT)

To: "Gary T.

* * * "There is typically no convenience charge when you drive to a box office to purchase tickets."

Yet, did Ticketmaster credit my credit card for the convenience charges since I purchased the tickets at the box office? No.

To sum the situation up:

1. Prior to the Ticketmaster and Live Nation merger—there were no convenience charges for purchasing the tickets at the box office where the event was occurring.

2. Post-merger: Customers are charged convenience charges on tickets purchased at the box office where the event is occurring.

I see the aforementioned charges as a blatant abuse of monopolistic power.

Gary T. Johnson

Houston, TX

Ticketmaster, Live Nation Merger Approved: Will It Lead To Lower Ticket Prices?

RYAN NAKASHIMA | 01/25/10 08:03 PM | AP

LOS ANGELES —Concert promoter Live Nation and ticket-seller Ticketmaster consummated their merger on Monday after the U.S. Justice Department approved it with conditions meant to lower ticket prices for consumers.

Shares in both companies rallied by about 15 percent in trading Monday, showing that investors approved of how the Obama administration handled its first big merger with its appointee Christine Varney as assistant attorney general.

Regulators required Ticketmaster to license its ticketing software to a competitor and sell a subsidiary that handles tens of millions of tickets a year.

That is meant to strengthen the companies that will compete for ticketing contracts and concert promotion work with Live Nation Entertainment Inc., the new company formed by the merger of Live Nation Inc. and Ticketmaster Entertainment Inc.

"Generally when you see robust competition, you see prices coming down," Varney told reporters. "This is the right result."

Consumer groups, ticket resellers and some politicians had expressed concerns that the combined company would control too much of the concert experience. Varney said the original proposal for the merger would have been "anticompetitive."

Both companies agreed to the conditions, but a federal court in Washington still has to approve it. Canadian regulators and 17 state attorneys general also signed on to the deal.

The combined company will handle all aspects of the concert business, including promoting them, selling tickets, beer and parking, putting out albums and managing an artist roster that includes U2, Madonna, Jay-Z and the Eagles. Its operations span more than 30 countries. The companies said music fans will benefit through lower ticket prices because the merged company can earn money in ways that separate companies could not.

Michael Rapino, CEO of Live Nation and the merged company, said the merger creates "a more diversified company with a great selling platform for artists and a stronger financial profile that will drive improved shareholder value over the long term."

Story continues below

Under the Justice Department rules, Ticketmaster must license its software for five years to Anschutz Entertainment Group Inc., which owns the Staples Center and other venues. It was also directed to sell subsidiary Paciolan to Comcast-Spectator, a subsidiary of Comcast Corp.

But consumers might not notice the difference right away, partly because the merger agreement preserves long-term exclusive ticketing contracts with venues.

AEG and Comcast-Spectacor could take years to effectively take ticketing deals away from Ticketmaster, Gabelli & Co. analyst Brett Harriss said. Only then would ticket fees start to come down, Harriss said.

Varney said about 20 percent of Ticketmaster's deals with venues will expire in 2010. Previously the vast majority of Ticketmaster clients renewed their deals upon expiration.

Some vocal opponents continued their attack. Rep. Bill Pascrell Jr., D–N.J., said the ruling did not address the resale market that led to consumers paying inflated prices for a Bruce Springsteen concert last February.

It also did not affect the vertical integration the companies proposed—although Varney said her department would monitor the companies for 10 years to prevent anticompetitive bundling of services.

Don Vaccaro, chief executive of ticket resale site TicketNetwork, said having three strong players was better than just one, but it still left small ticket retailers at a disadvantage, especially for VIP seating packages that artists sometimes release through their concert promoters.

"They created a lot of little monopolies on tickets at venues," Vaccaro said. "It could have gone further."

Under the deal, the merged entity will be under a 10-year court order prohibiting it from retaliating against venues that choose to sign ticket-selling contracts with competitors. It also must allow venues that sign deals elsewhere to take consumer ticketing data with them.

Live Nation, which is based in Los Angeles, and Ticketmaster, which has headquarters nearby in West Hollywood, have said the merger will streamline their operations, allowing them to save $40 million a year. It reversed a schism that happened in 2009, when Live Nation let its ticketing deal with Ticketmaster expire and instead sold tickets to its own venues with the help of German company CTS Eventim AG.

The merger closed on Monday, with Ticketmaster stockholders receiving about 1.474 Live Nation shares for every Ticketmaster share they own. Ticketmaster shares stopped trading at the end of the day.

Ticketmaster shares rose $2.10, or 15.8 percent, to close at $15.40 while Live Nation shares closed up $1.35, or 14.7 percent, at $10.51. The merged company now has a market capitalization of about $889 million.

Both Comcast-Spectacor and AEG hailed the ruling as an opportunity to expand their businesses.

Comcast-Spectacor, which owns the Philadelphia Flyers, Philadelphia 76ers and two arenas, said it would add Paciolan's 200 ticketing accounts and complement its capabilities as a venue manager, food and beverage seller and seller of venue-naming rights.

AEG Chief Executive Timothy Leiweke said his company has a

commitment from Ticketmaster to run ticket-selling operations under the brands of AEG and its clients starting immediately if AEG wants, and running for five years. He said AEG will "aggressively explore" alternative ticketing platforms in the coming years. AEG can choose to keep Ticketmaster's technology or develop a separate system by itself or with partners.

From: Ticketmaster Customer Support <*customer_support@ticketmaster.com*>

Reply-To: Ticketmaster Customer Support <*ticketmasterus@mailca.custhelp.com*>

Date: Sat, 10 Apr 2010 08:31:32–0400 (EDT)

To: "Gary T.

Subject: To Irving Azoff and the Ticketmaster/Live Nation management: I purchased tick * * *

[Incident: 100410–000351]

Thank you for allowing us to be of service to you.

Subject

To Irving Azoff and the Ticketmaster/Live Nation management: I purchased tick* * *

Discussion Thread

(Somer_ZYS774)04/10/2010 08:31 AM EDT

Dear Gary,

Thank you for your e-mail. The convenience charge covers costs that allow Ticketmaster to provide the widest range of available tickets while giving you multiple ways to purchase. Tickets are available in many neighborhoods via local ticket outlet locations, our local charge-by-phone network and online at Ticketmaster.com. Tickets can be purchased through at least one distribution channel virtually 24 hours a day. The convenience charge varies by event and is determined by negotiations with arena operators, promoters and others based on costs for each event.

Also, the convenience charge will vary depending upon where you purchase the tickets. There is typically no convenience charge when you drive to a box office to purchase tickets. A convenience charge is applied when you purchase from the Internet, phone or ticket outlet (*e.g.,* at your local department store) and this charge may vary depending upon Ticketmaster's local agreements with the venues, promoters and outlet partners.

Thank you for using Ticketmaster, where we continually strive to provide World Class Service to every customer, every day! We really appreciate your business, and hope we were able to resolve any problems or answer any questions you had. Please reply to this email if we may be of further assistance. Sincerely,

Somer_ZYS774

From: Tom Kuhr

To: ATR-Antitrust—Internet; Varney, Christine

Cc:

Subject: Ticketmaster

Sent: Tue 1/26/2010 3:31 PM

Dear Ms. Varney,

It's absolutely unconscionable of you to let an already monopolistic Ticketmaster acquire even more power to shut out competition. I don't know what kind of nonsense they told you about how they play or will play nice with others during your investigation, but it's clear that they dominate their market by a huge margin and will continue to shut out any competition with lockups on more venues.

This is the worst decision for consumers in years. The ticket fees that are already too high will continue to rise, and the new combined monster of an organization with a stranglehold on both artists and venues will make cable companies look like charities in comparison.

You made a bad decision this week in the name of corporate growth.

—Tom

Tom Kuhr

Hermosa Beach, California

From: Don Crepeau

To: ATR-Antitrust—Internet

Cc:

Subject: Ticketmaster Live Nation decision.

Sent: Tue 1/26/2010 3:07 PM

I want to thank you for making it near imposable for me to be able to afford tickets to the concerts of my favorite musicians.

Now that you have insured that the ticket prices will be too high for me to afford I can concentrate on other things important to me. Like helping the Republican Party remove the Democrats from office and maybe causing you to loose your jobs.

Don Crepeau

From: Jason Keenan

To: ATR–OPS Citizen Complaint Center

Cc:

Subject: ticketmaster/live nation merger

Sent: Tue 2/9/2010 8:30 AM

Please reconsider your decision, as a professional musician and lifelong fan of live music, I urge you to reverse this decision. As an American, and a believer in the Constitution and Equality of Opportunity, I simply cannot fathom how you could allow this to happen. Thank you, Jason Keenan

From: Chris Cantz

To: ATR–ISSG—Web Master

Cc:

Subject: Ticketmaster/Live Nation Merger

Sent: Tue 1/26/2010 12:47 AM

Attention Mr. Webmaster. Could you please ask Ms. Varney what she was smoking when she said that this merger would be beneficial and innovative to the public as I would like to order some of it. I'm not sure how someone in her position isn't aware of the definition of a monopoly and it's damage to the people our government is meant to represent. Does she really believe the already exorbitant service charges will go down now that there is no competition? Once again we the people get the shaft from the government and the rich corporations with deep pockets will continue to get richer. Thanks for nothing Ms. Varney (Other than increased service charges)

From: joseph carlson

To: Hoag, Aaron

Cc:

Subject: TUNNEY ACT COMMENTS RE: case 1:10-cv-00139 usa vs Tmaster

Sent: Tue 1/26/2010 11:47 AM

Mr. Hoag,

I believe the Justice Department made a huge mistake by allowing the LN TM merger as indicated by the seats made available for their first big onsale since the merger was approved. This week James Taylor went onsale for many US cities and Livenation-Ticketmaster OFFERED NO SEATS ON THE FLOOR FOR ANY OF THE SHOWS!!!!! Furthermore the entire lower bowl for each venue had less then 40 seats available for the public onsale. This means they kept well over 4 thousand of the best seats to scalp for themselves for all of the shows. By allowing this merger you have made it impossible for the average fan to get good seats for most concerts that go onsale in America. As government officials I believe that it is important for you to look out for the average American not BIG CORPORATIONS!!! You should have never allowed this merger without mandating TM–LV to offer at least 5% of the seats for ALL sections of a given venue at the time of an onsale.

The conditions set forth by the merger offered NOTHING to protect the consumers! Please call me at ***-***-**** for suggestions on conditions that the DOJ should've made when approving this merger.

Sincerely,

Joe Carlson

From: Kenneth de Anda

To: ATR–OPS Citizen Complaint Center

Cc:

Subject: YOU have FAILED to protect us yet again

Sent: Mon 1/25/2010 5:23 PM

To Whom It May Concern:

By allowing the Live Nation/Ticketmater merger to go ahead, you have failed to protect the American consumer. The very people with whom you are in charge of the task of protecting from large corporations. It is a very sad day for concert goers and consumers. Once again corporations have succeeded in blinding politicians with money and false hope for consumers. I am very saddened that this merger has occurred and hope for the day when the American consumer will once again be protected by the very government.agencies that were set up to protect them.

Sincerely,

Kenneth de Anda

[FR Doc. 2010–15686 Filed 6–28–10; 8:45 am]

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Tuesday, June 29, 2010

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